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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Tuesday, 22 October 2019

Members in attendance: Senators Kim Carr, Chandler, Chisholm, Hanson, Henderson, Keneally, Kitching, Lambie, Lines, McKim, O'Sullivan, Patrick, Siewert, Dean Smith, Steele-John, Stoker, Walsh, Waters.
ATTORNEY-GENERAL'S PORTFOLIO

In Attendance

Senator Payne, Minister for Foreign Affairs and Minister for Women

Attorney-General's Department
Mr Chris Moraitis PSM, Secretary
Mr Iain Anderson, Deputy Secretary, Legal Services and Families Group
Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group
Mr Martin Hehir, Deputy Secretary, Industrial Relations Group
Mr Michael Kingston, Australian Government Solicitor

Families and Legal System Division
Mr Cameron Gifford, First Assistant Secretary, Families and Legal System Division
Dr Albin Smrdel, Assistant Secretary, Legal System Branch
Ms Dianne Orr, Acting Assistant Secretary, Family Law Branch
Ms Alex Mathews, Assistant Secretary, Family Safety Branch

Legal Services Policy Division
Ms Tamsyn Harvey, First Assistant Secretary, Legal Services and Policy Division
Mr David Lewis, General Counsel, Office of Constitutional Law
Ms Kathleen Denley, Assistant Secretary, Native Title Unit
Ms Alana Fraser, Director, Native Title Unit
Ms Ariane Hermann, Assistant Secretary, Legal Assistance Branch
Ms Samantha Byng, Assistant Secretary, Royal Commissions Branch
Mr Michael Johnson, Assistant Secretary, Office of Legal Services Coordination Branch
Ms Susan Whitaker, Acting Assistant Secretary, Office of Legal Services Coordination

Integrity and Security Division
Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division
Ms Lucinda Atkinson, Assistant Secretary, Institutional Integrity
Ms Elizabeth Brayshaw, Assistant Secretary, Security and Criminal Justice
Ms Julia Galluccio, Assistant Secretary, Integrity Law
Ms Autumn O'Keeffe, Assistant Secretary, Commonwealth Fraud Prevention Centre
Mr Christopher McDermott, Director, Commonwealth Fraud Prevention Centre

International Division
Ms Sue Robertson, First Assistant Secretary International Division
Mr Jesse Clarke, Assistant Secretary, Office of International Law
Ms Anne Sheehan, Assistant Secretary, Office of International Law
Ms Karen Moore, Assistant Secretary, International Cooperation Unit
Ms Frances Anggadi, Assistant Secretary, International Cooperation Unit
Ms Erin Wells, Assistant Secretary, International Cooperation Unit

**Integrity and International Group**
- Ms Rosanna Bartlett, Executive Advisor to Deputy Secretary, Integrity and International Group

**Comprehensive Review of Intelligence Legislation**
- Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group

**Enabling Services Group**
- Ms Helen Daniels, Chief Operating Officer, Enabling Services Group
- Mr Stephen Lutze, Chief Finance Officer, Corporate Services Division
- Mr Stephen Andrew, Chief Information Officer, Information Division
- Mr Michael Harrison, Deputy Chief Information Officer, Information Division
- Mr Trevor Kennedy, Assistant Secretary, Financial Services
- Ms Ashleigh Saint, Assistant Secretary, Human Resources
- Ms Catherine Fitch, Assistant Secretary, Strategy and Governance

**Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability**
- Ms Toni Pirani, Official Secretary
- Mr Paul Cronan AM, Assistant Secretary

**PORTFOLIO AGENCIES**

**Administrative Appeals Tribunal**
- Ms Sian Leathem, Registrar
- Ms Sobet Haddad, Senior Reviewer, Immigration Assessment Authority
- Ms Jacqueline Fredman, Executive Director, Corporate Services
- Mr Chris Matthies, Executive Director, Strategy and Policy

**Australian Commission for Law Enforcement Integrity**
- Mr Michael Griffin AM, Integrity Commissioner
- Mr Craig Furry, Executive Director Secretariat
- Mr Dallas Rogers, Acting Executive Director Operations
- Mrs Eve Coutts, Director Corporate Services, Chief Financial Officer

**Australian Law Reform Commission**
- The Hon. Justice Sarah Derrington, President
- Mr Matthew Corrigan, General Counsel

**Australian Human Rights Commission**
- Professor Rosalind Croucher AM, President
- Ms Padma Raman PSM, Chief Executive
- Ms Kate Jenkins, Sex Discrimination Commissioner

**Commonwealth Director of Public Prosecutions**
CHAIR (Senator Stoker): I declare open this meeting of the Senate Legal and Constitutional Affairs Legislation Committee for the supplementary budget estimates. The Senate has referred to the committee the particulars of proposed expenditure for 2019-20 for the portfolios of Home Affairs and the Attorney-General and other related documents. The committee will proceed today with its examination of the Attorney-General's portfolio. The committee has set Friday 6 December 2019 as the date by which answers to questions on notice must be returned. The committee has also decided that written questions on notice should be provided to the secretariat by 5 pm on Friday 1 November 2019.

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

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

The Senate has resolved also that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions of matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. I particularly draw the attention of witnesses to an order of the Senate of 13 May 2009 specifying the process by which a claim of public interest immunity should be raised.

_The extract read as follows—_

**Public interest immunity claims**

That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

1. If:

   (a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

   (b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

2. If, after receiving the officer’s statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

3. If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

4. A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

5. If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.
(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

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

(Extract, Senate Standing Orders)

Witnesses are specifically 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 2009 order. 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 the document.

The committee has agreed to permit the media to film proceedings subject to the usual rules and in accordance with any direction from the committee or secretariat. I remind the media that this permission can be revoked at any time and filming must not occur during suspensions or after the adjournment of proceedings. If a witness objects to filming, the committee will consider that request. Copies of resolution 3, concerning the broadcasting of committee proceedings, are available from the secretariat.

I welcome Senator the Hon. Marise Payne, representing the Attorney-General today. Minister, would you like to make an opening statement?

Senator Payne: No, thank you, Madam Chair.

Administrative Appeals Tribunal

[09:04]

CHAIR: I call officers representing the Administrative Appeals Tribunal. Would you like to make an opening statement before we go to questions?

Ms Leathem: Thank you, Chair. I do have a short opening statement.

CHAIR: Please deliver it.

Ms Leathem: The Administrative Appeals Tribunal is a small but crucial part of the Australian government's administrative decision-making process. We provide an opportunity for independent merits review of government decisions made under more than 400 pieces of legislation. Our 2018-19 annual report was tabled yesterday and, as you may not have had a chance to read that, I want to highlight a few key statistics. During the reporting period, we received 60,595 applications for review, the highest ever number of lodgements to the AAT. During the same period, we were able to finalise 44,413 applications. While this represents
the highest number of finalisations ever achieved, it was just short of our published performance measure of 45,600 applications.

The AAT is a demand-driven organisation. We face ongoing challenges in our ability to meet that demand, largely as a result of increases in the number of applications lodged in the Migration and Refugee Division. These types of applications are now at record levels and have more than doubled over the past three years. These challenges were reflected in other aspects of our performance during 2018-19, including a deterioration in the timeliness of our finalisations. Outside of the Migration and Refugee Division, we continue to meet or exceed our target of resolving more than 75 per cent of applications within 12 months of lodgement. However, due to the increasing backlog and delays in the Migration and Refugee Division, our overall result declined from 77 per cent in 2017-18 year to 66 per cent in 2018-19 year. This trend is set to continue. On a positive note, we met or exceeded all other key performance measures in 2018-19.

The AAT remains committed to transparency as a means of building public trust and confidence. We remain one of the highest volume publishers of decisions amongst all courts and tribunals in Australia. During the reporting year, we published 5,905 decisions, 18 per cent higher than our target. The proportion of appeals against AAT decisions which were allowed by the courts remains low, which is evidence of the quality of our decision-making and there was improvement in our performance measure for the experience of our tribunal users, including applicants and their representatives. Thank you and I invite questions from the committee.

Senator KIM CARR: I appreciate your opening statement. I noticed that you referred to the building of public trust and confidence. Do you think you've got a problem with public trust and confidence?

Ms Leathem: It's one of the key reasons we have put special effort into making sure that we publish as many decisions as possible as well as ensuring that we engage with our stakeholders. We've also recently introduced a couple of additional publications. We think that has very much helped increase the level of understanding of what the AAT does and the types of decisions.

Senator KIM CARR: Why do you think you have a problem with public trust?

Ms Leathem: I didn't say that.

Senator KIM CARR: The point you made was that you are trying to build public trust. How do you measure it?

Ms Leathem: It was simply about trying to increase the level of understanding and knowledge of the decisions that we make.

Senator KIM CARR: Do you think the method of appointment of members to the Administrative Appeals Tribunal might be an issue in regard to building public trust?

Ms Leathem: The appointments to the tribunal are a matter for government.

Senator KIM CARR: Who should I ask about that; is that the minister?

Senator Payne: It's a matter for you, Senator, as to whom you target the question.
Senator KIM CARR: I will start with you, Minister. I'm led to believe that the government has put in place a new method of selection for members of the tribunal; is that correct?

Senator Payne: To the best of my knowledge, a protocol has been developed between the Attorney-General and the President of the Administrative Appeals Tribunal which relates to managing the ongoing appointment needs of the AAT. Ms Leathem has referred to the increase in business, if I can put it that way—the increase in the volume of activity. As I understand it, the Attorney-General in consultation with the president has developed a revised protocol, which was approved by the Prime Minister. That came into being in March of this year. This committee, as I understand it, was provided with a copy of that protocol some months ago.

The process underneath that involves seeking expressions of interest for appointment to the AAT. That was advertised and that process opened on 8 August and closed one month later. I am advised that there were over 800 expressions of interest received for that. Those expressions will be held on a register for up to a year. This process is used to inform the President of the AAT's recommendations to the Attorney-General about any future appointments to the AAT. My understanding is that the number and the level of any appointments that are recommended as a result of that EOI process are a matter for the president.

Senator KIM CARR: Thank you. I have a briefing paper which was produced under FOI. It appears to be dated from 2018. Is it the case that, as of prior to the establishment of this new protocol on 25 March, the merit-based selection process for the AAT had not been conducted by government?

Senator Payne: I don't have particular information on that. You asked about the protocol and I responded in relation to that. If there are further questions you want me to take on notice for the Attorney in relation to historic appointments, I'll do that.

Senator KIM CARR: Perhaps I'll ask the secretary. Mr Moraitis, could you assist me with that? Is that the case?

Mr Moraitis: We've explained several times that the protocol has had various iterations. In the period up to this year, there was a separate protocol in place which was somewhat different in the sense that there were no expressions of interest sought from the broader public. It was essentially a process between the president of the AAT and the Attorney—that is, the minister—who would then go to Executive Council via cabinet decisions. That process was followed until March this year. As the foreign minister has set out, a new protocol sets out a process of public expressions of interest and, as she has described, that process has well and truly commenced and there is a live, as it were, list of potential applicants.

Senator KIM CARR: Why wasn't the merit-based process in place prior to the establishment of this new protocol?

Mr Moraitis: It's before my time, but perhaps that was the view of government at the time that that process was the way to best accommodate the demands of the AAT's needs to fill positions. Let me note that my understanding is that there are no fixed number of positions in the AAT. It depends on demand and requirements of various skill sets. So the discretion of the president was to engage with government. The process now is a bit more—
CHAIR: Is it any different to the process that was in place under Labor?

Mr Moraitis: I would have to ask Mr Anderson. It was before my time.

Mr Anderson: The process under Labor did involve an advertised process with a selection panel. I should add to Mr Moraitis’s answer that the previous protocol did also provide for a merit-based selection process. It had three particular steps. The first step was that the President of the AAT wrote to the Attorney and made recommendations about either reappointments or fresh appointments. The second step was that the Attorney would consider that and could add additional names of his or her choosing. If there were positions that the president and the Attorney were desirous of filling that they had not identified between them, people to fill those positions then they were provided through a merit-based process.

Senator KIM CARR: Yes. But the briefing note that was produced under FOI from the department specified that it was a different approach taken by the department than that of previous Labor governments. The department said that, prior to the government introducing its own appointments protocol, ‘Appointments to the AAT were made in accordance with the Australian Public Service Commission's merit and transparency guidelines for merit-based selection of APS agency heads and statutory officeholders.’ So there was, in fact, quite a specific difference in approach. Is that not the case?

Mr Anderson: It’s correct that there was a different process, as I already indicated. The reason the protocols, both current and previous, were approved by the Prime Minister is that that’s in accordance with the APSC’s rules for the conduct of merit-based selection tests, that they operate as an exception to those rules.

Senator KIM CARR: I see. You would obviously be familiar with the Callinan report into the AAT?

Mr Anderson: Yes.

Senator KIM CARR: It is reported that Ian Callinan recommended that all further appointments be made on the basis of merit; is that correct?

Mr Anderson: It’s important to distinguish between a process and then the actual appointment itself. The criteria for appointment, as set out in the AAT Act, have not changed at any stage. It has always been that for different levels of appointment they are required to be a judge for certain levels of presidential positions, a legal practitioner of at least five years standing or a person who has special knowledge or skills in the view of the Governor-General that are relevant to the position.

Senator KIM CARR: I’m always interested when a public servant says you’ve got to distinguish between the process and the actual outcome, which is the point that you made. It’s a Sir Humphrey world. It’s a very sharp distinction between the process and the outcome. You’ve said here the normal criteria is five years of legal training or specialist knowledge.

Mr Anderson: Special knowledge or skills relevant to the position in the opinion of the Governor-General.

Senator KIM CARR: Special knowledge or skills. Let’s have a look at a couple of those, will we? But before we do, why do you think—it was Justice Callinan, wasn’t it?

Senator Payne: It was. The Hon. Ian Callinan AC.
Senator KIM CARR: So why would you think that he would recommend that all future appointments be made on the basis of merit? Why do you think it would be necessary to recommend that?

Mr Anderson: You'd have to do ask Justice Callinan the basis of this—

Senator KIM CARR: Yes, I know I would. I anticipate your response in that regard. But I'm a newcomer in this field, and I'm just interested to know why a man of his calibre would have to make that recommendation.

Senator Payne: I'm not sure you can expect Mr Anderson to put himself into the mind of Justice Callinan.

Senator KIM CARR: Secretary, would you be able to answer that? Why do you think former chief justice Callinan—was he a chief?

Mr Moraitis: He wasn't a chief justice. He was a judge of the High Court.

CHAIR: He's a former Justice of the High Court.

Senator KIM CARR: Why do you think a High Court judge would have to recommend to the government to make appointments to the AAT on the basis of merit? Why do you think he would need to do that?

Mr Moraitis: I've got nothing further to add to what Mr Iain Anderson said about this. I think it's really a matter for Mr Callinan. He came with a fresh set of eyes, based on his experience as a judge and a barrister. I think his starting premise would be, in these situations, that merit should be a determinative element, but I'm speculating.

CHAIR: It's hard to imagine him recommending anything else.

Mr Moraitis: Exactly. That's a first principles approach for anyone with that experience. Also, if I recall, Justice Callinan also proposed various other things to do with the appointment of members of the AAT, such as that they should all be legally qualified, but, as Mr Iain Anderson pointed out, the act actually provides for other forms of appointment, not necessarily exclusively legal, based on specialist experience. As I alluded to previously, the AAT has a broad spectrum of skill sets required, ranging from health expertise, social security expertise and other forms of expertise that's not necessarily legal.

Senator KIM CARR: So it's either five years or specialist experience, right? So how many of the current AAT members appointed by this government do not have legal experience?

Mr Moraitis: I'd have to take that on notice, unless Dr Smrdel has those details.

Mr Anderson: No. We'd have to take it on notice.

CHAIR: We've just hit almost 11 minutes. I've been sharing the call around, yesterday and today, in 10-minute blocks. Do you want to make a decision on whether you want to bring this to a conclusion or whether you want to continue in another block?

Senator KIM CARR: I won't be bringing it to a conclusion, because there's a fair bit I need to explore here. You might be able to find that out for me, because that wouldn't be too hard to find out, would it? You'd know that. Perhaps the president could tell me. How many of the current—

Ms Leathem: I haven't got that information. We would have to take that on notice.
Mr Anderson: I note the department is scheduled to give evidence later this afternoon, so we'll make our best endeavours to have that answered by this afternoon.

Senator KIM CARR: Thank you for that. That would be helpful. Chair, if you're going to break it up into 10-minute blocks, that's fine.

CHAIR: Thereabouts, yes.

Senator KIM CARR: I'll return to this matter. I want to look at some specific cases of specialist knowledge that the secretary has referred to.

CHAIR: Okay. The witnesses have notice of your interest, which is good.

Senator SIEWERT: Morning. I want to ask some questions. There's a lot of detail in the annual report, but it doesn't go to the level of detail on some issues that I would like, so I would like to follow it up. Looking at the number of cases that you have been dealing with, the caseload, it's quite clear that in terms of the Centrelink cases the number of cases around the DSP has continued to be the bulk of the cases that you have received.

Ms Leatham: I might invite Chris Matthies, our Executive Director of Strategy and Policy, up.

Mr Matthies: That's correct. The applications relating to disability support pension would constitute the largest set of particular applications about payment types. That's correct.

Senator SIEWERT: And they have continued to increase? And there are more cases still to be resolved in terms of on-hand caseload?

Mr Matthies: In terms of lodgements in relation to the disability support pension, they increased from 3,610 in 2017-18 to 5,348 in 2018-19. That was an increase of 48 per cent. In terms of the on-hand applications, as at 30 June 2018 it was 707. As at 30 2019 it was 1,114, which relates to that increase in lodgements.

Senator SIEWERT: That's a significant increase on hand.

Mr Matthies: Although I note in relation to the current financial year in the period from 1 July to 30 September there's been a decrease of 27 per cent in disability support pension applications compared to the same period in the previous year.

Senator SIEWERT: A decrease?

Mr Matthies: Yes.

Senator SIEWERT: That's over the quarter for that same period?

Mr Matthies: From 1 July to 30 September, comparing the current year to the previous year.

Senator SIEWERT: But, overall, last year it was up 48 per cent?

Mr Matthies: Correct.

Senator SIEWERT: Can you tell me the nature of the appeals or the applications? I understand they were not getting it, but on what grounds?

Mr Matthies: For 2018-19, I have some figures relating to the disability support pension applications that were finalised. Actually, no. All I've got is some information breaking down the number of applications where the decision under review was set aside. That would give some indication of the overall make-up of the caseload. Certainly the majority would be
refusal of a disability support pension claim. A much smaller proportion would be cancellations. Then there would be some other types of decisions. But the actual breakdown for the full set of applications either lodged or finalised I'd need to take on notice.

Senator SIEWERT: If you could take that on notice that would be appreciated. Thank you. In terms of the DSP in particular, how often do you require further medical advice?

Mr Matthies: I don't have that information with me. I'm not sure that we would necessarily record that information in our case management system. In cases for which either we have suggested that to the applicant or the applicant has provided some additional medical evidence, I don't think we would record that information.

Senator SIEWERT: If somebody were then seeking a review, if you don't record it, how do you then take that into consideration in second review?

Mr Matthies: Certainly we provide information to applicants about the nature of the case and the kind of information that they should provide to the AAT in relation to their matter. If the party then does provide further medical evidence, obviously that is taken into account by the tribunal. Then that material would be available on second review if the person then was unsuccessful at first review and applied for a second review.

Senator SIEWERT: But do the AAT require any further medical advice?

Ms Leathem: I think it entirely depends on the particular circumstances of that case. If it went to a second review, there would in almost all instances be a conference conducted during which they would explore whether or not there was any further evidence that might assist in the resolution of the matter.

Senator SIEWERT: When you require that, do you look at the feasibility of any of the decisions that you make in relation to that further medical advice?

Ms Leathem: What do you mean by 'feasibility'?

Senator SIEWERT: I'm trying to draw out some of the details of a particular case without going to the particular case. But in some instances—and this isn't the only instance—the advice that's been found through the AAT has been infeasible, because they can't afford to undertake what's recommended. Do you look at that?

Ms Leathem: A conference registrar on second review would be having a conversation with both of the parties—the applicant and the respondent agency—about what might be needed to be able to resolve that matter. That would be considered as part of all of the material.

Senator SIEWERT: That's under a second review?

Ms Leathem: That's right.

Senator SIEWERT: What about when the case first comes to you?

Ms Leathem: If it's first review then, as Mr Matthies said, we do try to provide as much information as possible through our website. We also have fact sheets available to people to let them know the sorts of information that would be useful. It's not possible for us to evaluate affordability at that point in time.

Senator SIEWERT: So you don't take that into account?

Ms Leathem: It wouldn't be something we could possibly take into account.
Senator SIEWERT: Affordability or feasibility aren't taken into account when you make your decisions?

Ms Leathem: What I was saying is that we provide information to the applicants about what is helpful in being able to consider and determine their application. It's then a matter for parties to our proceedings to be able to put forward information. Obviously we're not in a position to be able to make evaluations about affordability in that regard.

Senator SIEWERT: Or feasibility. When you make a decision, you don't take into account the feasibility of the decision that you make?

Mr Matthies: In terms of actually making the decision, it must be based on the information that is available to the tribunal. I'm not sure that, in that context, whether or not particular evidence was able to be provided would be a relevant consideration at the point of deciding whether or not the particular criteria had been met.

Senator SIEWERT: Do you seek further medical advice? Do you require people to seek further medical advice or do you work on the department? Sorry—I realise that's a three-pointed question.

Mr Matthies: We don't require parties to provide medical information. We would certainly suggest the kind of information that might be relevant and potentially look at ways in which that may be able to be gathered, including by the tribunal making a request for information or the party, for example—those kinds of options. But we wouldn't require somebody, for example, to seek an expert medical opinion, as far as I'm aware.

Senator SIEWERT: Or suggest that people undertake treatment?

Ms Leathem: I think it's very difficult without further information about the specifics to venture an opinion.

Senator SIEWERT: Sorry—that's a very general question. In your decisions, do you ever then recommend that someone seek further treatment?

Mr Matthies: I'm not sure. I think we'd have to take that on notice.

Senator SIEWERT: Could you take that on notice, please? And the next question is, does the department sometimes provide further medical advice?

Mr Matthies: At first review?

Senator SIEWERT: Through your process, during either the first or the second review, does DSS provide any further medical advice?

Mr Matthies: I'm certainly aware that it may occur at the second review stage. But I think we'd need to take that on notice in relation to first review.

Senator SIEWERT: If you could take that on notice, that would be appreciated. Of the case load for DSP—and you may need to take this on notice—how many of the applicants had been put on a program of support?

Ms Leathem: I think we'd definitely have to take that on notice.

Mr Matthies: Although I'm not sure that we would necessarily, again—

Ms Leathem: Have that data.

Mr Matthies: have that information recorded in our case management system—that level of detail.
Senator SIEWERT: Why is that? If they're on Newstart, for example, and they're on a program of support, why would that not be recorded?

Ms Leathem: Because we record the type of payment, not necessarily some of the underlying factors in relation to that. That's a level of granularity that I suspect our case management system would not go to. Obviously if we did individual audits of matters you would find some that did and some that didn't involve programs of support. But I'm fairly confident that's not part of the case management data collection.

Senator SIEWERT: Can I be really clear: you've just said you'd take on more information. During both the first review and the second review, you had the capacity and do take on the provision of further information by the applicants.

Ms Leathem: Yes.

Senator SIEWERT: And by the department?

Ms Leathem: In first tier, they generally don't appear, but in second tier that would be not an unusual situation.

Senator SIEWERT: Thank you.

Senator KENEALLY: Thank you all for being here today. I have some questions regarding the Migration and Refugee Division. The AAT's performance target in the Migration and Refugee Division, as I understand it, is to finalise 75 per cent of all applications within 12 months; is that correct?

Ms Leathem: Yes, that's correct.

Senator KENEALLY: In 2016-17, I understand that 66 per cent of migration or refugee matters were finalised within 12 months. In 2018-19, that had fallen to 36 per cent and it is now 27 per cent for 2019-20. Do you have a target that you anticipate you will hit in this financial year or do you expect that number to drop further?

Ms Leathem: We do maintain our published performance target of 75 per cent for all matters within the AAT. As the senator has noted, obviously we've had a deteriorating finalisation timeliness in the Migration and Refugee Division in particular. We're not proposing to change the published target but we acknowledge, obviously, we've been struggling to meet it, particularly in that division. In the 2018-19 year, the clearance ratio was 58 per cent. I am able to report that for the first quarter of this financial year that's increased to 62 per cent, but obviously we're not keeping pace with the volume of lodgements.

Senator KENEALLY: I want to ask about that because it's my understanding that between 1 July 2019 and 30 September 2019, the Migration and Refugee Division received 10,144 new applications and only finalised 6,281. As you've just said, you're not keeping pace. That means you are receiving 60 per cent more applications than you are managing to finalise. How many members currently hear applications in the Migration and Refugee Division?

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Ms Leathem: If you bear with me, I'll see if I can find that number. We do have a total at the moment of 353 members, but obviously not all of those are assigned to the Migration and Refugee Division. We have the equivalent to 105 full-time members currently servicing the Migration and Refugee Division.
Senator KENEALY: What is the current case load in the Migration and Refugee Division? How many cases are currently before it?

Ms Leathem: Mr Matthies, have you got the on-hand?

Mr Matthies: As at 30 September 2019, 63,576.

Senator KENEALY: How many of those are in the refugee division and how many are in the migration?

Mr Matthies: Applications relating to protection visas is 23,063 and other migration decisions is 40,513.

Senator KENEALY: What is the average processing time for refugee and migration appeals?

Mr Matthies: That was all applications finalised in 2018-19 relating to protection visas. The median time from lodgement to finalisation was 72 weeks.

Senator KENEALY: This might be a difficult question to answer but is there a high-water mark for appeals? Have you seen it blowout? Is this a high-water mark as a median figure?

Ms Leathem: This is the record level, if you like, of applications in terms of both lodgements and matters on hand.

Senator KENEALY: Of this appeal case load, what percentage are people appealing failed protection claims?

Mr Matthies: Are you referring to the proportion of people who when they get an adverse decision from the department are appealing to the AAT?

Senator KENEALY: Yes, for failed protection claims.

Mr Matthies: We don't have those figures. That's really a matter for the Department of Home Affairs.

Senator KENEALY: Thank you. Are you able to provide the nationalities of the individuals appealing in the refugee division?

Mr Matthies: Yes.

Ms Haddad: I'm not sure what order you want them in.

Senator KENEALY: Why don't we take them from the highest? Maybe give me the top five.

Ms Haddad: Okay. Just bear with me, because I have them in alphabetical order rather than numerical order. Would you like this financial year so far or last?

Senator KENEALY: If you could do both. I'm happy to take the last year on notice.

Ms Haddad: I can do last year to begin with.

Senator KENEALY: Okay, if that's easier then.

Ms Haddad: I've now got a table that's much more straightforward. Last year the top country was Malaysia with 5,825. The next country was China with 2,821. That was followed by Vietnam with 562.

Senator KENEALY: So Vietnam is only 562?
Ms Haddad: Yes. My apologies, Senator, this is for 2017-18. I'll come to 2018-19 in a minute. Pakistan was 345, Indonesia was 294 and Sri Lanka was 234. Would you like to drill down further, Senator?

Senator KENEALLY: No, that's fine. You have the figures for 2018-19 as well?

Ms Haddad: I do.

Senator KENEALLY: That would be great.

Ms Haddad: Again Malaysia was the top country with 5,858. That was followed by China with 1,561. That was followed by Vietnam with 465. Then there was India with 227 and Pakistan with 178.

Senator KENEALLY: Have you seen over the last five years any trends emerge? Is there any consistency in those numbers? Have they increased from certain countries?

Ms Haddad: The overall numbers have increased considerably, so they doubled in the last couple of years and quadrupled over the last 10 years. In the last three years certainly Malaysia has been the dominant country.

Ms Leathem: It has represented more than half of the protection lodgements in the last couple of years.

Senator KENEALLY: Do you have any insight as to whether the length of appeal time has a honeypot effect—that is, do you have any analysis or insight that people are appealing for the simple reason that it will give them more opportunity to extend their time in Australia?

Ms Leathem: We deal with the applications. It's probably for others on the policy front to be considering some of the other factors that might be in play here. We have to deal with the matters that come before us.

Senator KENEALLY: Have you had any requests from other departments in terms of analysis or advice?

Ms Leathem: There are certainly discussions happening, and the Attorney-General's Department are involved in those.

Senator KENEALLY: I might put some questions to them. Similarly, do you have any evidence or insight as to whether these individuals are coming here of their own choosing? Are people or intermediaries coercing, encouraging or, quite frankly, trafficking them here?

Ms Leathem: Again, I don't think that's something that we could reach any conclusions on or speculate about.

Senator KENEALLY: Are there discussions with Attorney-General's or Home Affairs about that?

Ms Leathem: I'll leave it to the Attorney-General's Department if they wish to say anything in relation to those discussions.

Senator KENEALLY: In the time remaining I have a few more questions. You said that there are 105 full-time equivalents in the Migration and Refugee Division. The Migration Act is fairly complicated. Most lawyers tell me that they find it difficult to navigate. How many members with no legal qualifications currently work in the Migration and Refugee Division?

Ms Leathem: I don't have that number. I would need to take that on notice.

Senator KENEALLY: Would you have that information?
Ms Leathem: We would need to go back and see what records we hold in relation to particular members and qualifications, but of course the appointment of members is a matter for government. We don't have a specific role in terms of the appointment of the members.

Senator KENEALLY: I'm asking you if you have the information.

Ms Leathem: We receive a CV. That should give you some information, but we would need to drill down into that information to be able to come up with an accurate figure for you.

Senator KENEALLY: Similarly, can I put on notice to advise whether there is a noticeable difference in the performance of members with legal qualifications as against those with no legal qualifications in the Migration and Refugee Division. Is there any significant difference in the time frames taken to finalise their decisions?

Ms Leathem: All members are effectively subject to the same professional development framework and evaluation process. Within the Migration and Refugee Division there is a case load strategy. Depending on the mix of work that they do, members are set a specific target for the work to be able to be undertaken. There is no distinction for particular qualifications, although of course for newer members there is a recognition that it takes some time for training and development and there may be some discount to that target while they are getting up to speed.

Senator KENEALLY: That is very helpful. Can I make two observations? One, can you tell me—you may need to take this on notice—of the 105 full-time equivalents in the Migration and Refugee Division, how many have been appointed in the last 12 months? They are newer members, that is. Secondly, given your answer that they each have performance targets, if I can characterise your answer in that way, once you know which ones have legal qualifications and which ones don't it shouldn't be too hard to answer the question I just put on notice as to whether people with legal qualifications are meeting their targets in a different way to the people who don't have legal qualifications.

Ms Leathem: I will take that on notice.

Senator HANSON: Just to follow on from those questions, what is the average time to process this, with regard to these migration and immigration cases?

Ms Leathem: There are different results depending on the type of case. There is migration and protection. I think Mr Matthies has some median time frames for resolution of each of those particular case loads.

Mr Matthies: Overall for the Migration and Refugee Division, in 2018-19, the median time from lodgement to finalisation was 68 weeks. It was also 68 weeks for the migration component of the case load and 72 weeks for the protection component of the case load.

Senator HANSON: How much does it cost them for their application—the fees that they actually have to pay for this?

Ms Leathem: I think for a migration and refugee matter the standard fee is $1,787.

Senator HANSON: That has increased over the years. What was that last year or the year before?

Ms Leathem: It is indexed.
Mr Matthies: I don't think we have that figure for the previous year with us. I just add, though, if you are applying for a review of a protection visa decision, there is no fee payable at the time of lodgement, but if the applicant is unsuccessful, then that $1,787 fee is payable.

Senator HANSON: You've got 68 weeks for finalisation of migration, 72 weeks for visa. What happens? Just guide me through it. They put in an application. There is an interim hearing, is that correct? It's heard, and then they have to wait for a decision? What happens in between? Are they given bridging visas; are they given work visas? What happens in between?

Ms Leathem: That is a really question for Home Affairs. We are not involved in any of the granting of the visas. By and large the position would be that most applicants would have a bridging visa for the duration of the matter being before the tribunal.

Senator HANSON: Once you are waiting for a decision to come down—you've got quite a number here. This year 5,858 Malaysians have applied for this. How many go before you again, 68 or 72 weeks later? How many go before you again for the final decision? Or do they leave the country before a final decision is handed down?

Ms Leathem: No, I wouldn't have those figures.

Senator HANSON: You don't have those figures for finalisation. You know how many are putting in applications, but you don't know how many you actually finalise the cases on?

Ms Leathem: Certainly we can tell you the number of finalisations. I wasn't clear what you are asking in terms of people turning up.

Senator HANSON: The people who put in their applications.

Ms Leathem: Yes.

Senator HANSON: You wait the 68 or 72 weeks, depending on the department or what area. How many of those people will then finally turn up for that final review?

Ms Leathem: For an appearance at the hearing?

Senator HANSON: For the final review, for the decision?

Ms Leathem: It's probably worthwhile saying that we have a range of different case management strategies for different case loads. One of the ways in which we have handled the Malaysian matters has been using multiple applicant hearing lists, which helps us to get through some of those matters in a more timely way. I think we probably would record things such as the non-appearance rate in relation to those matters.

Senator HANSON: You don't record that? The non-appearance rate?

Ms Leathem: No, we do. I don't think I have that information here, but we could take it on notice and give some information about the non-appearance rate for Malaysian applicants.

Senator HANSON: I'd be interested in that. You do have the visas that they arrive under—as you said, the protection visas. What visas do they appear in the AAT under?

Ms Haddad: We don't keep that data. We don't store what visas they are currently on when they appear before us.

Senator HANSON: When you come down with a decision, those ones that do turn up for the final decision—and by these figures it takes at least a year and a quarter to a year and a
half—under that process, are those ones that are denied their application to stay in the country? What happens then? How are they informed?

**Ms Haddad:** Typically an applicant will be invited to attend the hearing. Depending on whether they turn up or not, it may be dismissed shortly thereafter if they do not turn up. If they do, typically the member will prepare a decision. They will receive a written record of that decision and the reasons for that. That will be sent to them by post or email. What happens to them afterwards is a matter for the Department of Home Affairs.

**CHAIR:** I've got a couple of questions. Can you provide some numbers on the percentage of AAT rulings that are related to ASQA?

**Ms Leathem:** That's part of our tax and commercial division. We have some statistics. I'm not sure whether we have broken it down for ASQA matters for the purpose of today's statistics, but we could take that on notice.

**CHAIR:** If you could take it on notice I'd appreciate that. I'd also like to know how those numbers compare to the volume of cases that are faced by some of the other key subject areas in that commercial division.

**Ms Leathem:** Sure.

**CHAIR:** I am interested in hearing about any changes there have been in the number and nature of ASQA related cases that have been presented before the AAT in recent years. Do you have any sense of whether there has been any change in the content or the substance?

**Ms Leathem:** I would need to take that on notice. We'd probably need to talk to the division head, who I'm sure would have some insights into that.

**CHAIR:** That would be great. I'm interested in whether there is any observation of conduct by ASQA that could be regarded as anything less than model, and any sense that the regulator may be using the AAT in a way that might itself amount to unfairness.

**Ms Leathem:** I would expect that if there were concerns of that nature it would likely be contained in the decisions of a member there. I'm not aware of any, but we will take your questions on notice.

**Senator KIM CARR:** I was asking about former Justice Callinan's report. Could advise me as to your response to that report?

**Ms Leathem:** We received a copy of the report around the time it was tabled in late July this year. We have been in the process of considering the various recommendations. There are obviously a range of those that are more specifically a matter for government or would involve legislative change. We will be working to provide our response so that the government can ultimately determine what response it would like.

**Senator KIM CARR:** When do you anticipate that response going to government?

**Ms Leathem:** We would certainly be looking to provide our response before the end of this year.

**Senator KIM CARR:** The review made a number of suggestions in regard to legal advice from staff members. The review suggested there were a number of legal issues, suggesting for instance that the editing of draft decisions and reasons for decisions had to be made in the context of templates being provided for decisions to members. Is that correct?
Ms Leathem: Our starting point would be that we absolutely agree with the reviewer's recommendations that decisions and reasons for decisions are very much a matter for individual members. Having said that, we do have a legally qualified staff who provide information to members about the appropriate legislations that might apply. They certainly do maintain resource materials, including, for example, templates that would assist members, particularly in high-volume decisions. But it is always the case that the members must be the ones who reach the conclusions, consider the evidence and settle any decisions.

Senator KIM CARR: Can I explore that for a moment? You are saying it's not unreasonable that a member of a tribunal seek advice.

Ms Leathem: We certainly believe that in the context of the Migration and Refugee Division, which is an extremely complex area, it is helpful for members to have recourse to specialist staff who are able to ensure that they are giving attention to the right provisions.

Senator KIM CARR: Fair enough. I just want to be clear as to what you are saying—that members get advice from legal practitioners.

Ms Leathem: It's entirely a matter for the members whether they choose to accept the information that is put before them by the staff.

Senator KIM CARR: That's not what I asked you. That's the proposition you are putting before this committee.

Ms Leathem: Part of their role is to provide some information and direct them to relevant legislation.

Senator KIM CARR: But the templates were provided to members of the AAT?

Ms Leathem: There are a range of templates that are available to members.

Senator KIM CARR: How often have they been provided?

Ms Leathem: They are available on our case management systems and through our intranet. I couldn't give you an answer on how often they are utilised, but it's very common for members across a range of different case loads to be able to use some of those templates as a starting point.

Senator KIM CARR: So ready-made answers to problems—is that right?

Ms Leathem: No. For example, for a particular visa they are being asked to review, there are often a range of criteria that need to be taken into account. The templates simply guide the members through the relevant considerations or factors that need to be taken into account. They don't look at the individual evidence that would be presented in each of those cases. There are no conclusions that can be reached through the templates. They are really just there to help the members make sure they are taking into account the factors or provisions that need to be considered.

Senator KIM CARR: They are there for guidance, are they?

Ms Leathem: Correct.

Senator KIM CARR: Mr Callinan suggested that all these practices should cease, because ‘… they have a real capacity to affect the independence of the AAT and to fall short of reasonable community expectations.’ Ms Leathem, would you agree with that?
**Ms Leathem:** That is the reviewer's recommendation. As I said, we are yet to provide our response to that.

**Senator KIM CARR:** That's not my question. Would you agree with the assertion that they have the capacity to affect the independence of the AAT and to fall short of reasonable community expectations?

**Ms Leathem:** I'm not going to venture a view as to what the final position of the tribunal will be, but, as I said, we absolutely agree with the proposition that members should be solely responsible for determining and deciding cases before the courts.

**Senator KIM CARR:** So has the tribunal not reached a decision as to whether or not this practice affects the independence of the AAT and falls short of reasonable community expectations?

**Ms Leathem:** As I've already said, we are still in the course of considering all of the recommendations, and we will provide that.

**Senator KIM CARR:** So has this practice ceased?

**Ms Leathem:** As I said, we believe there's a whole range of useful guidance materials, information, training and assistance that our staff provide.

**Senator KIM CARR:** No, that's not my question. Has this practice ceased?

**Ms Leathem:** We have not changed practices within the tribunal. We maintain that the support those people are providing is appropriate and useful in the context.

**Senator KIM CARR:** Mr Secretary, what do you say to the proposition that this practice has the capacity to affect the independence of the AAT and falls short of reasonable community expectations?

**Mr Moraitis:** As was alluded to, it's the view of the reviewer. It's something we'll take into account when we assess the government's response to the report. We will also take into account the views of the AAT and the tribunal as a body as to what is the most efficient, effective and proper way to handle this issue.

**Senator KIM CARR:** So you're not surprised that the practice has not ceased?

**Mr Moraitis:** No, I'm not surprised. If you ask me personally, I'm not surprised, no, because, as outlined to me this morning by the AAT, the way it's utilised makes reasonable sense to me.

**Senator KIM CARR:** Mr Callinan also said that it was in fairness to some of the staff members that they were provided with this assistance because they lacked legal qualifications. He said:

… the lack of legal qualifications of a number of Members of the AAT provides some justification for its existence.

It does seem to be suggesting, as I've raised before, that it would appear that some members of the AAT who have been appointed in recent years are incapable of doing the work for themselves. Would that be a fair conclusion to draw?

**Ms Leathem:** I'm not drawing that conclusion. I wouldn't express that view.
Senator KIM CARR: I am surprised that people would need this type of assistance when it comes to making decisions about these matters. Effectively, these are judicial decisions, are they not?

Ms Leatham: No, they're executive decisions.

Senator KIM CARR: They have effect, though, at law.

Ms Leatham: They are reviews de novo of executive decisions. In that context, we believe there is real value in members being able to have access to information and support, including targeted advice, and certainly that support is not confined to non-legal-qualified members; it's accessed by all members and it's been available for many years.

Senator KIM CARR: How many members would you say are able to perform without this assistance?

Ms Leatham: I couldn't give you any figure about that. Obviously the support services are used by very many members in a range of different ways, but I certainly haven't got any detailed statistics about that.

Senator KIM CARR: So you have no review mechanism within the authority itself?

Ms Leatham: No, we do. I don't have the information at hand. We would be able to tell you, for example, if you wanted me to take on notice how many instances there had been of information provided or how many—

Senator KIM CARR: Perhaps you could help me. As you can see, I'm new to this, so I'm just trying to come to grips with this proposition that people are having quite serious decisions made about them by people who don't have legal training and are relying on advice by way of template. You have no review mechanism within the AAT as to how they're going on that?

Ms Leatham: No, we do. We have a very comprehensive appraisal system, but I might say that, of course, the decisions of the tribunal are subject to supervision of the courts, so there is always, if somebody has concerns about a decision, the ability to appeal to the Federal Circuit Court, in the case of the Migration and Refugee Division. Do you want to add something?

Ms Haddad: I would probably just add, in terms of the templates themselves, that, as I think Senator Keneally pointed out earlier, the Migration Act and regulations are extremely detailed and complex and subject to frequent change. One of the things that the templates do is, I suppose, set out the law of a particular criterion issue in that case. That will change depending upon a range of factors, such as when the applicant applied for the visa and what time it is now. There are a lot of variables. So what these templates will do is just ensure that the applicable criteria for that particular point in time are there. They don't have any reasons or factual findings or anything like that.

CHAIR: Senator Carr, just so I understand what's going on here: you just used the language 'advice by way of template'. Are you suggesting that the template itself is the advice, or that there is a distinction and in fact two steps—that there are templates that are used to help, for instance, in the drafting of a judgement, such as providing formatting and some references to key legislation and so forth? And then separately from that: if there is a non-legally trained person who is an AAT member, they have the ability—much as we
parliamentarians have the right to go and use the library—to go and seek additional advice and support if there are matters with which they need help. Are they separate? Or are they—

Senator KIM CARR: I'm told that the reviewer—

CHAIR: I'd just like that clarified by the witnesses, please.

Senator KIM CARR: I'm just relying on what the reviewer himself has said—that there is a practice—

CHAIR: Senator Carr, can I ask the witnesses to clarify that so that—

Senator KIM CARR: I thought you were asking me the question.

CHAIR: Well, I'd like the witnesses to clarify whether it is in fact a single process, as the question from Senator Carr suggested, or whether it is those two separate steps, so that the entirety of the committee understands what's going on so that Senator Carr can continue his questions.

Ms Haddad: My apologies, Senator: could I ask you to repeat the question?

Ms Leathem: I think I followed it. Yes, there are templates, and yes, they provide guidance to members when they are considering and writing a decision. There may also be reference to a pool of staff to, for example, look at things such as the procedural code under the Migration Act and to be able to assist if they have a view about whether or not they've approached things in the right way. That would simply be something that the member would then be invited to consider. But it is ultimately up to them to determine what they believe are the findings, the key evidence and the decision that they make.

CHAIR: Thank you for that—two separate things. I will adjust your time accordingly, Senator Carr.

Senator KIM CARR: Well, that's fine, but I just want to know whether or not the AAT has a mechanism to establish whether or not members are able to do their job. Are they performing the job at a high standard? Are you able to tell me that? How many of your members are performing their job at a high standard?

Ms Leathem: It's probably helpful to know that there is a comprehensive professional development framework for members. When they are appointed there is obviously a comprehensive induction that's provided. They would then be given some specialist training in the particular case load. In some cases they might be assigned a mentor who's a more experienced member. They might co-sit. But then of course they are given their own workload in allocations to do, and there is a cycle that applies within the tribunal. There's recently been significant work to refresh the performance evaluation and appraisal process, and that will be commencing if not before the end of this year then very early in the new year. That will be a process whereby there is a comprehensive evaluation of members in terms of looking at how they're managing workload, timeliness and so on. Somebody may observe some hearings, read some decisions—looking at appeal rates, reflecting on a whole range of measures that are likely to give a comprehensive picture about how a member is performing.

Senator KIM CARR: You have a ranking system, do you?

Ms Leathem: Not a ranking system, no.

Senator KIM CARR: So you can't tell me how many people are performing at a high standard?
Ms Leathem: I couldn't do that at the moment, no.

Senator KIM CARR: Why not?

Ms Leathem: Because, as I said, we're about to commence the new appraisal system. Many of the members before us have been appointed within the past couple of years, so we are at an earlier point in the cycle.

Senator KIM CARR: How long does it take to get a ranking system going in the AAT?

Ms Leathem: Well, it's a very comprehensive process to be able to appraise individual members. It involves a whole range of—

Senator KIM CARR: You've had a couple of years.

Ms Leathem: But, as I said, we're only just in the process now of finalising that, and it will be implemented very shortly.

Senator KIM CARR: You don't move quickly there, do you?—a couple of years.

CHAIR: Senator Carr, we are looking at the time well and truly expiring for you.

Senator KIM CARR: I've still got a few questions, on this particular matter, because I want to go to some specific cases. But I would just like to get it clear in my own mind. If you can't tell me how many are operating at a high standard, how many are at an acceptable standard?

Ms Leathem: I'm not sure what criteria you're using in relation to that.

Senator KIM CARR: Well, your criteria. You mentioned a whole list of things. On your own criteria, how many are operating at an acceptable standard?

Ms Leathem: We are in a situation now where we will be commencing individual appraisals and evaluations of members. I haven't got information of that nature now.

Senator KIM CARR: Has the President of the AAT ever complained or spoken to the Attorney-General or his office or the department about the capacity of certain members to do their job that they've been appointed to?

Ms Leathem: I'm not in a position to disclose confidential discussions between the president and—

CHAIR: Thank you, Senator Carr. That's your time expired.

Senator KIM CARR: But I'd like an answer. Has there been any complaint put to the government—through the department, through the minister's office or through the minister himself—about the performance of AAT members?

Ms Leathem: I'm not in a position to disclose confidential information.

Senator KIM CARR: This is not individuals. This is about the performance of members of the tribunal collectively. Has there been any complaint registered?

Ms Leathem: I'm just trying to clarify what you're asking.

Senator KIM CARR: On their performance.

CHAIR: Senator Carr, this question has been asked and answered.

Senator KIM CARR: You say you can't reveal confidential information—

CHAIR: Senator Carr, the question has been asked and answered. Let's keep this civil. The call is with Senator Siewert.
Senator SIEWERT: Thank you. I want to go back to the series of questions I was asking previously. On DSP, and you might need to take this on notice, you said that the applications for the first quarter this year have gone down by 27 per cent. Are you able to give us the figures for the previous quarter in 2016-17?

Mr Matthies: No, I don't have those figures with me.

Senator SIEWERT: If you could take that on notice, that would be appreciated. Can I go then to the table on page 42, chart and table 310. I just want to clarify a figure for Newstart first. It says here, if I understand it correctly, that the numbers have gone up by 36 per cent for the applications over Newstart.

Mr Matthies: Correct.

Senator SIEWERT: Could I just take you to the paragraph on page 41, where it says: When applications finalised on the basis that the division could not review the decisions are excluded, the number of applications lodged seeking review of … decisions rejecting a claim increased by 45 per cent …

Does that mean that if you looked at the overall total there was a certain number last year but when you take out the excluded for both years it gives a 45 per cent increase?

Mr Matthies: That's correct.

Senator SIEWERT: So there has been a 45 per cent increase in the number of applications on Newstart and youth allowance.

Mr Matthies: No, I think that relates specifically, in that paragraph, if I understand it correctly, to the proportion of applications that relate to a decision rejecting a claim of any type—for any payment type.

Senator SIEWERT: Of any type?

Mr Matthies: Yes. That paragraph just relates to what the types of decisions are that are coming for first review at the tribunal.

Senator SIEWERT: Thank you. Then: 'while applications seeking review one or more decisions about a debt increased by 16 per cent.' What nature of debts are those? Are those just Centrelink debts? Or are they debts in other areas?

Mr Matthies: That specific figure there relates to Centrelink decisions.

Senator SIEWERT: Okay, so there's been a 16 per cent increase in debts. Is that correct?

Mr Matthies: In applications relating to debt.

Senator SIEWERT: Thank you. From memory, in the past, you haven't been able to tell us whether they're the online compliance debts. Is that still the same? Have you changed your process?

Mr Matthies: No, that is still the same.

Senator SIEWERT: That is across all forms of debts?

Mr Matthies: Correct.

Senator SIEWERT: Thank you. Are you able to tell us the amount of debt that we're talking about? What's the volume in that 16 per cent?
Mr Matthies: I don't think we record the amount of the debt in the case management system but we can take that on notice, just to confirm that. I'm pretty certain that we don't collect that information.

Senator SIEWERT: Thank you. Can I then go to the nature of the increase of the 36 per cent for Newstart allowance. What is the nature of the appeals? Are they access to Newstart or about also being thrown off Newstart, for example?

Mr Matthies: We don't have that detailed information with us, but we can take that on notice.

Senator SIEWERT: Thank you. That would be appreciated. I also want to go to parenting payment. According to the table there's been a 30 per cent increase in the number of applications for a parenting payment. Could you take that on notice, if you don't have the 2016-17 figures, so I can compare it, other than—

Mr Matthies: I do have that.

Senator SIEWERT: You do have that?

Mr Matthies: No, actually. I don't have that, sorry.

Senator SIEWERT: Could you take that on notice? It doesn't show up in the bar chart with the wiggly line. It only shows Centrelink on that. What is the nature of those appeals?

Mr Matthies: Again, I will have to take that on notice.

Senator SIEWERT: Can I go back to the point we were talking about before. You talked about the applications finalised on the basis that you could not review the decision. Could you just explain that point to me, if there's a quick explanation?

Mr Matthies: In some cases when we receive an application we don't actually have the power to review the decision. Most often the reason for that is that the person hasn't applied for an internal review, so they don't have an ARO decision or a specialist decision in order to come to the tribunal. That's the most common reason.

Senator SIEWERT: That's where I wanted to go: the internal review. Are you saying you have to dismiss anything, if they haven't gone to an internal? I'm thinking for debts, for example. You can get it reviewed and then you have to go to the ARO process. If they come to you before that, do you have to send them back?

Mr Matthies: Correct.

Senator SIEWERT: How many of those were there, or do you need to take that on notice?

Mr Matthies: I do have the overall figure for Centrelink. In 2018-19 we didn't have jurisdiction to review 3,592 applications.

Senator SIEWERT: And the bulk of that was about not having done the internal review?

Mr Matthies: I expect that that is correct. Yes.

Senator SIEWERT: Could you take that on notice, just to confirm it. And they are purely Centrelink ones, aren't they?

Mr Matthies: Correct.
Senator SIEWERT: On page 44 in your report, you talk about the fast-tracked process. Can you just very quickly take me through that. On all those figures, if there's an agreement reached before the final review, does that get counted in the 'resolved' caseload?

Mr Matthies: That's in the child-support area where there would be an agreement.

Senator SIEWERT: Yes. Does that still get counted?

Mr Matthies: Absolutely.

Senator SIEWERT: What is the fast-tracked process?

Mr Matthies: When we do a triaging process to identify the application and the types of issues, if it's a more straightforward type of case and something that can be dealt with relatively quickly, it may be listed for a fast-tracked hearing. It's the timing and the particular pathway it follows. It's about the hearing process and the time within which that is listed, depending on the features of the case.

Senator SIEWERT: Do I understand from that that, if they're straightforward, they get fast tracked?

Mr Matthies: Yes. That may be the pathway that it goes down.

Senator SIEWERT: What percentage of applications were fast tracked the last financial year?

Mr Matthies: I think I'd want to take that on notice.

Senator SIEWERT: When you talk in the report about the decision delivered and how reasons for the decision were given orally at the end of a hearing and how 15 per cent of all applications for Centrelink decisions were finalised, does that just mean that's given on the day?

Mr Matthies: That's correct. The tribunal's decision, and importantly the reasons for the decision, are given to the applicant orally on the day.

Senator SIEWERT: So 15 per cent get resolved that way?

Mr Matthies: Yes. Once that occurs, we obviously inform them in writing of what the formal decision is, and then the person is able to request those reasons in writing within 14 days.

Senator SIEWERT: So they just get the decision. But they get the reasons on the day?

Mr Matthies: Yes. They get the reasons on the day. They're given orally and explained to the person, but they can subsequently ask for them in writing.

Senator SIEWERT: Can I just go to the debt. In the number for debts, not just the 16 per cent, there was an increase. Are you able to provide information on those debts, specifically on how many debts were affirmed and how many debts were set aside?

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Senator SIEWERT: Can I just go to the debt. In the number for debts, not just the 16 per cent, there was an increase. Are you able to provide information on those debts, specifically on how many debts were affirmed and how many debts were set aside?

Mr Matthies: In terms of the total number—but that doesn't exclude the no jurisdiction, those that were excluded—
Senator SIEWERT: Because they hadn't been to review?

Mr Matthies: That's correct. I have the total numbers. In 2017-18, in relation to Centrelink specifically, there were 4,366 applications. In 2018-19 it was 5,699 applications. That was an increase of 31 per cent. But when you exclude those matters that we couldn't actually review, then that's 16 per cent. But I don't have the figures when you exclude the cases that we weren't able to deal with from those particular figures in terms of raw numbers.

Senator SIEWERT: It would be difficult working back from the 16 per cent. If you could take that on notice, that would be fantastic. Thank you. On page 45 you talk about: 'of Centrelink decisions, 42 were lodged by the secretary of the department'. Can you take on notice how many were challenged by the secretary for the last five financial years?

Mr Matthies: Certainly.

Senator SIEWERT: And the nature of the applications—how many were against Centrelink or disability? You're looking at me a bit as if that might not be possible.

Mr Matthies: We have just made some changes over that period in relation to the way that we categorise at the second review. I'll certainly be able to give you information, but I'll then caveat anything that is unclear.

Senator SIEWERT: Can you give it to me for the period of time where there is consistency in how you categorise things?

Mr Matthies: We'll provide the information with some explanations around how it works. The particular issue is that the changing categorisation—if it were an application about a refusal of a claim for a payment or cancellation of a payment, for example, we would categorise it by the payment. But if it were a debt matter we would categorise it first as a debt matter. That's just the distinction. That will be clear from the information we provide.

Senator SIEWERT: Can I then go to the average length of decision-making up to review 1 and then review 2 against payment types.

Mr Matthies: In terms of the average time from lodgement to finalisation, first and second review by payment type, we'd have to take that on notice.

Senator SIEWERT: Can you give it to me for DSP? Do you have that already?

Mr Matthies: No. I've only got the overall Centrelink, child support—

Senator SIEWERT: Can you remind me what that is?

Mr Matthies: In 2018-19, the median time to finalisation from lodgement to finalisation in first review was nine weeks, and for second review it was 20 weeks.

Senator SIEWERT: That's the average for all the Centrelink payments?

Mr Matthies: That's correct.

Senator SIEWERT: Could you give that against payment type?

Mr Matthies: And maybe the top five payment types?

Senator SIEWERT: Yes, please. I go back to parenting payment. You've already taken on notice looking at the types of issues that people were appealing over. Could you also include, in the payment types, how long they take, even if it's not in the top—it should be in the top five anyway, shouldn't it? For the parenting payment, can you include that in the breakdown of the payments that you give me, please?
Mr Matthies: I can.

Senator SIEWERT: Does that make sense?

Mr Matthies: Yes.

CHAIR: Thank you, Senator Siewert. I appreciate your efficiency there. Senator Carr, we will go to you. As I understand it, the only other set of questions we have is from Senator Henderson. I'll give you about 10 minutes, give her a go and then go back to you to get you to the point where you're finished so that we can move on to the next session.

Senator KIM CARR: We'll do our best. Secretary, have you had any complaints from any members of the tribunal, from the president in particular, about the performance of members of the AAT?

Mr Moraitis: No.

Senator KIM CARR: None at all?

Mr Moraitis: Not that I'm aware of, no.

Senator KIM CARR: Minister, could you take on notice whether the minister's office or the minister had any complaints?

Senator Payne: I'll take that on notice.

Senator KIM CARR: Before the appointment process changed on the 25th, it was the practice for the Attorney-General's office to advise the department of candidates that had been nominated for appointment—that's correct, isn't it?

Mr Moraitis: In the previous protocol I think that was correct.

Mr Anderson: That's correct.

Senator KIM CARR: And that the department received nomination from anyone else apart from the ministers—MPs? Senators? Anyone else that was able to nominate?

Mr Anderson: I don't believe that we did receive any nominations from anyone else.

Senator KIM CARR: The Attorney-General's office received nominations from ministers, MPs or senators—are you aware of that?

Mr Anderson: I'm not aware of that. There was a process under the previous protocol where the president first wrote to the Attorney and proposed reappointments or appointments. The Attorney then considered either those reappointments or recommended appointees. The Attorney could come up with other names. I'm not sure how the Attorney might have received suggestions from other parties. We don't have visibility of that.

Senator KIM CARR: You have no knowledge of that, so you won't be able to tell me, of the 34 new appointments of the AAT nominated by the Attorney-General on 22 February, how many were nominated by current or former Liberal parliamentarians?

Mr Anderson: In the most recent appointments it's highly likely that some of those involved recommendations from the Treasurer. I'd need to confirm that. But that's because five of the appointments were actually for the small taxation claims division of the AAT. It's highly likely that there was advice from the Treasury portfolio. I'll see if I can confirm that.

Senator KIM CARR: I'm talking about members of parliament nominating members of the AAT.
CHAIR: I understand that the Treasurer is a member of parliament.

Senator KIM CARR: I take the point. Other than the Treasurer, cabinet ministers—is that right?

Mr Anderson: Because the AAT's jurisdiction is so broad in terms of social security, migration, veterans' affairs et cetera there may be suggestions by ministers in those areas, but that's not something I'm aware of.

Senator KIM CARR: I see. So you're saying another cabinet minister might be able to nominate persons in their policy area?

Mr Anderson: I'm saying another cabinet minister may choose to make a recommendation to the Attorney with respect to a particular policy area. But I'm not aware of whether those recommendations are in fact being made.

Senator KIM CARR: I understand that, of the 34 appointments, 16 had Liberal Party associations. This is after Mr Callinan delivered his report to the Attorney-General—is that correct?

Dr Smrdel: In terms of timing, the announcements were made in February 2019. Mr Callinan provided his report to the Attorney in December 2018. It clearly looks like there's an overlap of time there. In terms of how quickly the Attorney processed Mr Callinan's report versus when the decisions were made, which were announced in February 2019, there's an overlap of time but we don't have clarity as to the precise overlapping of time.

Senator KIM CARR: I see. Of those 34, how many would you say did not have legal qualifications?

Dr Smrdel: We've taken that on notice. We're working through that during the course of today and will hopefully get back to you this evening.

Senator KIM CARR: Maybe you will be able to help me later on in the evening. It was put to me that 65 of the current 333 AAT members are former Liberal Party staffers, former Liberals or National Party politicians, party donors, Liberal party members or unsuccessful Liberal candidates for Liberal governments; that 64 of the 65 were appointed to their roles in the last six years; and that 24 of the 65 appointments had no legal qualifications, including seven of the AAT senior members. Would you be able to confirm those figures for me by this evening?

Mr Moraitis: Senator, we wouldn't know political affiliations as a matter of process, unless it's a matter of public record or something. That's not something that's recorded when we went through this. As Dr Smrdel said, we're also seeking during the next few hours to get you details on the legal and non-legal statistics.

Senator KIM CARR: Thank you. Would you be able to tell me about the employment process for a Mr William Frost?

Mr Moraitis: Yes, we could.

Senator KIM CARR: It is true that he was a former senior adviser to the Attorney-General when he was appointed to the AAT?

Mr Anderson: That's correct.
Senator KIM CARR: Minister, are you able to tell me whether or not Minister Porter recused himself from the Cabinet deliberations on that matter?

Senator Payne: I'll take that on notice, Senator.

Senator KIM CARR: Immediately prior to the appointment—and we're talking immediately prior to that appointment—Mr Frost was in fact the Attorney-General's adviser. That's correct, is it?

Mr Moraitis: I'd have to take that on notice, Senator. He was senior adviser for the Attorney-General. He resigned. I'm not sure about the—I'll have to check the timing of the resignation with respect to the—

Senator KIM CARR: Just refresh my memory: what was the date of the announcement of his appointment?

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

Senator KIM CARR: You'll be able to tell me whether or not on 21 February he was a senior adviser to the Attorney-General.

CHAIR: Senator Carr, I can tell you that he was one of the most brilliant lawyers I dealt with in the Attorney's office. You will be pleased to know: he was quite meritorious.

Senator KIM CARR: I'm pleased to hear that he was a brilliant lawyer, but what I am interested to know is: did he move from the Attorney-General's office to the AAT almost overnight?

Mr Anderson: My recollection is that he didn't, that he resigned and there was an interregnum in between, but we'll take that on notice.

Senator KIM CARR: Recollection is that he didn't, that he resigned and there was an interregnum in between, but we'll take that on notice.

Senator KIM CARR: Is it a fact that his nomination would have been sent to the Attorney-General's Department on 21 December 2018?

Mr Anderson: I'll have to take that on notice.

Senator KIM CARR: Are you able to tell me who actually nominated Mr Frost?

Mr Anderson: I'm not sure we would know that. We receive the names from the Attorney.

Senator KIM CARR: At the 21 December, he was in fact working in Mr Porter's office.

Mr Anderson: I'll have to take that on notice.

Senator KIM CARR: Would you be able to advise me: was the nomination sent to the Attorney-General's Department via email?

Mr Anderson: I doubt very much that it was, but we'll take that on notice, Senator.
Senator KIM CARR: That would be an easy thing to check, though—it won't be too hard to find that out. The Attorney-General provided a reference, I presume. Was he a referee?

Mr Anderson: I don't know that; I'll have to take that on notice as well.

Senator KIM CARR: Was he a referee for Mr Frost—I'll be more precise?

Mr Anderson: I understood that to be the question.

Senator KIM CARR: Just to be clear: I've been doing this for a while and I know that sometimes I'll get an answer back and, when I ask a question like that, someone will be trying to tell me that I didn't quite mean was he a referee for Mr Frost. So we are clear?

Mr Anderson: Very clear, Senator, thank you.

Senator KIM CARR: Thank you very much. He wouldn't be providing himself with a reference, would he?

Mr Anderson: I'd be happy to take that on notice if you'd like us to, Senator.

Senator KIM CARR: And is it the case that the cabinet did approve that appointment?

Mr Anderson: All appointments are actually made by the Governor-General.

Senator KIM CARR: But on recommendation of the cabinet, surely.

Mr Anderson: I believe they go through cabinet before going to exco.

Senator KIM CARR: So it's normal process, Madam Minister, that the cabinet list of appointments would go up to the cabinet for the AAT? That practice hasn't changed, has it? No, so he would have been presented to cabinet. Can you tell me the date on which he was presented to cabinet for approval?

Mr Anderson: We will see if we can ascertain that and take it on notice.

Senator KIM CARR: Thank you. I've already sought this advice, but I will be very clear about this: I'd like to know whether Mr Porter recused himself from cabinet consideration on that appointment.

Senator Payne: I said I'd take that on notice, Senator.

Senator KIM CARR: Take it up from there. The other one I was interested to know is Mr Tony Barry. Are we familiar with Mr Tony Barry?

Mr Anderson: We know the name.

Senator KIM CARR: Immediately prior to his appointment as a part-time member he was the communications director of the Victorian Liberal opposition leader. Is that correct?

Dr Smrdel: We could only go by media reporting. As Mr Anderson explained, we would have obtained a list of appointments from the Attorney-General's office, for following appointments to be worked up, which include CVs et cetera.

Senator KIM CARR: And the Attorney-General's office would have made it clear that he was also a former press secretary to Mr Christopher Pyne, Mr Malcolm Turnbull and Mr Matthew Guy. Is that correct?

Mr Anderson: As Dr Smrdel said, we receive a CV for the proposed candidate. If it's stated on the CV, we're aware of it; if it's not stated on the CV, we might not be aware of it.
Senator KIM CARR: You can check that for me, then, can you? Was it stated on the CV that he'd worked for those other politicians? He'd also worked for big tobacco, reportedly at $20,000 a month, lobbying for big tobacco.

Mr Anderson: We wouldn't know his salary.

Senator KIM CARR: You wouldn't have noticed that, even if it's been reported?

CHAIR: Senator Carr, I note that we're at 10.30 and we're due for a break now. Do you have much to go on this case study or would you prefer to resume after the break?

Senator KIM CARR: I could probably finish off these case studies in about five minutes, because I can see the officers are going to take these on notice.

CHAIR: Let's knock them over in the next five and we will take a break.

Senator KIM CARR: Can you confirm from the curriculum vitae that Mr Barry had no qualifications, apart from his communications?

Mr Anderson: We will take that on notice.

Senator KIM CARR: You did say to me before that there were two criteria for appointment: legal qualifications or specialist ones. What were the specialist skills he had?

Mr Anderson: That's a matter for the Attorney in making a recommendation to cabinet, and for the government in making a recommendation to the Governor-General, as to: 'Does a person possess special knowledge or skills relevant to the position?' They are not required to specifically identify particular skills or knowledge, but they are required to form the opinion that the person has special knowledge or skills that will equip them to be an AAT member.

Senator KIM CARR: The Attorney-General, surely, would have specified what the specialist skills were. Apart from understanding it was moved on from the opposition leader, at the time—Malcolm Turnbull's office—because of his aggressive attitude towards journalists, is there a particular skill you have in this—

Senator Payne: I do think a—

Senator KIM CARR: I'm just relying on a media report, that's all.

Senator Payne: reflection of that nature on the Hansard record, in relation to an individual who's not in a position to respond, is unfair and—

Senator KIM CARR: Terribly unfair. I'm just wondering what the specialist skills were, for making life and death decisions about other people, in terms of the role at the AAT, demonstrated by this candidate. What were those specialist skills that would make this person suitable for appointment?

CHAIR: It's been taken on notice; it's time to move on.

Senator KIM CARR: Who nominated Mr Barry?

Mr Anderson: I'll take it on notice but we might not be able to answer that. As I said, the department is advised by the Attorney or the Attorney's office of the proposed appointments.

Senator KIM CARR: It's a part-time appointment. How many days a week does Mr Barry work at the AAT?

Mr Anderson: That's a matter for the tribunal.

Senator KIM CARR: Can the tribunal help me with that?
Ms Leathem: I'd have to check whether he's a full- or part-time or sessional appointment. I'm happy to take that on notice.

Senator KIM CARR: And has he met his targets?

Ms Leathem: We can certainly tell you what the case load mix is that he is working on.

Senator KIM CARR: Has he met them?

Ms Leathem: I haven't got information about that individual member, but certainly we'll take it on notice.

Senator KIM CARR: How many applications has he heard since he became a member of the AAT? Don't you have any information at all?

Ms Leathem: We have 353 members so, yes—

CHAIR: You're entitled to take it on notice.

Senator KIM CARR: And how many matters has Mr Barry finalised, if you wouldn't mind.

Ms Leathem: Yes.

Senator KIM CARR: What pay schedule is he on?

Ms Leathem: I can certainly confirm what level of membership the member is appointed at, but I don't have that individual information—

Senator KIM CARR: And has Mr Barry ever asked a staff member at the AAT to draft a decision for him or to provide him with legal advice? Thank you.

The last one I want to ask is in regard to Mr Terry Carney. Are you familiar with his situation?

Ms Leathem: He's a former member of the AAT.

Senator KIM CARR: Yes. He lost his job at the AAT in late 2017. Media reports suggest that he lost his job via a short blunt email in September 2017. Is that correct?

Ms Leathem: I couldn't comment; we haven't received a copy of that.

CHAIR: Do you have a copy of that media report?

Senator KIM CARR: I've got it here somewhere. We'll get you it, if you feel that's necessary.

CHAIR: If you are going to refer to media reports, yes, please provide those for the witness.

Senator KIM CARR: We will. But given that we've only got a few minutes, let's just say that the Crikey report says Mr Carney had a long career at the AAT and together he had—

CHAIR: Particularly given it is a Crikey report!

Senator KIM CARR: Do you mean to say that that's, what, illegitimate? Is that the suggestion?

CHAIR: I mean to suggest that it's very important we ensure reliability.

Senator KIM CARR: It's reported that Mr Carney had worked at AAT and, with his work on the Social Security Appeals Tribunal, had put in 40 years of service. Is that correct?
Ms Leathem: I would have to check his record of service, but he certainly was a longstanding member of the former SSAT as well as the AAT.

Senator KIM CARR: I understand that he is an emeritus professor of law at the University of Sydney. Is that correct?

Ms Leathem: I believe that's true.

Senator KIM CARR: Is it the case that Mr Carney's appointment came up for renewal in 2017?

Ms Leathem: His term came to an end, as I understand it, during that year.

Senator KIM CARR: Is it the case that the President of the AAT recommended to the Attorney-General that Mr Carney be reappointed?

Ms Leathem: I would have to take that on notice.

Senator KIM CARR: Mr Secretary, can you advise me? Did the—

Mr Moraitis: We will take that on notice.

CHAIR: Senator Carr, we are more than five minutes over. Are you far away?

Senator KIM CARR: I am not far away at all, as the officers, I trust, are able to help me here. Five months before he lost his job, Mr Carney delivered a decision in which he declared the Centrelink robo-debt scheme to be unlawful. Did that happen?

Ms Leathem: I would say he would have made many decisions. I would have to take on notice whether there was a specific decision of that nature.

Senator KIM CARR: Mr Carney also told the Community Affairs References Committee he handed down about six behind-closed-doors AAT decisions which found that the robo-debt scheme was illegal. In relation to those decisions Mr Carney said that Centrelink never appeals those decisions to second level, where the decision would become public. Are you familiar with any of those decisions?

Ms Leathem: We would certainly have a range of decisions in relation to debts. We don't record specifically what is referred to as robo-debt.

Senator KIM CARR: What would you call it?

Ms Leathem: We call them debts to the Commonwealth. So they're within our Centrelink caseload.

Senator KIM CARR: Within the technical definition I am using, he made a decision in regard to debts to the Commonwealth. Can you tell me categorically that the government is not aware that Mr Carney delivered a decision in which he declared Centrelink's debt scheme to be illegal?

Ms Leathem: The only thing I could confirm is whether or not the former member made a decision of the nature that is described.

Senator KIM CARR: What is the answer to the question?

Ms Leathem: We will take that on notice to determine when he made decisions and what the nature of those decisions were.

Senator KIM CARR: Can I have a copy of that decision?
Ms Leathem: Yes. If we can identify that, we can certainly provide that. I would say, though, it may have to be de-identified. It's probably not one that would be published, because of the— provisions.

Senator KIM CARR: I understand if you need to de-identify it, but I would like a copy of the decision. He's made a statement to the Community Affairs References Committee, and I'd like to see the decision, which I understand has not been published.

Ms Leathem: Yes.

Senator KIM CARR: Mr Porter was the Minister for Social Services at the time. I'm wondering if Mr Porter or his office ever contacted the then Attorney-General or the Attorney-General's Department about Mr Carney or any decision Mr Carney had made while a member of the AAT.

Mr Moraitis: I will have to take that on notice—

Senator KIM CARR: Thank you. Does the Attorney-General or the department have records of those decisions of Mr Carney? Do you have any of those?

Mr Moraitis: I'm not sure of that, but I'll take it on notice.

Mr Anderson: These are decisions made when Mr Carney was a member of the Social Security Appeals Tribunal before it actually was amalgamated with the AAT in 2015?

Senator KIM CARR: Yes.

Mr Anderson: That was actually in another portfolio.

Senator KIM CARR: So you don't have records of those?

Mr Anderson: We wouldn't generally—

Senator KIM CARR: Well, I'd like copies from the tribunal of any of those decisions that are available that are the subject of this controversy.

Minister Dutton said:

We have a problem with the AAT and there's no sense pretending otherwise.

Minister Dutton says that the appeals tribunal is failing to uphold community standards. Is this what you meant by building public trust and confidence?

Ms Leathem: What we meant is making sure that we can provide as much information to the public as possible about the decisions we make and the role that we perform. We do publish 100 per cent of matters that involve 501 cancellations, which are the ones that often attract media attention. That's one of the ways that we try and ensure that we're as transparent as possible.

Senator KIM CARR: Have there been occasions where decisions have had to be taken down as a result of being incorrect?

Ms Leathem: The only occasions we would take a decision down would be if we had identified that there had been some breach of confidentiality or potentially provisions in the legislation that prevented us from disclosing certain information. On all those occasions, we would seek to try and redact and republish that decision as soon as possible.

Senator KIM CARR: On notice, can you provide us with the indices that you use in regard to public trust and confidence, because you must measure those things?
Ms Leathem: We certainly do have what we call a user survey that we run periodically, and there is, if you like, a published satisfaction benchmark of 70 per cent that we look to meet or exceed. We received 73 per cent in the last user survey.

Senator KIM CARR: I've just been advised there are other questions. I will need to ask that you come back after the break.

CHAIR: We will suspend.

Proceedings suspended from 10:41 to 11:01

CHAIR: The Legal and Constitutional Affairs Legislation Committee will now resume its examination of the Administrative Appeals Tribunal. Senator Carr had one matter he wanted to clarify.

Senator KIM CARR: Madam Registrar, I want to be clear that I was looking for the full six decisions of Mr Carney. There were six decisions. I asked two sets of questions, and I wasn't sure, from your response to me, that you appreciated that I was looking for the six.

Ms Leathem: Thank you, Senator.

Senator HENDERSON: I wanted, by way of clarification, to pick up a few points in relation, first of all, to appointments on the AAT. I want to confirm, Mr Anderson, that it is the case that, under the previous Labor government, high-profile Labor figures were appointed to the AAT, such as Duncan Kerr, who is a former Labor member of parliament. He was appointed as president. Is that correct?

Mr Anderson: That's correct.

Senator KIM CARR: And reappointed by a Liberal government!

CHAIR: That's quite the point, I think.

Senator HENDERSON: Can I reiterate that and take the interjection to say that he was reappointed by our government. I assume that's because the government recognises the values and skills of people who work on both sides of politics.

Mr Anderson: There have been a number of people with an ALP background who've been appointed to the AAT. Former member of parliament Anna Burke is another, and also former member of parliament David Cox. It's always a question of: does the person meet the statutory criteria—

Senator KIM CARR: So we've got 333, and three are Labor.

Senator HENDERSON: Senator Carr, could you not interject while I'm asking my questions. So, Mr Anderson, you're making the point that, on both sides of politics, the government has been very robust in recognising the skills and values of people appointed to the AAT. Could I also clarify and confirm that they also include: Ms Moira Brophy, a former South Australian Labor Party senator appointed in January 2017; Mr John Black, a former Queensland Labor senator appointed in 2017; David Cox, as you mentioned, a former federal Labor MP appointed in February 2019; Anna Burke, a former Labor House of Representatives Speaker; and Mr Shane Lucas, appointed in 2017, a staffer who served under Premiers Bracks and Brumby and, I believe, also under the Andrews Labor government. Is that correct?
Mr Anderson: I can confirm the appointment of Linda Kirk, but the others we'll have to take on notice.

Senator HENDERSON: I think it's fair to say that Senator Carr has rather unwisely opened a can of worms in relation to people appointed to the AAT who have political affiliations. To keep this very even-handed—we've just talked about a number of Labor appointments made by our government—would you be able to provide a list of all people appointed to the AAT who are associated with the Labor Party so that we can get a proper perspective on what has occurred under both the previous government and our government.

Mr Anderson: As I think I indicated earlier, the department doesn't necessarily have details about whether someone has an affiliation to a political party, unless it's declared in a CV or we're otherwise aware of it.

Senator HENDERSON: Could you do your very best.

Mr Anderson: We'll take that on notice. I should try and caveat that—how far back do you want us to go? The AAT has been around for a long time.

Senator HENDERSON: I think we should maybe go back to 2007.

Senator PATRICK: What does 'associated' mean?

Senator Payne: I'm not chair, of course, Senator Patrick, but this is a long discussion which you haven't been present for. I think the officials understand the implication of the question.

Senator HENDERSON: Yes. Mr Anderson, I also want to clarify and confirm with you that any Commonwealth Attorney-General, whether Liberal or Labor, under whichever government, always endeavours to engage the various highest calibre staff to advise him or her. Is that the case?

Mr Anderson: We don't have visibility of the processes for appointment of staff to ministerial offices. It's not a matter that we could comment on.

Senator HENDERSON: You're not able to make any sort of assessment as to the Attorney-General’s motivations in engaging his or her staff?

Mr Anderson: I can speculate that any minister will want to attract and appoint the best possible staff, but—

CHAIR: Please don't.

Mr Moraitis: We're not going to speculate on that.

CHAIR: That's right.

Senator HENDERSON: Thank you, Mr Anderson. Madam Registrar, I also want to return to the issue of the role of registry staff. You made some comments in relation to the use of templates—that the use of templates is not unusual. I want to draw your attention to paragraph 1.11 in Mr Callinan's report, in which he said:

Members may and should discuss in a collegiate way the legislation and decisions relevant to their work. There is no need for, and it is not appropriate that Registry staff, whether by preparing "templates" for decisions, or giving "legal advice" to Members, participate in making or writing, or assisting in writing, decisions by Members. The role of the Registry is to support the Members by obtaining and providing to the Members, all necessary resources to enable them to decide cases.
Is it the case that the registry staff are involved in supporting members in that way?

**Ms Leathem:** They certainly support members by providing them with resources to assist the members in their statutory function.

**Senator HENDERSON:** In your view, does the use of the templates, and the way in which you use your templates—or precedents, as they are sometimes known in the legal game—constitute the giving of legal advice?

**Ms Leathem:** We believe that they do not constitute the giving of legal advice. They provided a framework to guide members in their decision-making.

**Senator HENDERSON:** Thank you very much. I have no further questions.

**Senator KIM CARR:** Given that line of questioning—

**CHAIR:** Senator Carr, you don't get an automatic opportunity. Senator Patrick has the call now.

**Senator KIM CARR:** Sure. I just indicate to you that I'll need to respond to that.

**Senator Payne:** Madam Chair, may I provide a response, please?

**CHAIR:** To what, Minister?

**Senator Payne:** To a question I took on notice prior to the morning break.

**CHAIR:** Yes, of course.

**Senator Payne:** This is in response to a question from Senator Carr relating to the Attorney-General's presence at a cabinet meeting. I am advised that the Attorney-General did not attend the cabinet meeting in question, when the relevant appointments to the AAT were presented to and approved by cabinet. The Attorney-General was on leave at this time.

**CHAIR:** Thank you. I appreciate the clarification.

**Senator KIM CARR:** Would you be able to tell us the date of that, please?

**Senator Payne:** I don't have it in front of me, but I'll come back to the committee.

**Senator PATRICK:** As a crossbencher, I don't have any dog in this fight, other than a concern about confidence in the AAT as a result of matters arising from articles in places like Crikey. I would just ask—and I don't know who at the table to ask, perhaps Mr Anderson—when did the Attorney receive the Callinan review?

**Mr Anderson:** I believe it was 19 December 2018.

**Senator PATRICK:** It's now been publicly released. Is the government intending to respond to that review?

**Mr Anderson:** The government is certainly considering in detail the recommendations and the best way to take the various recommendations forward.

**Senator PATRICK:** What process is involved in government deciding how to respond to that review? That's just a general question of process.

**Mr Anderson:** Because the AAT's jurisdiction covers a number of different portfolios, there's a discussion happening with a number of other portfolios as to possible reforms that could be made. But there are also some discussions involving the AAT and the federal courts in terms of observations from them about the case load and things like that. So the department
has been having a range of meetings with other agencies, including the AAT and the courts, over the course of this calendar year.

Senator PATRICK: Do you have an expectation as to when a government response might be forthcoming?

Mr Anderson: That's a matter for government.

Senator PATRICK: I understand it's a matter for government. Do you have any indication? Has the minister talked to you about what his aim is? It would be irresponsible to say, 'Let's just respond to this.' The minister would typically say: 'We need to respond to this. We should do this by a particular time.'

CHAIR: Senator Patrick, you're inviting speculation.

Senator PATRICK: No. I'm asking, as a question of fact: has that discussion occurred? Has the minister indicated to the Attorney-General's Department a target date for responding to the Callinan review?

Mr Anderson: We've had a number of discussions with the Attorney, indicating that he's certainly seized of the desirability of making some reforms with respect to the AAT. But we haven't got a target date as such, because these are complicated matters, and many of them go back to policy leaders in other portfolios.

Senator PATRICK: Ms Leathem, in respect of the AAT, what tasks have you been asked to undertake in respect of the Callinan review, and what time frames have you been given in respect of those tasks?

Ms Leathem: There are a number of recommendations which, as Mr Anderson has indicated, go outside of the scope of just the AAT. So, to the extent that we're involved, it's as part of a broader interdepartmental group. But there are some that are more specific to the AAT, and we are at the moment considering those, evaluating those, with a view to providing our input to government by the end of the year.

Senator PATRICK: The question went to what the tasks are.

Ms Leathem: We haven't been allocated any specific tasks, but there have been discussions with both the Attorney's office and the Attorney-General's Department about our intention to provide them with some information and analysis about a range of the recommendations.

Senator PATRICK: In responses to questions on notice, you provided me with details of lodgements, finalisations and decisions affirmed, varied or remitted. This is question No. 21 BE 19-20. I want to be clear in understanding this: when you say decisions 'affirmed or 'varied', they are decisions related to the AAT, not on appeal from the AAT?

Mr Matthies: That's correct. Those figures relate to the finalisation of applications at the AAT.

Senator PATRICK: Do you keep a record of decisions that are then appealed to the Federal Court?

Mr Matthies: We do keep information about that.
Senator PATRICK: Could you provide me with some details, perhaps in the same format, of decisions that were then appealed to the Federal Court, and whether they were affirmed or set aside?

Mr Matthies: That's in relation to this particular subclass of visa?

Senator PATRICK: Yes.

Mr Matthies: I'll check whether we keep it down to that level of granularity. If we do, we can certainly provide that on notice.

Senator PATRICK: To save the committee's time, could the AAT provide—this might involve a bit of work, but I presume you track these things anyway—the number of cases that each member has finalised over the last two years, and could you describe what division they're in.

Ms Leathem: The difficulty with that is that we have a mix of full-time, part-time and sessional, so some members may have only have worked very infrequently.

Senator PATRICK: Let's stick with full-time to make sure we compare apples with apples. I understand there are different complexities with different matters, and I will be mindful of that when I review the answers. But, of course, I note that that's an approach that has been taken by the Attorney-General's Department in relation to the family courts.

Ms Leathem: That was finalised matters?

Senator PATRICK: Yes. And could you indicate the division in some sense? That also would possibly give some indication as to the complexity of matters.

Ms Leathem: Yes.

Senator PATRICK: So, only full-time and indicate whether they are a senior member or a judicial member—just some details that would help analyse, in some sense, performance or KPIs.

Ms Leathem: We'll take that on notice.

CHAIR: Thank you, Senator Patrick. That is all—

Senator KIM CARR: No, that's not quite right.

CHAIR: I beg your pardon?

Senator KIM CARR: That's not all.

CHAIR: What is your estimate of what you further require?

Senator KIM CARR: Since the government sought to ask—

CHAIR: No, you've had your opportunity, Senator Carr. You asked all the questions you wished to. Other senators are entitled to ask matters in response—

Senator KIM CARR: They are entitled to, Chair.

CHAIR: so I'm asking you: what is your further requirement? How much time do you need?

Senator KIM CARR: It depends on the answers. I don't expect I'll need very long at all, because—

CHAIR: Is that five minutes or two?
Senator KIM CARR: I don't know. It will depend on the answers that I get. And you'll know that, under the standing orders, I can ask questions as we see fit.

CHAIR: Provided we don't extend into repetition. You have the call.

Senator KIM CARR: This is not repetition. This is—

CHAIR: You have the call, Senator Carr. Get on with it.

Senator KIM CARR: Ms Leathem, you made some comments before about the nature of the advice that members get. I just want to be clear about the process by which legally qualified staff members provide advice on these templates that have been mentioned. Can you confirm that there have been occasions when there have been poorly drafted decisions which are then provided to the legal team at the AAT for review?

Ms Leathem: What I can comment on is the process whereby we have an optional internal service. There are legally qualified staff there, and the members can seek advice about the correct law, including procedural requirements and whether those have been applied. I must emphasise that staff don't provide advice or comment on the merits, facts or outcomes of the case, and it's a matter for the member whether they accept the advice on the legislation or the procedural requirements.

Senator KIM CARR: You have said this—and the chair has indicated that she doesn't like repetition—

CHAIR: I don't!

Senator KIM CARR: You've said this several times. Have there been occasions on which the legal team has sought to review a decision by a member and suggested amendments to the decisions to ensure that those decisions will stand up to appeal?

Ms Leathem: I have no specific knowledge of that happening, but I would say it's not uncommon for a member of the legal team to return a decision to a member with the suggestion that they may have missed some part of the legislation or one of the criteria, and it's a matter for the member then to determine whether they wish to make any changes.

Senator KIM CARR: I'm advised the legal team will often go so far as to propose particular drafting. Can you comment on that?

CHAIR: Do you have a source, Senator Carr? Is it from a press article?

Senator KIM CARR: I have a source, and that's a matter for me to reveal. I'm putting it to you that there are members of the legal team that will often go as far as proposing particular drafting.

Ms Leathem: I'd be concerned by that, and that is not the terms upon which my understanding—

Senator KIM CARR: That's not my question. Are you aware of that?

Ms Leathem: I am not aware of that.

Senator KIM CARR: Are any other members of the tribunal here today aware of that practice being currently underway?

Mr Matthies: No, Senator, I'm not aware of it.

Senator KIM CARR: No-one is aware of it? Never heard of it before? This is a revelation to you?
CHAIR: They've given their answer, Senator Carr.

Senator KIM CARR: When Mr Callinan referred to this matter, was he referring to this practice?

Ms Leathem: I don't know what the reviewer was referring to. I can only read what's in the report.

Senator KIM CARR: Is it, in fact, common practice that unqualified members are producing very poorly drafted decisions which are not able to stand up, in the view of the legal team, to a possible challenge and had to be fixed by staff members who are legally trained?

CHAIR: That's been asked and answered. You've asked it. It's been answered. Move on.

Senator KIM CARR: Could you take that on notice and ask the legal team within the AAT whether or not that event has occurred.

Ms Leathem: Just to be clear, Senator, what are you asking me to ask them?

Senator KIM CARR: I'm asking you to take on notice whether or not unqualified members have produced poorly drafted decisions and provided them to the legal team, which has suggested amendments and gone as far as proposing redrafting so the decisions would be able to withstand challenge.

Senator HENDERSON: Can I just ask you to clarify what 'unqualified members' means.

Senator KIM CARR: Unqualified legally.

Senator HENDERSON: So the question that you're asking is in relation to members who have no legal qualifications? That's a very different question to saying that people are unqualified members.

Senator KIM CARR: We've already been through this all morning, Senator, if you'd been listening.

CHAIR: Senator Carr and Senator Henderson, the question is clear in the context of the discussions that have been had this morning. He's referring to people who are not legally qualified. The question has been asked and answered. I'm giving you an awful lot of indulgence. You've put it on notice.

Senator KIM CARR: Yes, thank you, and the officers have taken it on notice. Hansard will not respond to a nod.

Ms Leathem: Thank you. In regard to the appointments—

CHAIR: Senator Carr, this is not an infinite exercise. I hope you're not going to be repetitive.

Senator KIM CARR: No, it's not. It's a very straightforward question. Former Senator Kirk was appointed by a Labor government, and Duncan Kerr—

Dr Smerdel: Not a former senator.

Senator KIM CARR: No, Duncan Kerr, a justice. They were the two. The rest have all been appointed by Liberal governments. That's correct, isn't it—the others that have been named today that are Labor Party associates?

CHAIR: It's already been taken on notice.
Senator KIM CARR: That's the case, is it not?

CHAIR: It's been taken on notice. It's been asked and answered, in the sense that it has been taken on notice.

Senator KIM CARR: Then take this on notice: isn't it the case that 70 per cent of the 330 members of the tribunal have been turned over by this government?

CHAIR: I expect that's a factor of the normal tenure process, in any event.

Senator KIM CARR: Seventy per cent have been appointed by the Liberal government since the election in 2013—is that the case?

Mr Anderson: 2015 saw the amalgamation of a number of other merits review tribunals with the AAT, so the total number of members expanded very dramatically in 2015. So it would not be possible to do a meaningful comparison before 2015.

Senator KIM CARR: I see. All right. The Minister for Home Affairs has said, 'We have a problem with the AAT,' and he's said that they don't meet community standards. The secretary of the department has said he's had no complaints about the members of the tribunal. Are you able to advise the committee: has the Attorney-General's Department had any complaints put to it from Mr Dutton as to the operations of the AAT?

Mr Anderson: I'm not aware of any complaints made by Minister Dutton to the department.

Senator KIM CARR: I'm just wondering if you've had any discussions with the home affairs department as to how community standards are measured.

Mr Anderson: I don't believe we've had any discussions with the department about how community standards are measured. We certainly have discussions with the Department of Home Affairs about the migration caseload and about policy settings related to migration.

Senator KIM CARR: I see. Ms Leathem, have you had any conversations with the Department of Home Affairs as to how community standards are measured?

Ms Leathem: No, we have not.

Senator KIM CARR: Have you had any complaint directly to you from the Minister for Home Affairs about the performance of members of the AAT?

Ms Leathem: No, we have not.

Senator KIM CARR: Thank you very much.

CHAIR: Senator Siewert has the call, after which—she's given me an undertaking that it will take two minutes—we will move on.

Senator SIEWERT: Can I clarify your policy for publishing decisions. I've had a look at the decision from 2 July that's on the website. Are you able to publish Social Services decisions other than child support decisions? If so, how do you do it? How do you make the decision?

Mr Matthies: At the moment we don't publish any Centrelink or paid parental leave decisions in the first review, and that's a function of the way in which the legislation operates. The Social Services and Child Support Division generally operates in private. There is a specific exception in the child support legislation for us to publish de-identified child support
decisions, but a similar provision is not contained in the social services legislation relating to Centrelink and paid parental leave—

**Senator SIEWERT:** So you can't publish any of the decisions on debt, for example, under the rules?

**Mr Matthies:** That's our current understanding.

**Senator SIEWERT:** If the legislation is silent though, does that mean you can't?

**Mr Matthies:** All the sets of the child support and the social services legislation have very tight secrecy and confidentiality provisions. The child support legislation provides for a specific exception to those very tight standards in order to publish decisions, but that doesn't exist currently in the social services legislation.

**Senator SIEWERT:** What about second reviews?

**Mr Matthies:** The second review operates differently because that operates in public. It follows from that that, in general, decisions are made public unless there is a specific confidentiality order made to either de-identify or not publish at all.

**Senator SIEWERT:** Thank you.

**CHAIR:** Thank you, Senator Siewert, for your efficiency.

**Senator KIM CARR:** Chair, you indicated that you wanted to see some articles. I would like to table those articles from Crikey.

**CHAIR:** Thank you, Senator Carr. That's consistent with the practice that we had yesterday of tabling the articles we refer to. Officers of the Administrative Appeals Tribunal are excused. I now call officers from the Australian Law Reform Commission.

It being almost 11.30 am, I take this opportunity to put on the record that at 11.30 am there will be a commemoration of the one-year anniversary of the national apology to victims and survivors of institutional child sexual abuse. I know that many members of the committee would have liked to have been part of that. It's not something that we're able to participate in, because we're here; nevertheless, we acknowledge the significance of that moment.

**Senator Payne:** Madam Chair, I indicate that that does not go just for members of the committee. It goes for both the minister and I'm sure the officials who are part of this morning's proceedings.

**CHAIR:** Quite right. Thank you.

**Australian Law Reform Commission**

[11:27]

**CHAIR:** I welcome officers from the Australian Law Reform Commission. Thank you for being with us here today. Justice Derrington, would you like to make an opening statement before we go to questions?

**Justice Derrington:** I would, thank you, Madam Chair and Members of the Committee. I make this opening statement in the context of completing my first full financial year as President of the Australian Law Reform Commission. I thought I would take this opportunity to update you on the agency as a whole. I've been very grateful to have the continuing support of the Honourable Justice John Middleton as a standing part-time commissioner and I have
welcomed the appointment of the Honourable Justice Bromwich as a part-time commissioner for the duration of the review of corporate criminal responsibility.

Many of you will be aware that the agency moved to Brisbane in October 2018 as part of the government's regionalisation agenda. The office, including the Michael Kirby Library, is now established on level 4 of the Commonwealth Law Courts building on North Quay. The savings in rent that have been achieved by moving from the Sydney CBD to the Brisbane CBD, coupled with the outsourcing of corporate services to the Attorney-General's Department, have enabled the ALRC to employ a full complement of eight highly skilled lawyers, as opposed to our previous three, many of whom have postgraduate qualifications from the world's leading law schools, including Oxford and NYU. The ALRC is a highly sought-after employer by applicants from around the nation.

We've also enhanced our internal probity measures by appointing an independent and external-to-government chair of our audit committee, consistent with the Department of Finance's guidance as to best practice. The ALRC have also entered into memorandums of understanding with three universities—Monash, Sydney and Queensland—through which we are able to support internships for students from those universities who engage in their home city in research relevant to the current work of the ALRC, jointly supervised by ALRC staff and university academics.

In the last financial year the ALRC has produced report No. 134, Integrity, fairness and efficiency—an inquiry into class action proceedings and third-party litigation funders; discussion paper No. 86, Review of the family law system; and report No. 135, Family law for the future—an inquiry into the family law system.

We have also been working on the two references received in April: the review of religious exemptions in anti-discrimination law; and the review of corporate criminal responsibility. We have already conducted 57 consultations in relation to the issues raised by the latter inquiry, and the discussion paper will be released on 15 of November this year.

The ALRC is actively engaged with stakeholders of the current inquiries and remains actively engaged with speaking engagements, media requests, workshops and academic publications relating to our previous enquiries. Our engagement has also been enhanced by the launch of our new website earlier in the year.

In addition to the matters referred to it by the Attorney-General, the ALRC has been involved in a nationwide consultation to discern areas of law that are generally considered ripe for reform. This project, the future of law reform, received almost 400 responses to an online survey; involved academics, and industry and consultative workshops, in Perth, Melbourne, Sydney, Canberra and Brisbane on a range of topics; and will culminate with the launch of the report in a suggested three-to-five-year program of law reform by the Hon. Michael Kirby in Brisbane on 2 December of this year.

We have also forged strong links with other law reform agencies both within Australia and internationally. In July 2020, we will be hosting the Australasian Law Reform Agencies Conference in Brisbane. This conference aims primarily to bring together law reform agencies from the Asia-Pacific region. The substantive theme of the conference will be approaches to law reform in family law, and we hope to welcome in particular those agencies that have been
working concurrently with us on family law reform, particularly New Zealand, Ontario, Scotland and Singapore.

In summary, the ALRC remains committed to research of the highest quality, broad and transparent consultation processes and the formulation of evidence based recommendations in response to the terms of reference for each enquiry referred to it by the Attorney-General. Thank you.

**CHAIR:** Thank you very much.

**Senator KIM CARR:** Madam President, could you table a copy of your statement, please.

**Justice Derrington:** Certainly.

**Senator KIM CARR:** Could you update us on the progress of your review into the framework of religious exemptions in the anti-discrimination legislation.

**Justice Derrington:** At the moment, that review is paused because of the work that the government is undertaking in relation to its own anti-discrimination bill specifically in relation to religion. We were issued with fresh terms of reference on 29 August. Through those terms of reference, we will await the consultation process that has been underway in response to the government's bill so that we are not consulting the same people twice on the same issues. Our report on that enquiry is now not due until the end of December next year.

**Senator KIM CARR:** So had you made any progress before the pausing of your work?

**Justice Derrington:** We had made some progress, yes. We had conducted a number of consultations and we were anticipating being in a position to issue a discussion paper in early September, but we did not do so.

**Senator KIM CARR:** You've been asked under the new terms of reference to confine any amendment recommendations to legislation other than the Religious Discrimination Bill. Can you explain how that change will impact on your work.

**Justice Derrington:** It's really just a narrowing of what we had originally intended to do because much of the policy discussion about how rights would be balanced will be dealt with now, as I understand it, in the government's bill. So what we've been asked to do is restrict ourselves to a drafting exercise which would ensure that the Sex Discrimination Act and the Fair Work Act were consistent with the government's bill.

**Senator KIM CARR:** So it's a bit more than just a narrowing, surely; it's a very significant reduction in your role.

**Justice Derrington:** We had originally thought that our first set of terms of reference were quite narrow in any event. It was a technical exercise to work out how the antidiscrimination provisions could be made compatible with faith based institutions' right to conduct their affairs in accordance with their ethos. So the terms of reference, as originally drafted, were quite narrow in any event.

**Senator KIM CARR:** They're even narrower again.

**Justice Derrington:** But they're narrower again, yes.

**Senator KIM CARR:** How is it possible to separate the two inquiries?
Justice Derrington: To be quite frank, I don't think there will be much for us to enquire into post the government's bill.

Senator KIM CARR: So you are really cut out of the action.

Justice Derrington: That's one interpretation.

Senator KIM CARR: That would be a fair interpretation, wouldn't it?

Senator Payne: You can make that assessment.

Senator KIM CARR: That is a reasonable interpretation. There is not much left, as you say.

Justice Derrington: Yes, for the time being. It will depend very much on what form the government's bill finally takes.

Senator KIM CARR: That's unknown, isn't it?

Justice Derrington: It is.

Senator KIM CARR: So how can you say there won't be much work for you to do?

Justice Derrington: I'm making an assumption.

Senator KIM CARR: I see. On 29 August, the Attorney-General pushed out your reporting date some eight months to 12 December 2020. Did you ask for that extension?

Justice Derrington: We did ask for our terms of reference to be reviewed because we were very concerned that the public consultation process would be entirely overlapping. So we approached the Attorney when we became aware that he was about to table his bill and suggested that a fresh look at the terms of reference would be appropriate to avoid duplication of work and wasted resources.

Senator KIM CARR: That's why it is such a significant extension of time, is it?

Justice Derrington: The matter of the extension was a matter for the Attorney.

Senator KIM CARR: You didn't ask for that length of time?

Justice Derrington: We didn't ask for any particular length of time.

Senator KIM CARR: Minister, I've got some questions that go to the government's position, if I could seek advice from you.

Senator Payne: I will help if I can.

Senator KIM CARR: The Prime Minister committed in last October to amend the SDA to prevent schools from discriminating against students on the basis of sexual orientation, gender identity and intersex status. Wasn't that legislation supposed to have been introduced last year?

Senator Payne: I don't have the timing on that legislation with me, but I'm very happy to follow that up with the Attorney.

Senator KIM CARR: Is anyone else able to help me as to what's happened to the timing on this particular legislation?

Ms Chidgey: That has been overtaken by the ALRC inquiry, which will now look at those issues with the exemptions in the Sex Discrimination Act. That would then be considered in any government legislation.

Senator Payne: And of course we had the release of the draft bill in August.
Senator KIM CARR: It doesn't strike me that there is much work being actually done here. I'm just trying to get it clear. What is the process? When will we actually see a bill?

Ms Chidgey: The expectation at this point would be that the government would want to consider the work of the ALRC, which would particularly look at those exemptions in the Sex Discrimination Act.

Senator KIM CARR: That's the reason why it hasn't been introduced—is that the case?

Ms Chidgey: Yes.

Senator KIM CARR: Is it possible that referring it to the ALRC, in fact, this becomes a mechanism by which the whole matter can be delayed?

Senator Payne: I might be wrong on this but, as I recall, the former Leader of the Opposition was offered the opportunity to participate in a conscience vote on these matters last year and it was decided, I presume by the Labor Party, not to take that up. We had legislation drafted. It was ready to be advanced. Matters have moved on since then, as both the president and Ms Chidgey have outlined, and you'd be well aware of the work that's also being done in relation to the religious discrimination bill more broadly.

Senator KIM CARR: The ALRC is due to report at the end of next year—is that right?

Ms Chidgey: That's correct—2020.

Senator KIM CARR: In the normal process, the government sits on these sorts of reports. Is it likely that we'll see the report much before 2021? Minister, is that the case?

Senator Payne: It's due for release by 12 December 2020, as I understand and as the president said.

Senator KIM CARR: Can you repeat that date.


Senator KIM CARR: That's after the parliament's got up.

Senator Payne: You may have sight of the 2020 sitting schedule, Senator Carr. I don't, and I'm sure the Attorney would be thrilled to know that you do. But I would also add that one of the benefits of the change in the terms of reference and the timing for the ALRC review is to avoid double-handling the issues that are addressed under the Religious Discrimination Bill, being able to take into account the matters that are addressed by the bill and also, of course, having the benefit of the public debate and the public consultation on that bill, which is, of course, extensive.

Senator KIM CARR: Minister, when was the last time the parliament was sitting here on 12 December?

Senator Payne: Senator, you and I could compare notes over more than two decades on that matter, but I'm not sure it would be very edifying.

Senator KIM CARR: No, but we have a fair indication of the sitting patterns of the Australian parliament.

Senator Payne: I don't know. I haven't seen the sitting schedule.

Senator KIM CARR: The reason I raise this—and I'm not trying to be a smart alec here—is that it is the common practice for the parliament to get up in the first week of December. The ALRC report is not due until 12 December. That is the second week of
December. It is common practice for governments, or this government, to sit on a report for up to 15 days. It is more than likely, I put to you, that this report will not be seen until 2021.

Senator Payne: That may be the case, but it is equally likely, if we're going to engage in hypotheticals of that nature, that the reporting date doesn't preclude the ALRC from reporting earlier if the work is finished earlier.

Senator KIM CARR: I see. And you can give a commitment that the report will be released?

Senator Payne: I will take that on notice and refer that to the Attorney-General, of course, but, if the ALRC finish their work earlier, I'm sure they'll advise the Attorney-General of that.

Senator KIM CARR: I see. Will you be able to produce the report prior to that date?

Justice Derrington: I can't answer that question, because I can't resume my work on it until I know what the state of the government's bill is.

Senator KIM CARR: But, given you've said it's so narrow and given what the minister's just said, surely we could expect a report before then—or is it the case that there's been a political decision made not to have this matter put before the Australian people until 2021?

CHAIR: That sounds awfully speculative to me. Perhaps you could move on, Senator Carr.

Senator KIM CARR: Minister, with a report date of 12 December, this is set up to be delayed until 2021. In fact, I read in the paper this morning that speculation of an early election is already mounting. Is it the intention of the government to use this as yet another issue for a future election?

Senator Payne: Senator, I think that is entirely speculative on your part. Obviously that's your right, but the government has a number of actions in process. The ALRC report is one. The Religious Discrimination Bill is another. As I recall, the Attorney-General has publicly said in relation to the Religious Discrimination Bill that it will be introduced this year, but obviously its passage through parliament is subject to Senate inquiries, as you and I are both very familiar with, and similar matters.

CHAIR: Indeed, it will come to this committee, I expect.

Senator Payne: I expect that it will.

Senator KIM CARR: I'm looking forward to that. So the Religious Discrimination Bill has actually been tabled, has it?

Senator Payne: It's a draft which has been released, as I understand it—an exposure draft.

Senator KIM CARR: Is it in a form that—

CHAIR: An exposure draft for consultation has been released.

Senator KIM CARR: Yes. That's it, though, isn't it?

CHAIR: That's the stage which it is at.

Senator Payne: And I just indicated that it is the Attorney's intention, which he has publicly indicated, that it would be introduced this year. Its passage through the parliament will depend on the normal processes of Senate inquiry and similar activities.
Senator KIM CARR: It won't be this year, though, will it? It won't be referred to this committee this year, will it?

Senator Payne: I don't think you could assume that.

Senator KIM CARR: No, I certainly couldn't. Given the workload, I wouldn't have thought it will be.

Senator Payne: It's speculative.

Senator KIM CARR: Yes, indeed.

Senator Payne: It can still be referred. Whether it is dealt with this year, I think, is a different question.

Senator KIM CARR: In September 2017, former Attorney Brandis commissioned the ALRC to undertake a comprehensive review of the family law system. Where are we at with that review?

Justice Derrington: That review was completed in March of this year and was tabled in April of this year.

Senator KIM CARR: Roughly, what was involved in the work and consultations that you undertook and the resources applied? What proposals did you actually come forward with involving that comprehensive review of the family law system?

Justice Derrington: We made 60 recommendations for reform. Having consulted with a very wide range of stakeholders, we received over 800 confidential stories through a 'tell us your story' portal on the ALRC website. We received an additional 331 confidential submissions, largely from people with personal experience of the family law system, and we received over 400 public submissions, largely from agencies and institutions involved in the family law system. I can give you a summary of the recommendations.

Senator KIM CARR: Yes, please.

Justice Derrington: I can break them into categories. The first recommendation was around the theme of closing the jurisdictional gap. That was a recommendation which was premised on the proposition that children are currently disadvantaged by the gap that is created between federal family law courts, state and territory child protection systems and state and territory responses to family violence.

The second group of recommendations was around children's orders and simplifying the factors to be considered when determining living arrangements that promote a child's best interests. We made a set of recommendations around stricter case management, largely designed to ensure that, if couples and their advisers don't seek to resolve disputes as quickly, inexpensively and efficiently as possible and with the least acrimony, they will be visited with costs orders.

We made a group of recommendations around encouraging amicable dispute resolution and strengthening mediation and arbitration options. We made a set of recommendations around simpler property division, including a starting proposition that separated couples made equal contributions during the relationship, whether they be financial or nonfinancial. We made recommendations around better compliance with children's orders. To improve the understanding of orders we recommended that family consultants sit down with families after orders and explain them to them and the consequences of noncompliance. Finally we made a
set of recommendations around simplifying the legislation so that those people who are compelled to use the family law system at least have a sporting chance of understanding the legislation.

**CHAIR:** Senator Carr, I've let you go a little over time. Do you have much more in this block?

**Senator KIM CARR:** I don't have much more. This will finish off my matters for this agency. Given you have 60 recommendations, 800 individual stories and 400 submissions, I'm just wondering whether your recommendations were consistent with the proposed structural reforms introduced by the Attorney-General in 2018. As I understand it, they were based on a six-week desktop modelling study conducted by two consultants. Were they consistent?

**Justice Derrington:** Not entirely, because the structural reform of the existing federal Family Court arrangements was outside the scope of our terms of reference and so we didn't deal with that precise issue that was being considered by the Attorney's proposal.

**Senator KIM CARR:** So if that proposal by the Attorney-General as suggested in 2018 were to be pursued, the Family Court division would effectively wither, would it not, over time?

**Justice Derrington:** I'm not sure I understand you.

**Senator KIM CARR:** As a superior court, what would happen to the Federal Court division? Would that take over the work of the Family Court if those reforms were pursued?

**Justice Derrington:** I think perhaps it might be better if Mr Anderson answered that question as to what precisely that reform is directed at, because I haven't looked at the most recent version of the proposed bill.

**Mr Anderson:** If the question was, will a part of a court wither—

**Senator KIM CARR:** Yes. Will the Family Court effectively wither under those proposals as put forward by the Attorney in 2018?

**Mr Anderson:** That's not correct. No courts will be abolished as the result of the court reform proposal, if that is passed by parliament. The Family Court will continue on as Division 1 of the proposed Federal Court and Family Court. The Attorney has said that he would be happy to agree to a minimum number of judges in Division 1 as well. There is no suggestion that—

**Senator KIM CARR:** Specialist judges, Family Court judges, would it be?

**Mr Anderson:** It's worth noting that I think 89 per cent of family law cases are heard by the Federal Circuit Court. There is considerable specialisation in that court as well. The judges who are the family law jurisdiction of the Federal Circuit Court will constitute Division 2 of the proposed Federal Circuit and Family Court. There will continue to be a great deal of expertise and specialist skills with respect to family law in the proposed court if the proposed legislation is passed by parliament.

**CHAIR:** And indeed there is a requirement of the act, isn't there, that those that serve in the Family Court are specialists in family law.

**Mr Anderson:** That's correct.
Senator KIM CARR: So when will the government be responding to the ALRC's review into the family law system, delivered seven months ago now?

Mr Anderson: Firstly I note there is no statutory requirement to publicly respond to an ALRC report. Secondly, I note the scope of the ALRC's report. In the 60 recommendations there are some very weighty matters covered, so you will not be surprised to know that there is continuing consideration within and also consultation outside government on how best to progress some of those reforms.

In the meantime, the government is carrying on a wide range of reforms in the family law space, so it's certainly not the case nothing is happening. One example is the proposed court reform. Another example is the small claims property pilot that was announced in the women's economic security package on 20 November 2018, which is establishing a small claims property pilot. That was actually commended by the ALRC in their report.

Another example is that there is work under way in relation to information-sharing between the family violence and child protection sectors. There is a working group that sits underneath the Council of Attorneys-General that's working on seeking to improve sharing of information between those three sectors. There is funding of approximately $11 million, of which the majority goes to funding the colocation of state and territory officials in the Family Court registry so there can be better information-sharing. There's also some small funding for starting to investigate a technological solution.

Then there are the property mediation and family relationships centres, a pilot that is being done with $13 million for the year ongoing. That was also announced in the women's economic security package. There is a two-year trial of lawyer assisted mediation in family law property matters by the Legal Aid Commission. That was also announced in the women's economic security package on 20 November. There's work being done to improve the visibility of superannuation assets in family law proceedings. That was also announced in the women's economic security package. There is additional funding that was committed in 2018 for the family advocacy and support services.

Senator KIM CARR: That's terrific, but you haven't answered my question. Why has the government not responded to the comprehensive review, with 60 recommendations, 800 separate stories and 400 submissions? Why has the government not responded?

Senator Payne: I think you've just answered your own question, Senator. I would imagine that your preference would be that a body of 60 recommendations, which are very focused on the procedural and the substantive family law that affects separating families and how they interact with dispute resolution services and the family courts, is responded to in a very considered and constructive way. I know from my discussions with the Attorney that that work is well underway. It's not something that I would expect to see, nor wish to see, rushed.

CHAIR: Senator Carr, you've been going for twice the usual block.

Senator KIM CARR: I know. I've only got one more. Minister, if that's the case, why did you then agree to establish yet another inquiry in the family law system through another parliamentary process?

Senator Payne: If you look at the terms of reference of that particular inquiry, it covers a very broad range of issues. It covers the interaction between the family law system and the domestic violence; the child protection and child support systems; the financial costs of
family law disputes; the health, safety and wellbeing impacts of family law proceedings; the regulation of family law system professionals and a range of other matters. It's very, very wide. I think the parliament has every right, if it wishes to pursue an inquiry of that nature, to do so.

Senator KIM CARR: When can we—

CHAIR: Senator Carr, that was your last question.

Senator KIM CARR: When can we expect a response?

CHAIR: Senator Carr, could you have some discipline please?

Senator Payne: I will happily, of course, take that matter on notice and refer it to the Attorney and come back to the committee.

CHAIR: Senator Carr, I expect you to abide by the directions of the chair, not to do as you wish with impunity. It is disrespectful and not conducive to this committee being effective.

Senator McKIM: Good morning, everyone. I've just got a few questions on the same issue. I'd just like to start with the department first. Perhaps, Mr Anderson, this is in your area. Has the department provided advice to government on the recommendations of the ALRC's inquiry into the family law system?

Mr Anderson: We have certainly provided some advice to government. That's an ongoing process.

Senator McKIM: Did you say that it's on an ongoing basis?

Mr Anderson: Yes. We've provided more than one piece of advice, and there will be more to be provided.

Senator McKIM: There is still more to be provided?

Mr Anderson: That's correct.

Senator McKIM: And do you have the dates on which you provided that advice? I'm happy for you to take that on notice.

Mr Anderson: We'd have to take that on notice.

Senator McKIM: That matter, the government's response to the recommendations of the ALRC's inquiry into the family law system, is now before cabinet, is it not?

Senator Payne: No. It's with the Attorney-General.

Senator McKIM: So it's not in the cabinet process?

Senator Payne: It's with the Attorney-General.

Senator McKIM: So it's not in the cabinet process?

Senator Payne: It's in the cabinet process to the extent that it is before a cabinet minister, but it's with the Attorney-General. As I said in response to Senator Carr, the Attorney is dealing with the over 60 recommendations of the ALRC inquiry, and I'm sure he'll bring that forward in due course.

Senator McKIM: To cabinet?

Senator Payne: I believe so, but I stand to be corrected, and I'm happy to take that on notice.
**Senator McKIM:** Sure. But everything before a cabinet minister is not before cabinet.

**Senator Payne:** No. That's absolutely correct, but I will take that on notice.

**Senator McKIM:** Mr Anderson, when you say there'll be more advice to come on that in the future, is that because—I'm not meaning to be critical—the previous advice that you gave to the minister on this matter was partial advice in response to the ALRC's recommendations?

**Mr Anderson:** I wouldn't use that description. It's just because of the depth some of the recommendations. We've been having an ongoing discussion, effectively, with the Attorney-General as to what some of the recommendations might mean and different ways that some of the things could be implemented or changed. I see it as being an iterative process in that sense.

**Senator McKIM:** Do you have any idea, through your discussions with the Attorney or his office, as to a time frame that we could expect a response from government?

**Mr Anderson:** I couldn't be specific. The Attorney has certainly been very engaged on it. Then again, these are not simple matters. He has made it very clear, both to us and publicly, that there is a range of other reforms that will keep going in the meantime as well. I was giving Senator Carr a list of different pilots that we're currently funding. The evaluation of those pilots with the Family Advocacy and Support Service and the Domestic Violence Unit and things like that are happening outside the courts actually feeds back into what is the best way to structure the family law system, because most of the activity in the family law system happens outside the courts, so it is very important to pay a lot of attention to those measures outside the courts.

**Senator McKIM:** Has the Attorney or his office indicated to the department that any advice may need to change as a result of the Senate inquiry that's recently been established?

**Senator Payne:** It's a joint select inquiry.

**Senator McKIM:** Thanks, Minister.

**Mr Anderson:** Is it any advice that may need to change?

**Senator McKIM:** I'll ask it in another way. It's true, isn't it, that the joint house inquiry has terms of reference that overlap, to a degree, with the terms of reference of the ALRC inquiry?

**Mr Anderson:** Yes, there are some areas where there is overlap, but there are also other areas where there's no overlap.

**Senator McKIM:** What I'm trying to understand—and if it's not appropriate to ask you this I'll refer it to the minister—is whether the process that's an iterative process between the department and the Attorney-General has changed at all, or is foreseen to possibly change in the future, as a result of the inquiry that's been established by parliament.

**Mr Anderson:** There's been no change to the process we're pursuing. We're continuing to pursue that with full alacrity, and the Attorney is very engaged on that process of discussing both the ALRC and other possible recommendations for performance.

**Senator McKIM:** Minister, that being the case, why did the government support the establishment of the parliamentary inquiry?
**Senator Payne:** I think I responded to Senator Carr on that. But this parliamentary inquiry has a very broad set of terms of reference, some of which I outlined in my discussion with Senator Carr. The ALRC's final report was substantially focused—primarily focused, indeed—on the procedural and substantive law in this area. This inquiry and its terms of reference include issues that haven't necessarily been fully explored previously. They also allow consideration of other related matters, which is a broader term of reference as well, as you'd appreciate.

I think the opportunity for stakeholders, for individuals—for, frankly, people all around the country—who are impacted by the operation of the family law system, engaged in the operation of the family law system, in so many ways, which we know is immensely difficult for very many families, have the opportunity to participate through their elected representatives in the Senate and in the House to make a contribution to that inquiry in a way that is perhaps not always the case.

**Senator McKIM:** Thanks, Minister. But we've heard from Justice Derrington that the ALRC had a portal that many hundreds of people—

**Senator Payne:** Which I think is very important.

**Senator McKIM:** I totally agree. But what you've just outlined is a replication of the process that was gone through by the ALRC. The question is, and I will ask it slightly differently from the way I asked it previously: why has the government supported those parts of the terms of reference of the parliamentary inquiry that are directly replicating the terms of reference of the ALRC inquiry?

**Senator Payne:** My view about parliamentary inquiries is one that I developed over many years here, and that is that the parliament is entitled to inquire into matters as representative of the people of Australia, across all of the states and territories and across all of the electorates of the Commonwealth, on a range of issues. This is an important inquiry and it has a varied membership, in terms of the committee. It is moving away from that focus on procedural and substantive law, which the ALRC had, and I went through the issues before: child protection, child-support systems, domestic violence and their interaction with the family law systems, the financial costs of family law disputes, the health and safety and wellbeing impacts of family law proceedings, and the regulation of the professionals in the family law system. Those sorts of things are matters into which the parliament is, in my view, entitled to inquire into.

**Senator McKIM:** Of course it's entitled to inquire into those things, but that wasn't my question. I'll repeat the question for clarity. My question relates to the overlap, which we have agreed exists, between the ALRC terms of reference and recommendations, on one hand, and that part or those parts of the terms of reference of the parliamentary inquiry. If you drew a Venn diagram of those two things, there would be some overlap. We can agree on that, can't we?

**Senator Payne:** I'm familiar with the concept.
Senator McKIM: So my question is: why has the government agreed to those parts of the terms of reference that, in a Venn diagram, would overlap between those parts of the terms of reference of the parliamentary inquiry and the ALRC?

Senator Payne: Actually, the parliament has agreed to the terms of reference—

Senator McKIM: I'm asking about the government's support.

Senator Payne: and it is an opportunity for the parliament and the members of the committee, and the constituents of members of parliament, to have input on those terms of reference—all of them—which they may not otherwise have had.

Senator McKIM: In relation to those parts of the terms of reference that overlap with the ALRC's inquiry, people have had the opportunity to participate through the ALRC, have they not?

Senator Payne: I understand, from the President's description of the inquiry, that there was some opportunity for that. But I think a joint select committee of the parliament, which also takes up this area of policy, presents a further opportunity.

Senator McKIM: It is the case, isn't it, that it is not the parliament's decision but the government's decision to support that inquiry in the parliament? The government did that as part of a political trade-off with One Nation?

Senator Payne: That's an assertion I reject.

Senator McKIM: I will try once more. Why did the government choose to support those parts of the terms of reference that have already been dealt with by the ALRC?

CHAIR: You've asked and been answered, Senator McKim.

Senator Payne: I'll give it another go, Chair. Around this country, in the offices of members of the House of Representatives and in the offices of senators of the states and territories, I can absolutely promise you that those issues continue to be advanced—

Senator McKIM: You don't have to; I get 'em as well.

Senator Payne: Of course you do. And so for the parliament to take the opportunity to examine these matters in the broad terms of reference that I have referred to a couple of times here this morning is in fact the role of the parliament, many would argue.

CHAIR: Thank you very much to the representatives of the Australian Law Reform Commission. We are grateful for your evidence day. There being no further questions, you are excused.

Commonwealth Director of Public Prosecutions

[12:08]

CHAIR: I welcome officers from the office of the Commonwealth Director of Public Prosecutions. Ms McNaughton, would you like to make an opening statement before we go to questions.

Ms McNaughton: Thank you, Chair; I will. The CDPP's annual report has recently been tabled. I'm very proud of the work of the office and of my staff. 2018-19 was a very busy year and, overall, a very gratifying one, as evidenced by our work set out in the annual report. The CDPP measures its performance in a number of ways. Our three key measures include, firstly, compliance with the prosecution policy of the Commonwealth. This measure sits at the
heart of what we do. It requires us to assess whether a prosecution will commence or continue. In order to proceed, there needs to be a reasonable prospect of conviction, and the prosecution must also be in the public interest. Partner agency satisfaction with CDPP services is another measure, and the third measure is prosecutions resulting in a conviction. I am very pleased to say that we are performing strongly against each of these measures.

For those senators who are new to the parliament or not familiar with the work of the CDPP, you'll see from the annual report that the CDPP's prosecution practice is quite different from state and territory prosecution agencies. It's also a highly complex and interesting practice for a number of reasons. We practice predominantly in the state and territory courts, as well as having a small but growing practice in the Federal Court. Last year, we received referrals from 62 different federal and state agencies. Of course, many of those cases are investigated not by police but, rather, by investigating officers working within the relevant agency.

The breadth of the work is significant and the subject matter is extremely interesting for our prosecutors to undertake—from terrorism to money laundering, from child exploitation to revenue fraud, from regulatory noncompliance to illicit drug importations, and from cartel conduct to breaches of directors duties. Over and above this, federal criminal law continues to change. The crimes we prosecute are not static. They change constantly, in line with new conduct being criminalised and the changing nature of law enforcement priorities. Some recent examples include our first prosecutions for frauds relating to the NDIS and family day care. Big data means that the volume of material seized by investigators and requiring analysis by prosecutors has increased significantly. We are also seeing increases in victim based crimes and the many challenges associated with this type of offence. And, of course, much of our work has an international aspect, often requiring evidence to be sought from overseas.

In relation to our transformation and innovation agenda I can say that, against this dynamic backdrop, which has a great many moving parts, you will see from the annual report that my office is engaged in a very significant digital transformation which underpins our ongoing efforts to modernise the way we undertake our work. When I joined the office as director more than three years ago, I was committed to ensuring that the CDPP became a digitally enabled workplace and that we modernised our businesses to meet the challenges of litigation in the 21st century.

The annual report sets out just how we are achieving this goal; but, as a snapshot, I would like to mention the key highlights for us in 2018-19. We've delivered a new business management system which is helping prosecutors undertake their work, enables us to more accurately allocate resources and identify emerging themes and trends, and provides improved reporting functionality. Our ICT systems have been upgraded, allowing our staff to work remotely and more flexibly—whether that be from court, home or elsewhere. We are seeing a steady increase in the number of e-briefs that agencies are submitting, and the submission of many of these e-briefs is happening through our e-briefs referrals gateway. Finally, we have brought a number of digital litigation specialists into the organisation. This team is leading our efforts to build digital capability across the CDPP, especially in relation to how we can best manage our large, complex and long-running cases. Thank you, Chair, for the opportunity to share with the committee those reflections on 2018-19.
CHAIR: Thank you very much. Can I start by asking a few questions about the processes that the CDPP engages in, because I'm not sure they are well understood. When a brief of evidence is referred to the Commonwealth DPP from a Commonwealth agency, what is the process of assessment that the CDPP goes through in determining whether to either lay charges or continue with charges that have been laid?

Ms McNaughton: When we receive a brief of evidence, we assess it in accordance with the Prosecution Policy of the Commonwealth, which is a publicly available document. We look at the evidence, we see the nature and quality of the evidence, and we work out, first of all, if there is a prima facie case. We then work out whether there is a reasonable prospect of conviction and then we work out whether in our assessment, which is a discretionary decision, it is in the public interest to prosecute.

CHAIR: Is that process engaged in in an apolitical, independent way?

Ms McNaughton: Yes, of course.

CHAIR: For some offences, in addition to the process you've just outlined, there is a requirement to get a ministerial consent. Can you explain what sort of offences those relate to and give some context for how that operates?

Ms McNaughton: There are two categories of consent that are required to be sought. By far the largest category are statutory requirements for consent in certain cases—for example, some foreign fighter offences and some prosecution of child exploitation offences where minors are alleged to have done the offending. They are that type of matter. Then there is another category of offences subject to a ministerial direction. That has been the subject of some discussion in recent weeks. And it's important to note that ministerial direction in relation to consent was first issued by Senator Brandis, as he then was, when he was the Attorney in 2014, and the current Attorney's ministerial direction basically keeps the same offences—the four offences that Senator Brandis's direction mentioned—and has added four further offences into that direction. That is essentially the effect of it.

CHAIR: So the source of the requirement to get consent can come from statute, or it can come from ministerial direction—effectively a policy of sorts.

Ms McNaughton: Yes.

CHAIR: Tell me this: does that consent process, whether statutory or based on a ministerial direction, allow a minister to commence a prosecution or direct that a prosecution occur if the CDPP hasn't already recommended that one be commenced?

Ms McNaughton: Thank you for your question, Chair. No, it only gets to us asking for a consent if we have gone through that process I outlined earlier. So, it has to be a prima facie case with a reasonable prospect of conviction and in our assessment in the public interest. It is only if we have made that assessment that we would then, if required by statute or by the direction, be asking for the ministerial consent.

CHAIR: Rather than continue with that—because it was very helpful; thank you—I might pass over to Senator Chandler.

Senator CHANDLER: Ms McNaughton, what difficulties would it present for the CDPP and for prosecutions if, for example, when compiling your evidence, putting together your
cases, you had to consider exemptions for certain classes of citizens, like journalists? That is I guess the class of interest of the week.

Ms McNaughton: First of all, we assess a matter only if we have a brief of evidence referred to us, so we don't do the investigating, just to be clear.

Senator CHANDLER: Of course.

Ms McNaughton: It would only be within my office if we'd had a brief of evidence referred to us. And we operate—because we have the rule of law in this country—only according to legislation and prosecution policy. You ask how difficult it would be if a whole class was exempted. That would presumably have to be done by legislation—

Senator CHANDLER: Yes.

Ms McNaughton: and we would have to consider the effect of any such legislation if that were passed. Hypothetically, if it were—and that's a very difficult hypothetical situation, because there were so many potential offences, so it would depend on how some carve out was done. Would it be for a class of person for all offences for all time? Would it be for only a category of offences involving this class of persons? So, we would very much have to be into the detail, and it would be, I presume, a difficult carve out to draft, I would imagine.

Senator CHANDLER: Let's just try to think of a way to limit the hypothetical for the benefit of this line of questioning. What about if we took a particular offence—let's say section 35P(2) of the ASIO Act; are you familiar with that one? I can read it out:

A person commits an offence if:

(a) the person discloses information; and
(b) the information relates to a special intelligence operation; and
(c) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.

What if we were to say that we were to exempt journalists from committing this offence on the basis that they are just doing their job? Would that be difficult in terms of mounting a prosecution?

Ms McNaughton: I am loath to speak in a hypothetical way. It's very, very difficult. If a journalist were to be exempted just because they were a journalist, it would mean that that was an absolute rule that in no circumstances could a journalist be prosecuted. All I can indicate is that the jurisprudence of our modern society has no such absolute rule involving freedom of speech and the like, to date. For example, there are contempt of court matters, there are suppression orders. There are all sorts of issues like that, which are well-accepted restrictions on the very important, fundamentally important, freedom of expression and freedom of speech and the like. If the parliament decided to make a law, we would obviously attempt to do our job in accordance with the law, as we always do. And if parliament decided to do that, it would be a matter of policy. But I can't really give an on-the-run commentary on how that would work in practice. I would need to see the facts et cetera.

Senator CHANDLER: That's all right. Speaking in general terms, there are other areas of the law, not just in terms of the freedom of speech issues we're talking about today, where exemptions are sometimes carved out. If we were saying that we wanted to carve out journalists, is that quite a broad-ranging definition to impose? What is 'a journalist' at law?
Ms McNaughton: Again, it's a question of statutory construction of whatever law was passed. I suppose a journalist in this day and age could be regarded as a difficult matter to define, but that would be a matter for the legislature to grapple with.

Senator CHANDLER: Yes. It could be, say, a presenter on Sky News ranging through to a blogger on the internet. Is that what we could define as a journalist?

Ms McNaughton: It would be a matter for the parliament and those advising the drafters. But, yes, I can envisage difficulties in relation to the definition of a journalist.

Senator CHANDLER: Unless, of course, we were to carve out and quite expressly define what was inherently the job of a journalist and perhaps include limitations around that. Would that make it any easier?

Ms McNaughton: Again, we would have to see the legislation as it was determined. That really is a matter of policy, and it's something that I really couldn't comment further upon.

Senator CHANDLER: That's all right. Again, in general terms, it is not a straightforward exemption to make just to say that a certain class of persons, whether they're journalists, chefs, bakers or candlestick makers, are exempt from certain laws because of the definitional requirements of doing such. We live in a changing world. What is relevant today may not necessarily be relevant tomorrow, in much the same way as the example of internet bloggers that I just used. Twenty years ago, or maybe even 15 years ago, we perhaps wouldn't have considered internet bloggers to be journalists, but that might be a different interpretation within the community, if not legislatively, now.

Ms McNaughton: Yes. I presume the definition of a journalist would have to be grappled with, and also what offences would apply would have to be grappled with.

Senator PATRICK: If it helps, Chair, 'journalist' is defined in the Corporations Act for the purpose of whistleblowing, so that's an example where it's defined in statute. There's also an instrument where it's been defined by Senator Cormann in relation to free ASIC searches for journalists.

CHAIR: Thank you, Senator Patrick. Before I hand over to Senator Carr, I will ask one follow-up question. As a general proposition, is the exemption of one particular profession from the criminal law more generally consistent with the concept of equality before the law?

Ms McNaughton: I think we're getting into deep philosophical issues here.

CHAIR: I like those!

Ms McNaughton: Yes. I presume the definition of a journalist would have to be grappled with, and also what offences would apply would have to be grappled with.

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CHAIR: Thank you, Senator Patrick. Before I hand over to Senator Carr, I will ask one follow-up question. As a general proposition, is the exemption of one particular profession from the criminal law more generally consistent with the concept of equality before the law?

Ms McNaughton: I think we're getting into deep philosophical issues here.

CHAIR: I like those!

Ms McNaughton: My remit is to prosecute offences in accordance with the law. I think it's probably a matter for others better qualified than me to provide a useful answer to your question.

CHAIR: Is it something the minister would care to comment on?

Senator Payne: I was going to say that I think Ms McNaughton is underselling herself—

CHAIR: I think so too.

Senator Payne: but I understand the point she is making. I don't think it is necessarily helpful for me to canvass that in detail, given the nature of the committee's questioning process, but equality before the law is recognised as a fairly universal proposition, I would have thought.
CHAIR: Thank you, Minister. Senator Carr.

Senator KIM CARR: I was wondering if the officers could explain something to me. On 17 September, I understand, Ms McNaughton, that you wrote to the government in the Australian Capital Territory indicating that if they were to pass a law that legalised the possession and use of small amounts of cannabis then it would be open for a person in the ACT charged under section 308.1 of the Criminal Code to rely on section 313.1 of the code for the purpose of establishing a defence. Is that correct?

Ms McNaughton: That was the initial letter that I signed, yes.

Senator KIM CARR: A week later you wrote to the territory government in Canberra to say that you had changed your position and that it would not be appropriate to provide a view on the proposed legislation. Is that correct?

Ms McNaughton: That's a summary of what I said, yes.

Senator KIM CARR: Why did you change your view?

Ms McNaughton: When I signed the first letter I was not aware of a particular case that was drawn to my attention prior to the signing of the second letter. What influenced me to sign the second letter was a case which suggested that the excuse or justification may properly have to be a positive excuse or justification rather than simply the removal of criminality of actions. When I became aware of that case, it was readily apparent to me that it was more complex than when we had first assessed the issue, and I therefore wrote the second letter.

Senator KIM CARR: I see. Was that case drawn to your attention by the Attorney-General's office?

Ms McNaughton: In the course of our relationship with the Attorney-General's office, we have—not the Attorney-General's office, the Attorney-General's Department. We have regular conversations, through my officers, with officers from the Attorney-General's Department. It was in the course of one of those regular conversations that that case was drawn to our attention.

Senator KIM CARR: I see. So it was the department itself, not the minister's office?

Ms McNaughton: Correct.

Senator KIM CARR: What is the case that you're referring to?

Ms McNaughton: I'll just pull that up. It's not directly on point. It is Denlay v Commissioner of Taxation. It's not directly on the same legislation, but it was enough such that it gave us pause and caused me to send the second letter.

Senator KIM CARR: So you had no contact with the minister's office?

Ms McNaughton: In relation to this, no.

Senator KIM CARR: It was all through the department.

Ms McNaughton: Correct.

Senator KIM CARR: What was the nature of the department's view to you?

Ms McNaughton: I became aware of that case, and, on becoming aware of that case, that's when I decided that the previous view was no longer one that I held.

Senator KIM CARR: But you said it's not on point.
Ms McNaughton: It's not directly on point, but it does deal with a very similar section. It deals with the words 'justification' or 'excuse' and suggests that it has to be a positive one.

Senator KIM CARR: I see. Do you think that's consistent with your role as an independent agency within the Attorney-General's portfolio?

Ms McNaughton: Sorry, I don't quite understand your question.

Senator KIM CARR: You are there to operate independently of the Attorney-General and the political process.

Ms McNaughton: Indeed.

CHAIR: In understanding and applying the law as it is in force at any given time.

Senator KIM CARR: Do you think that changing your mind is consistent with that responsibility?

Ms McNaughton: Absolutely, yes.

Senator KIM CARR: So your interpretation of the law was affected by this notification of a change; it wasn't put to you in any political context?

Ms McNaughton: Absolutely not.

CHAIR: Senator Carr, I am conscious you've just got started, but we are at 12.30. Do you wish to kick off when we resume after lunch?

Senator KIM CARR: I think I can probably finish this matter.

CHAIR: Within five?

Senator KIM CARR: Hopefully.

CHAIR: If it can't be done within five, we'll do it after lunch.

Senator KIM CARR: I have one question. Let's see how long it takes to answer it. Do you agree with the advice the Attorney-General gave the ACT on 20 October 2019, that the ACT's new laws would not provide a defence to Commonwealth drug possession laws?

Ms McNaughton: My view sitting here today is that I have no absolutely concluded view. I haven't seen the final version of the legislation. But, with the greatest of respect, it is clearly open—what the Attorney-General has indicated to the ACT. My job and that of my office is to assess cases when they are referred to us. I will come to a concluded view if and when a case is referred to us. I will then look at what the legislation would look like as at the date of the alleged offence which will be the subject of the brief and will come to a concluded view at that point.

Proceedings suspended from 12:31 to 13:31

CHAIR: We will now resume and continue to hear from officers of the Commonwealth Director of Public Prosecutions.

Senator McKIM: I want to start by going to a couple of matters that relate to the issue that Senator Carr was questioning you on just before lunch, Ms McNaughton, which is the change of opinion that you had in regard to the ACT's personal cannabis use laws. You made it very clear that you had not had any contact on this matter from the Attorney-General or his office, but you have said that—I'm paraphrasing you here, and please correct me if I'm
paraphrasing you inaccurately—it came up in the course of discussions with the Attorney-General's office—

**Ms McNaughton:** The Attorney-General's Department.

**Senator McKIM:** I'm sorry. The Attorney-General's Department.

**Ms McNaughton:** Between officers of my agency and the Attorney-General's Department.

**Senator McKIM:** To finish that line off, Ms McNaughton: it was as a result of that interaction with the department that you became aware of the Denlay case?

**Ms McNaughton:** That's correct.

**Senator McKIM:** And, having considered that, that caused you to change your opinion?

**Ms McNaughton:** That's correct.

**Senator McKIM:** Mr Moraitis, did the department have any contact with the Attorney-General's office on this matter?

**Mr Moraitis:** We would have given submissions over a period of months on this matter, because it was obviously something we were discussing with the ACT, our counterparts in the justice department, and explaining our position. I imagine there would have been advice and submissions to the office and the Attorney through normal processes. On this particular question and the time lines we're alluding to now, I'd have to ask Ms Chidgey whether there was anything specific about that. If I may say, from our perspective we had a very consistent position all along on this.

**Senator McKIM:** The department did?

**Mr Moraitis:** Yes. I'd have to ask Ms Chidgey whether there was some sort of communication with the office to explain anything in particular, but my understanding was that the department had a longstanding process of consulting and discussing with the ACT government and our colleagues—who are, for the record, sometimes ex-AGD staff in Canberra, so we have a good relationship with them—explaining where we're coming from on this. That's the same way we have consultations with normal colleagues in the DPP. Unless Ms Chidgey has anything further on that.

**Senator McKIM:** Ms Chidgey, just before you do that, and I do apologise: Mr Moraitis, you said in that answer that the department had a consistent position. What was that position?

**Mr Moraitis:** I think it's been alluded to by the Attorney publicly, so I can go into that. Basically, the idea of a positive right as distinct from enabling—it centred on how the decriminalisation was defined in the act. We had discussions based on language in a bill, but I think the act only was finalised to our visibility a few weeks ago, and then we had a definitive position on where we stood, which was to confirm our position that, as a result, the ACT law did not, as it were, provide that exceptional defence for Commonwealth offences.

**Senator McKIM:** Ms Chidgey are you able to provide any extra information for the committee?

**Ms Chidgey:** The only thing I would add is that we had interactions with the Attorney's office over some period, because the Attorney had received correspondence much earlier this
year about that proposed legislation when it originally came before the ACT Legislative Assembly. We had been in contact and provided some initial advice some months ago.

Senator McKIM: Perhaps either to Mr Moraitis or Ms Chidgey: how did the department become aware of the Denlay case? Was that brought to your attention by the Attorney-General's office?

Ms Chidgey: No, it wasn't.

Mr Moraitis: We have in-house expertise.

Senator McKIM: I'm sure you do. So the answer is no to that question. Ms McNaughton, obviously this is a matter of significant public and media interest. It's fair to say you changed your opinion on this matter?

Ms McNaughton: I guess. Yes.

Senator McKIM: If you wish to add anything, please do.

Ms McNaughton: It's fair.

CHAIR: Because the law on which you were basing your opinion changed?

Ms McNaughton: Because I became aware of additional legal material that I was not initially aware of.

Senator McKIM: And that was the Denlay case?

Ms McNaughton: Yes.

Senator McKIM: Do you often change your opinion on matters? Is that a regular occurrence? I ask this genuinely. Would you categorise this as quite unusual, that you gave an opinion and then, within a relatively short time frame, changed your opinion? Is that something that happens often or is it unusual?

Ms McNaughton: If I as a lawyer came into possession of additional information, I would not stick to my guns for the sake of it. I did what I felt was appropriate. I can't say whether I'd normally do it. Of course, I try to not change my opinion in this sort of context, but if it's the right thing to do that's what I do.

Senator McKIM: Thank you. I'm not offering a criticism. I think any reasonable person, if new information came to light, would certainly reserve their right to change their opinions. I don't offer a criticism of that. I'm just seeking to understand whether it's something that happens regularly or whether you'd categorise it as unusual in your experience in this role.

Ms McNaughton: It's not something that has happened often.

Senator McKIM: Ms Chidgey, you wrote to Mr Glenn, the acting director general of the ACT Justice and Community Safety Directorate, on 23 September effectively raising a question about whether the exemption of the kind that was proposed by the ACT would satisfy the requirement for the conduct to be justified or excused. That letter was just one day ahead of Ms McNaughton's second letter, the one in which she conveyed her change of opinion. When you wrote that letter, where you aware of the fact that the Commonwealth DPP was at least considering changing her opinion?

Ms Chidgey: I think we knew that the director was considering the issue, but we had had already quite a lot of interaction with Mr Glenn and the ACT directorate about the matter, and so the letter was really confirming the views we'd already expressed to them verbally.
Senator McKIM: Which is the position that Mr Moraitis just explained?

Ms Chidgey: That's correct.

Senator McKIM: I'm not a lawyer, so I'm just going to ask this as a layperson: is the position that you conveyed to Mr Glenn in that letter substantially in accordance with the revised opinion of Ms McNaughton as conveyed to Mr Glenn on the 24th?

Ms Chidgey: I might defer to the director but, as I recall it, her letter was really a retraction of the earlier letter and an indication that the matter had some additional complexities, whereas ours provided a clearer indication to the ACT of the position as we understood it.

Senator McKIM: Ms McNaughton, in your second letter—this is the letter you sent to Mr Glenn on 24 September that contained, in effect, your revised opinion—you said you've concluded it would not be appropriate to provide a view on the proposed legislation. Why do you think it would have been inappropriate for you to provide a view?

Ms McNaughton: Because, at that point, it was clear and I wanted to make it clear as quickly as I could, given what we had said earlier, that the position was more complicated. Then I decided it wasn't appropriate to provide any concluded view at that point. I simply wanted to make clear that our previous view was attended by additional complexities that I could no longer indicate was our view. Then it becomes appropriate, in my view, that we consider, finally, the meaning of the legislation if and when we are referred a brief of evidence in relation to a potential offence.

Senator McKIM: As it currently stands, you don't intend to provide a view on the legislation unless or until you have a brief on the matter.

Ms McNaughton: That's correct. What I would be doing, through my officers, is assessing the brief in accordance with the prosecution policy of the Commonwealth.

Senator McKIM: Could I ask you, then, Ms McNaughton, what changed between you providing a view on 17 September and then coming to the conclusion that it would be inappropriate for you to provide a view unless it was enlivened by a brief? What changed, not in terms of what your opinion was but just in the context of whether or not you would provide that view on the legislation?

Ms McNaughton: It appeared that it was a more complex situation and it was, potentially, a fluid situation. It wasn't something that we thought was appropriate to do.

Senator McKIM: I understand that in regard to 24 September but on 17 September you, clearly, regarded it as appropriate that you would share your view. What changed? I understand your view changed but I'm asking in the context of the provision of that view to the ACT government.

Ms McNaughton: Just on further reflection, given the complexities, it was thought the appropriate response of my office should be to wait for a brief of evidence, should one come to our office.

Senator McKIM: Ms McNaughton, you didn't have a brief in regard to any potential prosecution under this legislation on the 17th. I'm just trying to understand your thinking here. Is it fair to say that when the added complexity of this matter was drawn to your attention, via the Attorney-General's Department, it was that added layer of complexity that made you
believe that it would not be appropriate for you to share your view, even though you had previously shared your view on the legislation?

Ms McNaughton: It was the added complexity provided by me learning about a case that was, although not involving an identical provision, a similar provision. It made it clear to me that it wasn't an appropriate use of our resources to provide a concluded view.

Senator McKIM: Is that because it would have taken up more of your resources, to come to a conclusion?

Ms McNaughton: It could have. And at that point we thought it is a more complicated issue than first appears, and should a brief come we should wait until that happens, to see what the legislation might look like as at that date, should a brief of evidence even come to our office.

Senator McKIM: So it's appropriate for you to share your view on a proposed legislation when it's quite a simple matter, in your mind, but when it became more complex you decided that it would no longer be appropriate for you to share your view.

Ms McNaughton: In this particular instance, that's what occurred. Should it happen again, in the future, I will take wise counsel and we will see what we will do.

Senator McKIM: And who would you seek that counsel from?

Ms McNaughton: From my colleagues.

Senator McKIM: In the DPP's office, in your office?

Ms McNaughton: Yes.

Senator KIM CARR: I have raised the issue of the independence of the DPP's office. I want to do that again in the context of the ministerial direction requiring the Commonwealth Director of Public Prosecutions to obtain the agreement of the federal Attorney-General for the prosecution of a journalist charged under the Criminal Code, sections 131.1, theft, and 132.1, receiving stolen property; and section 73A of the Defence Act 1903, unlawful giving or obtaining information as to defences. This of course is a matter that's been subject to quite substantial criticism from the Law Council.

I'd like to ask you specifically about the direction that you received on 18 September from the Attorney-General's office in relation to journalists. What's the effect of that direction, in your view?

Ms McNaughton: You said the 'direction'. Are you talking about the direction from the Attorney?

Senator KIM CARR: The Attorney-General.

Ms McNaughton: I've got one dated 19 September.

Senator KIM CARR: Okay, well, I trust it's the same one. This relates to your office in relation to journalists.

Ms McNaughton: Yes, and, as I've indicated before, there was a previous one in similar terms issued by the previous Attorney-General, Mr Brandis, on 30 October 2014, which covered four of the same sections covered by Mr Porter's direction, the current Attorney, just to put it in context.
I can indicate, too, for further context, that under our act, the DPP Act 1983, section 8 provides for directions and guidelines by the Attorney-General. It says:

(1) In the performance of the Director’s functions and in the exercise of the Director’s powers, the Director is subject to such directions or guidelines as the Attorney-General, after consultation with the Director, gives or furnishes to the Director by instrument in writing.

Then it goes on at some length as to how that is to be dealt with, what matters it may relate to and how it should be tabled in parliament and the like. So that’s the context: it’s provided for in the act. It’s rarely used; the directions power is rarely used, and I can indicate that there were no consents under the previous direction, on 30 October 2014, that Senator Brandis issued.

As I understand it, and as I think I indicated to Senator Stoker, the Chair, before it would even get to the Attorney for his consent under this direction, my office would have made an assessment in accordance with the prosecution policy that there was a prima facie case and a reasonable prospect of conviction and that it was in the public interest. It would only be at that point that it would go to the Attorney for his consent.

Senator KIM CARR: Let me be clear, though. It’s a perfectly reasonable point you make, that under the current legislative framework the minister has the power to direct. You don’t see that as inconsistent with your role and your independence in terms of your current role?

Ms McNaughton: It’s provided for under a law passed by this honourable parliament.

Senator KIM CARR: Yes.

Ms McNaughton: It is rarely used, so in a practical sense—

Senator KIM CARR: Can you think of occasions where it has been used? You mentioned a previous event with Senator Brandis.

Ms McNaughton: There were a number of previous directions, but as I said, there aren’t many. I have them all here with me, and they’re publicly available, obviously, because they’ve all been tabled. They concern a whole lot of different things. For example, there was one by the Hon. Daryl Williams back in 1996 as to how we should act in accordance with the general policy of the Australian parliament, including, for example, in an estimates committee such as this. So there are all sorts of different—

Senator KIM CARR: Can we have a look at that, if possible—if it's in a form that can be tabled?

Ms McNaughton: They’re all publicly available.

Senator KIM CARR: That may be the case, but for convenience—

Ms McNaughton: Mine are all marked up and scribbled all over, but we can certainly provide them.

Senator KIM CARR: Thank you, if you will.

Ms McNaughton: There is no problem. Do we have all of them? We have some.

Senator KIM CARR: If I could have a look at that, that would help me understand the nature of the directions. But essentially they’ve been procedural questions, have they?

Ms McNaughton: There was another direction. In relation to people-smuggling prosecutions in 2012, the Hon. Nicola Roxon, who was then Attorney-General, issued a
direction in terms of what prosecutions for people smuggling in certain circumstances should or shouldn't be continued. It's very detailed. I don't know whether that's a fair summary.

**Senator KIM CARR:** So, it's a range of matters. And we'll have a look at those when you get a chance. But the provision that was detailed to you on 19 September doesn't actually prevent the prosecution of journalists, does it?

**Ms McNaughton:** No, not at all.

**Senator KIM CARR:** It in fact requires the Attorney-General to consent to the prosecution of a journalist for a certain offence. Is that correct?

**Ms McNaughton:** Yes.

**Senator KIM CARR:** What are those offences?

**Ms McNaughton:** There are a number of specified offences there. They're under a number of different acts, being the Australian Security Intelligence Organisation Act, some under the Crimes Act, some under the Code and one under the Defence Act. So, they're a variety of different offences.

**Senator KIM CARR:** And that's standard practice that's operated?

**Ms McNaughton:** Sorry, I don't know what you mean by that.

**Senator KIM CARR:** It's consistent with practice that has occurred for some time.

**Ms McNaughton:** Well, there was the other direction that was enforced from October 2014, which covered four of those eight sections, and there have been an additional four sections that have been added.

**Senator KIM CARR:** Please explain to me the difference between the two directions, then.

**Ms McNaughton:** The one that was issued by Mr Brandis covered section 35P of the ASIO Act—and these are publicly available—and 15HK, 15HL and 3ZZHA of the Crimes Act. All of those offences have been picked up in the new direction that was issued. In addition, four additional ones have been added: section 70 of the Crimes Act, sections 131.1 and 132.1 of the Code and section 73A of the Defence Act.

**Senator KIM CARR:** The effect of this now requires the Attorney-General to personally consent to the prosecution?

**Ms McNaughton:** Correct—in relation to offences where we have found reasonable prospect, public interest, in relation to these offences.

**Senator KIM CARR:** Would it be fair to say that the Attorney-General gets the final say on whether a journalist who reports on government activity may be prosecuted for their actions in that reporting?

**Ms McNaughton:** Only if it involves a consideration of the offences specified in this direction.

**Senator KIM CARR:** Under those provisions.

**Ms McNaughton:** Correct.

**Senator KIM CARR:** But that's the effect of it, is it not?

**Ms McNaughton:** Yes.
CHAIR: Just a related question before we move on: I want to be very clear that the process of getting a minister's consent provides an opportunity for the minister to intervene to stop a prosecution but not an opportunity to unilaterally direct that someone be prosecuted. Is that right?

Ms McNaughton: Yes. The way Commonwealth prosecutions work is that we are the people who always do the initial assessment of the brief. And it is only if it goes through our office that it would even get there. So, the Attorney would either say, 'Yes, what you have indicated is an appropriate prosecution can go ahead' or, 'No, it should not commence.'

CHAIR: And it's always got the benefit of the Commonwealth DPP's independent judgement of the evidence available in that case.

Ms McNaughton: Yes.

CHAIR: And in a sense it provides an opportunity—say, in the case of a journalist—for their protection rather than for them to face additional or political retribution, because it acts to stop somebody.

Ms McNaughton: Well, we would never be making a political decision to prosecute.

CHAIR: I'm not suggesting that.

Ms McNaughton: We are entirely independent and apolitical in terms of how we make our decisions. So all the Attorney can do in relation to these specific offences is say, 'Yes, I consent', or, 'No, I don't consent.'

CHAIR: Correct. So that operates as an opportunity for the minister to step in to stop a prosecution proceeding against someone, but not the converse?

Ms McNaughton: Correct.

Senator KIM CARR: However, if a minister was involved in an unauthorised disclosure—directly involved—it would also be an opportunity to stop that prosecution, wouldn't it?

Ms McNaughton: Perhaps I should make clear—and it's probably that I haven't made it clear—that on the face of the notice, the direction only applies in relation to these eight specified offences, and then there is a further phrase:

... where the person is a journalist and the facts constituting the alleged offence relate to the work of the person in a professional capacity as a journalist.

Which is in identical terms to the one that Mr Brandis issued.

Senator KIM CARR: What happens if a journalist's metadata has been gathered by police without a warrant? Would that be cause for you not to prosecute?

Ms McNaughton: Each case would have to be considered in relation to its own facts. I can't say in—

Senator KIM CARR: As a matter of principle, though, if metadata is being drawn upon without warrant, as has been the case the AFP have indicated in the case of the Australian Capital Territory police on 116 occasions in 2017 alone, would that be a cause in itself for you to actually question whether or not prosecution should proceed?

Ms McNaughton: That's the sort of matter that in a vacuum I cannot answer, because I have to take into account all facts and circumstances. It would depend on a whole range of
things, including the seriousness of the offence and all the other matters that are mentioned in the Prosecution Policy of the Commonwealth. It would be, no doubt, a factor which would be as part of the consideration.

**Senator KIM CARR:** Do you get the opportunity to examine the metadata of politicians?

**Ms McNaughton:** Me personally? Only if it was ever given to us in the course of the assessment of a brief of evidence. I cannot recall any such instance, and I'm sure my colleagues would correct me if they've ever had any such instance.

**Senator KIM CARR:** It's been put to me that the police in the Australian Capital Territory have in fact drawn, without warrant, upon metadata involving politicians.

**Ms McNaughton:** Police is different to the DPP.

**Senator KIM CARR:** I understand that, but that becomes part of the brief of evidence.

**Ms McNaughton:** If it does become part of the brief of evidence.

**Senator KIM CARR:** So if Federal Police, the AFP, have called upon evidence—

**Ms McNaughton:** I really couldn't say in a vacuum. There's nothing I am aware of sitting here now that I could indicate that that has occurred.

**Senator KIM CARR:** Even if it would be a breach of parliamentary privilege? Would that be a consideration?

**Ms McNaughton:** I really can't—I have no knowledge of that ever happening.

**Senator KIM CARR:** But you would be concerned about the abuse of parliamentary privilege, wouldn't you, as the DPP? Or the breach of it?

**Ms McNaughton:** That's too broad a question for me to answer.

**Senator KIM CARR:** When was the last time you undertook any training on the question of parliamentary privilege?

**Ms McNaughton:** I don't know that I've ever had direct training in parliamentary privilege. I had initial training—limited training—in relation to estimates when I took up the position. That was in August 2016.

**Senator KIM CARR:** It's a matter that has been before various committees of this parliament and it's one of the considerations that we have been looking at. I can say to you that I'm a member of the Privileges Committee and it's a matter that has concerned me that so few officers from the AFP and others have had any training in the question of parliamentary privilege. I'm wondering whether or not this would be part of your duties—to examine that question of the way in which parliamentary privilege operates.

**Ms McNaughton:** Well, not as the way you've put it, with respect. The only reason we would be dealing with any issue in relation to parliamentary privilege is if it came up in the course of the consideration of brief of evidence. That's all I could indicate. If there were an issue, we would consider that issue along with a whole lot of other issues in relation to whatever evidence was put before us to consider.

**Senator KIM CARR:** Thank you.

**Senator PATRICK:** I presume in that circumstance where a brief were presented to you that did involve a politician's metadata you would have to consider matters of admissibility in reviewing that brief?
Ms McNaughton: Yes, presumably.

Senator PATRICK: Okay. Thank you. I have been watching on the parliamentary television and it was very helpful with the chair's opening questions. There is another circumstance or mechanism by which the Attorney can cease a prosecution. That would be by way of section 71(1) of the Judiciary Act.

Ms McNaughton: I would have to double-check that. I don't have every section of the Judiciary Act to hand.

Senator PATRICK: I will just read it to you:

(1) When any person is under commitment upon a charge of an indictable offence against the laws of the Commonwealth, the Attorney-General or such other person as the Governor-General appoints in that behalf may decline to proceed further in the prosecution, and may, if the person is in custody, by warrant under his or her hand direct the discharge of the person from custody, and he or she shall be discharged accordingly.

There is some jurisprudence on this in the Federal Court but basically the motive behind that particular provision is: 'The Attorney-General's first law has always borne the ultimate responsibility for prosecution decisions and legislation enacted. It provides a power so that the Attorney-General may discharge his ultimate responsibility to the parliament and to the people for the conduct of the prosecution process.' The reason I've gone to that is that it does add additionally to the conversation that's gone on today. In a letter to me, the Attorney has indicated to me that he is not aware of that being used. I wonder if, on notice, you could perhaps examine any instances—and obviously not necessarily in your tenure—where that power has ever been exercised. I understand it would be unusual.

Ms McNaughton: Since the instigation of the office of the DPP in the 1980s? Or between the passing of the Judiciary Act in the early 1900s and the 1980s?

Senator PATRICK: Yes. Going back, if there is any incident—I don't want an exhaustive search but if there is some indication as to whether or not that provision has ever been exercised.

Ms McNaughton: Yes. Given that the office of the DPP here and around the world is a moderately recent invention.

Senator PATRICK: The secretary is looking like he is eager to say something.

Mr Moraitis: I just wanted to add, from our perspective—not going back to 1901—but we are not aware of any recent cases involving section 71, for what it's worth.

Senator PATRICK: Thank you. I have another quick question in relation to whistleblowers. It arises from a series of questions asked of the Inspector-General of Taxation. Just to indulge you, briefly, section 15 of the IGT Act, the Inspector-General of Taxation Act, permits the IGT to use section 7—sorry, section 9—of the Ombudsman's Act which is basically a power for the production of documents, for ordering someone to produce a document. Then section 39 of the IGT Act provides a protection in respect of victimisation for anyone who is discharging their lawful duty to comply with the section 9 notice. The question was raised as to, if someone is victimised, who then is responsible for invoking the protection? This goes to, really, in some sense, who can raise a brief—noting it's a criminal offence with a six-month prison sentence—for the Director of Public Prosecutions to perhaps conduct proceedings to protect someone? Is it only the inspector-general in those
circumstances? Or can a private person come to you and say: 'I've been victimised under this section of the act. I'm protected. I'd like to put a brief to you?'

Ms McNaughton: Certainly, the general practice is that an investigative agency gives a brief to the CDPP but, as you would also be aware, Senator, there is a provision under the DPP Act for me to take over private prosecutions. Of course, what that connotes is that anyone can commence a private prosecution. Because of that, technically, anyone could do so.

Senator PATRICK: If you take over a prosecution—and this goes to Senator Carr's question—are you then in a position to drop the prosecution if you think there is insufficient evidence or isn't in the public interest.

Ms McNaughton: Yes, indeed. That is provided both under the act and under the prosecution policy of the Commonwealth and we do have instances of those issues occurring—not that frequently, but I suppose reasonably regularly—where a private prosecution is commenced and we have to determine whether or not we will take it over and continue it, or take it over and not continue it.

Senator PATRICK: In the circumstances where we don't continue it, it's a bit like disallowances in this building in that, if I move a disallowance and then seek to withdraw it, there is opportunity given for other senators to take up the disallowance?

Ms McNaughton: Yes.

Senator PATRICK: In circumstances where you decided to take over and then cease prosecution, does the original applicant have the ability to step back and say, 'Well, I wish to continue'?

Ms McNaughton: The person is able to provide information to my office in order to assist our decision, but, once I've taken it over, I've taken it over.

Senator PATRICK: All right. Just going back to my whistleblower instance, I'm just trying to get a general feel for circumstances where someone feels victimised and is protected by Commonwealth law. Is it normal for you to receive a brief in relation to that? I'm not sure that a whistleblower always has the capacity to invoke the protection themselves; they don't have the wherewithal or indeed the financial means to do so. Is it normal for the Commonwealth, in circumstances where those sorts of protections exist, to invoke the protections and conduct the investigation and the referral?

Ms McNaughton: By 'the Commonwealth', who do you mean?

Senator PATRICK: An agency of the Commonwealth.

Ms McNaughton: I don't know about 'normal'; I don't think I know the answer to that.

Senator PATRICK: All right. You would be familiar with the case against Mr Collaery and Witness K. We have talked about it in the past.

Ms McNaughton: Yes.

Senator PATRICK: In relation to closed courts. I don't necessarily want to go to the details of that particular case. However, in principle, we have a desire to hold all proceedings in open court.

Ms McNaughton: Yes, indeed.
Senator PATRICK: As a result of what has happened in relation to Witness K, do we have a better understanding of the national security law and how that now works?

Ms McNaughton: It's still very much in the course of proceedings in relation to that matter. We are also keen to have as much in public as we possibly can, and it's a matter of the balancing of a number of factors.

Senator PATRICK: I am just going into the operation of the law, because I don't think this secrecy provision has been invoked very often, if at all.

Ms McNaughton: In most of the terrorist matters—maybe not most, but certainly some of the terrorist matters—that we have run, it is invoked; and, in relation to another class of matters, it's invoked. Normally, arrangements are made by way of agreement, and that's perhaps one of the—I don't really want to say much more than that—but here we have yet to reach such agreement.

Senator PATRICK: Okay. I thought the court had intervened in this particular instance. Or has that not been finalised?

Ms McNaughton: There are various things still on foot in relation to various aspects. Yes.

Senator PATRICK: Okay. That's it for me. Thank you.

CHAIR: Thank you, Senator Patrick. Senator McKim.

Senator McKIM: Ms McNaughton, apologies in advance, something has come to my attention in regards to the previous conversation we were having about the ACT matter so I will just tie that up if that's okay. Again I think I'm paraphrasing you here but would it be accurate to say that, at the moment, as we sit here, you don't have a settled view as to the matter that you covered in your two letters?

CHAIR: Senator McKim, you've canvassed this at length. I'm quite sure we've—

Senator McKIM: You don't know what I'm going to ask.

CHAIR: That question is one you've asked about four times.

Senator McKIM: No, you're wrong, chair.

CHAIR: These please move to the substance of something different.

Senator McKIM: Would it be fair to say, Ms McNaughton, that you don't have an absolutely settled view?

Ms McNaughton: I don't have a concluded view, yes.

Senator McKIM: Thank you. If a prosecution brief came to you under that legislation, would you consider the defence that the ACT Parliament has established as you decide whether or not you would prosecute?

Ms McNaughton: That's part of the regular test we do for all matters. Sorry, that wasn't quite clear enough. In the course of us working out, for example, whether there are reasonable prospects of conviction, we do look at prospective defences. Would I consider the current law? It would depend what the law looked like when and if I received a brief. So I would look at the law as it stood at the relevant time of the alleged offending.

Senator McKIM: Thank you. I understand that. But would it be fair to say that, in the consideration of whether or not there is a reasonable chance of a conviction, in normal circumstances, potential defences would be part of that consideration?
Ms McNaughton: Yes.

Senator McKIM: Thanks very much. I'll move to another topic now. I've had a look at the Prosecution Policy of the Commonwealth. This specifically goes to the matters afoot regarding Mr Collaery and Witness K, but it doesn't go to what's happening in the courts; it goes to your consideration of the public interest in forming a view on whether or not those prosecutions should be launched. It's not explicit in 2.10 of the prosecution policy—I can't see it explicitly in that section—in your consideration of whether or not the prosecution was in the public interest, what the effect is on potential whistleblowers in the future. I note that the list in 2.10 is a non-exhaustive list, so could I ask you whether you did consider the effect that the prosecution may have on people who may be considering blowing the whistle in the future.

Ms McNaughton: A very similar question was put to me on a previous occasion, and I do believe that public interest immunity has been sought and claimed over that.

Senator McKIM: I reviewed the Hansard—you and I have discussed similar matters in the past—and I don't believe that that claim was made. Public interest immunity claims were made during a previous exchange, which was in October last year, but I don't believe a public interest immunity claim was made in regard to that question at that time. It may have been made in response to questioning from another senator. I'm not sure I could understand what the public interest immunity claim might be there, Ms McNaughton. I'm simply asking whether you considered a particular matter during your assessment of whether or not you should recommend a prosecution.

Ms McNaughton: The matter is before the court, as you stated, and I certainly don't want to say anything that's going to impede a fair trial of anyone before the court. My recollection is that perhaps it wasn't in precise terms, but it was in terms which overlapped with what you are asking me now—that public interest immunity.

Senator McKIM: There was a public interest immunity claim made in response to a question I asked around your decision to seek an external counsel's advice.

Ms McNaughton: Right.

Senator McKIM: That was made on 23 October.

Ms McNaughton: I might be mistaken, in which case I apologise.

Senator McKIM: That's okay.

Ms McNaughton: But, in relation to that, I can't answer in the particular, but I can say, in the general, that, if such a factor was relevant, yes, I would have taken it into account.

Senator McKIM: Why can't you answer in the particular?

Ms McNaughton: Because it is a matter before the court and I don't want to affect any matter that's currently before a court.

Senator McKIM: This question, Ms McNaughton, goes to your decision to recommend prosecution.

Ms McNaughton: Yes, indeed, and I said, if it were relevant, I would have taken it into account. I'm not prepared to comment further.

Senator McKIM: So you're making a claim for public interest immunity?
Ms McNaughton: Yes, I am.

Senator McKIM: All right. Under the normal forms of the committee, I'm prepared to accept that on a temporary basis until the written claim is made, and then that can be assessed ultimately by the Senate if necessary. So I won't pursue that line of questioning, but I look forward to a written explanation of why you think it's in the public interest not to answer that question.

Ms McNaughton: I'm sorry, Senator.

Senator McKIM: That's okay. You can finish there. Minister?

Senator Payne: I'm just clarifying something with the director.

Senator McKIM: I believe Ms McNaughton is in a position to make a claim rather than you, Minister?

Senator Payne: Indeed. I was not discussing that. I was just clarifying whether there was an extant claim or whether this was a separate matter.

Senator McKIM: I believe it's a separate matter—

Senator Payne: I understand that to be the case.

Senator McKIM: but the record will confirm that or otherwise. You have said, quite understandably, that you don't want to prejudice matters that are afoot, and I think that's entirely reasonable. Again, I'm not a lawyer, so I do have some questions I'd like to ask you. Please, if you believe that responding would be prejudicial—unless I think it's a stretch to make that claim—I won't require you to make a public interest immunity claim if you don't wish to answer. But are you able to answer who in your office is actually dealing with the prosecution of Mr Collaery?

Ms McNaughton: There are a number of officers that have some involvement with that matter, as well as some external counsel.

Senator McKIM: Is the lead counsel from your office or external?

Ms McNaughton: External. The lead barrister is external, yes.

Senator McKIM: But you have your own officers supporting that person?

Ms McNaughton: Correct.

Senator McKIM: Are you able to say who that person is?

Ms McNaughton: I have a number of people.

Senator McKIM: Sorry, who is the lead barrister?

Ms McNaughton: I'd have to double-check. I think it's Mr Maidment QC, but I'd need to triple-check that.

Senator McKIM: Mr Maidment was not the person you sought external advice from when you were considering whether or not to prosecute, was he?

Ms McNaughton: That's correct.

Senator McKIM: It's correct that he's not?

Ms McNaughton: That's correct that it was not.

Senator McKIM: Are you able to inform the committee about whether Mr Collaery is legally aided to view the full brief of evidence against him?
Ms McNaughton: I'm not aware of that. I don't know the answer to that.

Senator McKIM: Could you take that on notice?

Ms McNaughton: If I'm in a position to assist, I certainly would assist. We will take on notice to answer as far as we are able to. We don't always know the legal aid status of someone who is a defendant.

Senator McKIM: Understood. Again, I'm happy for you to take these on notice if you like. Are you aware of any restrictions on what Mr Collaery can or cannot advise his lawyers?

Ms McNaughton: No, I'm not aware of that detail. All I know is that it involves national security, the legislation, and various arrangements in relation to that—the National Security Information (Criminal and Civil Proceedings) Act 2004.

CHAIR: Senator McKim, you are almost at—

Senator McKIM: I'm nearly done, Chair. Perhaps you could take that on notice and provide any information you are able to on that, Ms McNaughton. If you're not or unable to then you can simply put that on notice. Have you or Mr Maidment or anyone assisting Mr Maidment from your office provided a harm statement to the court? Are you aware—

Ms McNaughton: In relation to Mr Collaery?

Senator McKIM: Yes.

Ms McNaughton: I'm not aware of that, no—not in relation to Mr Collaery, because Mr Collaery, as is on the public record, has pleaded not guilty.

Senator McKIM: What about in relation to Witness K?

Ms McNaughton: I understand that that is pending.

Senator McKIM: A harm statement is pending?

Ms McNaughton: Yes, if not already provided. But it's certainly imminent.

Senator McKIM: And that's because he's pleaded guilty?

Ms McNaughton: Correct—or has indicated a plea of guilty.

Senator McKIM: Sorry, thank you—indicated a plea of guilty. Are you aware of what the cost to the Commonwealth is so far of the prosecution of Mr Collaery and dealing with the matter of Witness K?

Ms McNaughton: Cost to the Commonwealth is a broad notion. Do you mean confined to my office and those I brief, or are you talking about the cost of the Commonwealth more generally?

Senator McKIM: I think it's only fair to ask you about your office and the people you brief.

Ms McNaughton: I'm not aware of the cost. Whilst I could add up any external counsel fees, I would somehow have to work out time in relation to internal people that have spent time on it, yes.

Senator McKIM: Wouldn't you normally keep that information in the CDPP office, in terms of time that people spend on particular cases?

Ms McNaughton: Up to a point, we do. We could work it out, probably. I'll just turn around to my finance people. Yes, We'd be able to work it out.
Senator McKIM: Would you provide that cost on notice?
Ms McNaughton: Yes.
Senator McKIM: For clarity, that was in regard to Witness K and Mr Collaery, but if you could provide them separately, that would be appreciated.
Ms McNaughton: Certainly.
Senator McKIM: Thank you.
CHAIR: Can I ask a question, Mr Secretary, just before we wrap up on this subject and this session? Is the policy rationale, for having a consent in place that's required to be obtained before a prosecution that has been recommended by the Commonwealth DPP is allowed to proceed, ultimately one providing additional scrutiny to a government that intends to proceed with a particular prosecution?
Ms Chidgey: Yes. I might just add that, in terms of the direction, in some ways it aligns the position for a number of those offences with a range of other offences, where there is a statutory requirement to obtain the Attorney's consent—a range of similar offences for which that is standard practice. The direction, in a way, brings the position for a few offences on the statute books that don't have that as a statutory requirement into line with other offences. And across the statute books there'd be around 50 or more offences in Commonwealth law for which the Attorney's consent is required. It is to enable a range of matters to be taken into account. Yes, it's not an uncommon practice for the Attorney to have that final say after it's gone through an investigative agency and the DPP has made its decisions to have that final check by the Attorney-General.
Mr Moraitis: For example, almost two years ago there was a consideration of new secrecy laws, and there was an express provision put into this effect that's in the spirit of this policy position.
CHAIR: I've made a note here that, at the time, Mr Dreyfus, the shadow Attorney-General, said in the context of that bill and the requirement being put in there:
I see that as an additional safeguard, and it’s something that’s been present in Australian criminal law. It’s been present in relation to the sabotage offences for many decades, it’s something that’s been present in relation to espionage offences for many decades.
A little bit later on he said:
That exposes the Attorney-General and the government to scrutiny. It makes the government accountable. Because we are here talking about something that is at the intersection between national security and our political processes of free debate in Australia, which has to be protected.
I found that interesting.

Thank you. I appreciate very much the evidence that has been put forward by officers for the Commonwealth Director of Public Prosecutions today. You are excused, and we will move on to the next session please. I call to the table officers of the Australian Human Rights Commission.

Australian Human Rights Commission

[14:24]
CHAIR: I welcome officers from the Australian Human Rights Commission. Thank you for joining us today. Would you like to make an opening statement before we go to questions?
Prof. Croucher: I will if I may, thank you. First of all, I'd like to welcome the new committee. As with previous committees, we'd like to extend an offer to provide briefings on any of the matters that we deal with. We've found that a helpful engagement with the committee in the past.

I thought, as it is a new committee, I'd give you a quick snapshot on the commission's work prior to going to questions. As the national human rights institution of nearly 40 years standing, the Australian Human Rights Commission plays a significant role both domestically within Australia but also within the Asia-Pacific region as well as internationally. Under our statutory mandate, the commission's work falls broadly into two areas. There is our longstanding complaint-handling role under federal discrimination law and the Australian Human Rights Commission Act, which is led by me as president, and there is also our policy, advocacy and education work, which is led by our commissioners.

Our commissioners, by way of example, are currently leading major projects, and I thought I'd just give an illustration of the kinds of projects that they are involved in. Our Sex Discrimination Commissioner, Ms Kate Jenkins, who is attending with me at the invitation of the committee today, is leading a national inquiry into sexual harassment in the workplace, which will report early next year. Our Human Rights Commissioner, Mr Ed Santow, is leading a major inquiry into human rights and the impact of new technology, which will shortly release a discussion paper to frame the second round of consultations. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Ms June Oscar AO, is leading the Wiyi Yani U Thangani project, amplifying the voices of Indigenous women and girls, and that is also to report early next year. Our National Children's Commissioner, Ms Megan Mitchell, who will be concluding her now seven-year term as Australia's first Children's Commissioner next year, will shortly release her seventh annual national children's report, which reflects on Australia's progress under the UN Convention on the Rights of the Child, following Australia's periodic review just recently in September.

Our new Disability Discrimination Commissioner, Dr Ben Gauntlett, is considering follow-up measures in relation to Australia's progress under the Convention on the Rights of Persons with Disabilities following Australia's appearance for its periodic review under that convention, also last month. The Age Discrimination Commissioner, the Hon. Dr Kay Patterson AO, is undertaking educational and implementation activities in relation to the National Plan to Respond to the Abuse of Older Australians, or elder abuse. Our Race Discrimination Commissioner, Mr Chin Tan, is conducting national consultations with members of the Australian Muslim community about their needs and experiences of discrimination, Islamophobia and hate speech, and their right to practise safely their religion, with a focus on building social cohesion. As president of the commission, I am leading the Free and Equal: An Australian Conversation on Human Rights project, which will provide a reform agenda for human rights in Australia by the middle of next year. That project is providing a coalescing focus for all the commissioners' work. I think that will provide you a quick snapshot overview of the range of work undertaken by the commissioners, but today it is just myself and the Sex Discrimination Commissioner with our chief executive, Padma Raman, to provide answers to any questions you might like to raise with us.

CHAIR: Thank you very much.
Senator SIEWERT: Thank you for that run down. One of the issues that I particularly wanted to go to is the project that June Oscar is leading, the Wiyi Yani U Thangani project. We've had ongoing reports from Ms Oscar, and I'm wondering when the report will be tabled.

Prof. Croucher: Thank you for your question. The report is being written up at the moment. As to the precise tabling date, that will be, as required under the act, within 15 sitting days of when it is provided. We anticipate early next year.

Senator SIEWERT: I probably should have reframed that. You can't tell me exactly when it's going to be tabled. My question was more: when it's going to be finalised? Because I understand it's a very, very significant piece of work, and I'm anticipating some very significant and important findings. I'm aware that it'll be a bit later, as I understand it, because of the significance of the project and the extent of the work.

Prof. Croucher: We're anticipating completion at the end of March. The tabling would flow from that time.

Senator SIEWERT: Can I just go to the work of Dr Patterson and the work that she's doing on elder abuse. I'm aware of some of that excellent work. Has Dr Patterson or the commission considered the issues around sexual abuse in aged care? I'm aware of some work that's being done there, but I'm not seeing it being picked up more broadly. There's a great deal of concern that, while elder abuse is now, rightly, getting addressed, the issues around sexual abuse, which I realise can be quite confronting in aged care, is an issue that, listening to some of the work that's going on, isn't getting the attention it requires.

Prof. Croucher: I would anticipate that matters such as that would be covered by the royal commission that is looking at aged care at the moment. I will need to corroborate with Dr Patterson's team on whether they have done specific work on the topic, but otherwise I think Dr Patterson has taken the approach of leaving the royal commission to do its work and that her work will be complementing the initiatives to get greater implementation of the recommendations in the Law Reform Commission's report on elder abuse.

Senator SIEWERT: Sorry, what was that?

Prof. Croucher: The Law Reform Commission's report on elder abuse, which I had the great privilege to lead in my last role. Dr Patterson has been most interested in ensuring as much implementation of the recommendations in that report gets done as she can during her term.

Senator SIEWERT: I realise that the royal commission is being undertaken at the moment, but we're not waiting for the royal commission to finish before we do other reforms in aged care. In fact, there is very active discussion around a whole lot of reforms going on, including more legislation introduced just last week, so I'm not sure why we're leaving sexual abuse to be addressed until the royal commission reports.

Prof. Croucher: I know from my knowledge of Dr Patterson's work that she has been focusing on some of the topics that perhaps don't get as much attention, like the risk of homelessness for older women—that's been a particular concern in her work—and addressing issues of stereotyping ageism problems. But I can certainly ask her team if they have done any specific work on that.

Senator SIEWERT: While I'm not taking away from those two very important issues at all, I would argue strongly that sexual abuse in aged care is something that is definitely not
getting the attention it deserves. Again, I appreciate it's a very tricky topic, but it's one that is not getting the attention it deserves. I'll ask again, why isn't that issue—given the importance of the other two issues—getting the attention it deserves?

**Prof. Croucher:** I think you raising it today gives it attention.

**Senator SIEWERT:** Thank you for that, but I want to know, where to from here. You've said you'll raise it with her team. Could you take it on notice?

**Prof. Croucher:** I'd be very happy to.

**Senator SIEWERT:** I appreciate it. I have one last question and then I'll hand over. I've raise this before, and I'm wondering if this has been raised with you again since I last asked. Have you had complaints, specifically about access to the disability support pension?

**Prof. Croucher:** I can't answer that off the top of my head, but I'll provide that response on notice as well.

**Senator SIEWERT:** If you could, and could you also take this on notice: the Australian Federation of Disability Organisations released a series of three reports on the DSP and the effectiveness, or the ineffectiveness, of the DSP as it relates to the extra cost of health for somebody living with a disability on both DSP and Newstart, and the issues around Aboriginal and Torres Strait Islander people and disability. The third one, for the minute, escapes my recollection, but there's a series of three very excellent reports. Have you or Doctor Patterson had a chance to look at those reports in terms of their impact on older Australians?

**Prof. Croucher:** Again, I'll have to consult her.

**Senator SIEWERT:** And there are also issues around women living with a disability. Could you also take on notice whether our new disability commissioner has had a chance to look at it yet.

**Prof. Croucher:** Certainly. I'll ascertain the answers with the relevant team.

**Senator SIEWERT:** Thank you very much.

**Senator KITCHING:** Professor Croucher, good to see you. Can I ask a couple of questions regarding Ms Christina Ryan, the CEO of the Disability Leadership Institute. I'm not sure whether you're aware that recently Ms Ryan visited Parliament House, on 17 September. She was handled by security staff in a way that made her feel very uncomfortable: her belongings were handled without her permission and she was asked to move clothing. I understand that Ms Ryan has previously made two complaints to the commission about the Department of Parliamentary Services. What are you able to tell me about those complaints?

**Prof. Croucher:** I'm not able to disclose anything.

**Senator KITCHING:** That is fair enough.

**Prof. Croucher:** We have strict—

**Senator KITCHING:** What about the dates of the complaints?

**Prof. Croucher:** I can't even provide that.

**Senator KITCHING:** Can you advise whether you've received any other complaints about the Department of Parliamentary Services?

**Prof. Croucher:** I certainly couldn't off the top of my head.
Senator KITCHING: That's fine.

Prof. Croucher: But those matters are also handled within the constraints of our confidentiality provisions.

Senator KITCHING: So you wouldn't be able to give the number of complaints where the Department of Parliamentary Services would be the respondent either?

Prof. Croucher: I can check to see whether we have received such complaints and whether I can give you a generalised response.

Senator KITCHING: That would be great; thank you. A media article which detailed this incident quoted the department as saying:

The department will ensure that if any shortcomings are identified they will be appropriately addressed. Is the commission aware of whether any shortcomings have been addressed?

Prof. Croucher: I can't discuss, nor do I have specific knowledge of, any particular matter to which you refer. What I will say is that, when complaints are handled through our processes, it is very often the outcome that we get systemic changes of the kind that you have described.

Senator KITCHING: Thank you. Does the commission provide, or does it suggest, cultural and sensitivity training for organisations, and are you aware of whether the Department of Parliamentary Services have completed any such training?

Prof. Croucher: We undertake a whole range of trainings, and certainly disability training is one of the highlights of the kinds of support work we can provide, but I'm not aware of any such training being given to the body you refer to.

Senator KITCHING: Okay. We'll put that on notice back to the department. You would also give training to organisations on how a visitor to Parliament House wearing religious garments should be treated, for example?

Prof. Croucher: Providing education training initiatives is part of the really good work that we can undertake, and we have done it regularly and continue to do so.

Senator KITCHING: I'll leave it there, but thank you very much for that.

Prof. Croucher: And maybe I could give you one illustration. One of the recent resources that we developed was 'How to have a conversation about racism'. It's an illustration of the kinds of support resources that we provide.

Senator KITCHING: Thank you, and thank you for the work you do.

Senator WATERS: I have a number of questions. Let's start off with the work that you've done about sexual assault on campus. I understand that the report was released in 2017, which I think was just a smidge before your time—correct me if I'm wrong. No? I'm in a time warp!

Anyway: on the 2017 report, which led to various recommendations—and I understand you wrote to universities earlier this year effectively to find out what's been done—can you give me an update on how they're tracking with acting on those recommendations?

Ms Jenkins: That report was released on 1 August 2017. I commenced in 2016, so time flies. It was the first major piece of work I completed in the role. Since that time—it's now more than two years—we have written at regular intervals to ask all 39 universities to update us on their progress, particularly against the nine recommendations we made towards the
universities. We've found that the universities have been very keen to respond to those requests, and we put their responses on our website. So, anyone who is interested to see the progress and the steps that have been taken can look at our website. I think originally we contacted them at three months then 12 months and then I think 18 months. I know that information is used by TEQSA, the Tertiary Education Quality and Standards Agency, and it has been taken quite seriously from universities. So, I'm very heartened and encouraged. I'm absolutely clear that this issue has not been resolved or solved, and I look forward to the next survey that will be done in the coming year to measure progress and that it be made publicly available. But there has been a lot of activity since that time, which I think really reinforces for the commission and for the public that having a really strong review based on data publicly available supports organisations to make positive progress on things like sexual assault and sexual harassment.

**Senator WATERS:** Indeed. That was a very important body of work. I can go and chase up some of those details. Thank you. But are you able to give me a distillation, in general terms, as to whether those recommendations are being acted upon and implemented? What's your rough assessment of the various responses the 39 unis have given?

**Ms Jenkins:** All universities accepted most of the recommendations, and most universities accepted all—if that makes sense. So we have seen a huge amount of momentum. If I go to the areas of the recommendations, one was about governance and leadership. Most universities have established specific groups within the university, led at a senior level of people who are tasked to implement the recommendations to report against them, including getting external advice. There were also recommendations about education and prevention, and I think you'll even have seen in the newspapers that a lot of universities have really improved their consent training and training for students in particular when they start on appropriate conduct.

There were also recommendations about responses. We observed that students generally didn't know where to respond and had difficulty getting the help they needed. So there has again been a lot of work done to review policies to ensure that the services available are appropriate. Some universities have partnered with sexual assault services to provide a more regular service to make sure that more support is available. The second-last area was measurement and transparency. When some of us ask for this information it is part of us taking the initiative, but we asked for universities to actually publicly report against how they were going and to do another survey, and that is planned for the next 12 months.

The last area of action was that we asked that all universities that had residential colleges conduct an independent review of those colleges. The statistics told us that, while something like seven per cent of students lived on university campus, 34 per cent of sexual assaults happened in residential locations. So what we identified was that they were a more high-risk area and our survey had not particularly targeted that information. Many universities have undertaken that review and most have publicly published the results. The commission did the review for the University of New England, but there are a number of other reports out. I think it's really helpful to be able to read those reports and understand the different drivers and what action has undertaken.

As a general comment, all of those areas have had action. I am very positive about it. I absolutely have been told by students and communities that universities have changed as a
result. From within universities, the thing I have been told—and I'm sure it's not true across the board—is that one of the biggest changes has been a better engagement with the student population, and also student services, with the leadership to collectively bring about change. Having said that, I absolutely expect that the next survey will still show us that we should be concerned about sexual harassment and sexual assault. We know it is a huge community-wide problem, and the stats tell us that groups of young people face a higher risk than the broader community. I absolutely would not say that this work is done, but I think the advocacy from people outside of universities has been really important to create the spotlight and the change that we are seeing. That spotlight continues, and I think it is warranted. I look forward to more action from the universities.

Senator WATERS: Thank you. That was a really useful summary. I will stick with that issue before we go to the detailed UNE report, which I'm also interested in. Are any of those nine recommendations pertaining to the unis being less acted on, or are any unis doing less than their comparators? Are there any real outliers that you think warrant special mention?

Ms Jenkins: No, I don't. I've seen a lot of work across the universities. There have been things that have been piloted at different universities that interest me to see—apps in some places restorative justice systems in others, and different partnerships. I wouldn't say there is one fabulous uni and I wouldn't say there are any that are terrible. I think they are all really conscious that this is an important issue that needs action. I could go through and provide you with some specifics, but, like the sexual harassment inquiry that I'm conducting, it worries me when we take an issue and then highlight one and say it is the particularly bad one. Actually, I think they all have a concern and I don't want anyone to say they are the good one or the bad one. I do think there are some excellent leaders who are really passionate about the topic. Even then, some of those universities aren't the best universities. So I'm hesitant to name anyone in particular for that reason.

Senator WATERS: That's fine. I think you've done that question justice. Would you mind providing on notice some more examples of some of the actions that have been adopted. I am interested in whether you think they could potentially have a broader application outside of the university context. Could these be useful mechanisms to tackle sexual harassment in other places? You mentioned the apps and the restorative justice. If you've got the time, it would be great to have a summation of all the different ways—pilots and things that have been trialled—and a reflection on whether you think there is a broader utility and a potentially broader application.

Can I take you now to the UNE report about the res colleges. You mentioned that a number of other universities had commissioned independent reports on this issue, but I think it is only UNE that has asked you to do the report.

Ms Jenkins: Yes.

Senator WATERS: Firstly, how many of those other res colleges have commissioned independent reports?

Ms Jenkins: I have known that at moments in time but, right now, I can't tell you exactly. I can come back to you and give you that number.

Senator WATERS: Okay. Thank you. Can you recall if it is the bulk of them or just a tiny fraction?
Ms Jenkins: There are quite a few. If there are 39 universities, I want to say it is more than 20—

Senator WATERS: So it's more than half?

Ms Jenkins: I do believe that. And I also do recognise that some universities really don't have residential colleges of the nature that that recommendation related to. So I wouldn't expect it of them.

Senator WATERS: Can you come back to me on notice with the relevant proportion of unis that have res colleges and how many have acted on that recommendation to undertake further research.

Ms Jenkins: Yes.

Senator WATERS: Coming now to the UNE review, what were the key findings?

Ms Jenkins: Off the top of my head—and remembering that I have done a whole lot of other work since that time—we still identified that sexual harassment and sexual assault did occur regularly. That was consistent with the previous survey, so the statistics didn't tell us that much difference. In particular, there was still a very gendered nature to the experience of sexual harassment and sexual assault. Whilst it certainly was experienced by men as well as women, it was predominantly women who experienced it and predominantly men who were the perpetrators. We identified that there were still issues about initiation ceremonies or hazing conduct, and that the service of alcohol was still an issue in relation to those things. We looked at things like the student support services out of hours, who were the lead students, and how well they were trained to be able to deal with disclosures or concerns as they arose. I am doing this off the top of my head. There are five or six key themes and the recommendations were steps that could be taken by all the colleges around those particular areas.

Senator WATERS: Broader application. Okay, that's good. Thank you. I will stick with sexual harassment. I find this area really interesting, so my apologies to everyone else for going on at length. The sexual harassment survey which you conducted last year—and I think that is the fourth time it's been done—found that 85 per cent of women have experienced sexual harassment in the workplace, which is a phenomenally large amount, yet only 17 per cent pursue complaints. I would like to hear what you think are the main barriers to women reporting sexual harassment in the workplace.

Ms Jenkins: As you know, Senator Waters, those results have been used for our national inquiry that is currently underway, where we are focusing very heavily on what can be done to assist with making people feel more comfortable to report and, more importantly, to prevent.

Senator WATERS: Good. And I have some questions on that soon, too.

Ms Jenkins: We have identified that only 17 per cent of people who experience sexual harassment complain. The statistic I use even more frequently than the statistic you have used—about 85 per cent—is that one in three Australian workers has been sexually harassed in the last five years. The reason I intentionally use that statistic is that I fear that people think sexual harassment is something that used to happen in the old days. Certainly, some of the media reporting—the one that got a lot of coverage in 2007 was Don Burke. If you are of an age, Don Burke is from a long time ago in the past. So quite often when I am talking about
this I do focus on the more recent sexual harassment. The stats are that 39 per cent of women and 26 per cent of men have been sexually harassed in the last five years. Again, as I said before, four in five of the harassers are men, both men and women are more likely to be harassed by a man and, in particular, young people are at the highest risk.

Those are some of the stats that that survey told us. Those results are really important, because most people think this is from the past. I'm often told, 'Surely, things are better?' I know these questions are coming up. Actually, we need to highlight that things are not better but we can do better. It has been consistent over the four surveys we've done since 2003 that reporting is very low. About 17 per cent is where it has stayed. It hasn't increased. Indeed, I would point out that that survey was done after the Me Too movement started. I don't foreshadow any huge increase in complains about sexual harassment because what I've heard from talking around the country is that women and men don't want to complain but they do want it to stop.

The fears about sexual harassment are: 'I won't be believed'; 'It's not serious enough for me to do anything about'—so it feels like it has to be much more physical or more serious—'Nothing will happen as a result'; 'I will suffer as a result' or 'I actually don't want to effect this person's career; I'd just like the conduct to change.' There are multiple reasons why people really say, 'I don't want to complain.' Some of it is about feeling like it's not serious enough, because the narrative is that you shouldn't complain unless it's really bad. I think, underneath it, from most of the conversations I had, it was about, 'I can't afford to lose my job,' and that's true for everyone everywhere. It feels too risky.

In lots of the thinking we're doing, we're still very interested in a victim-centric process, but also really focused on stopping the victims being the ones required to raise the issue and shifting the responsibility to employers to make sure that they're responsible to stop the sexual harassment, not waiting for someone to complain and seeing if they're prepared to have the courage and fortitude to survive a complaint process before action is taken.

**Senator WATERS:** What can be done by your office and indeed by workplaces to better breakdown the barriers that mitigate against people who are being targeted for speaking out?

**Ms Jenkins:** You would be aware that my office has been supported by government to do a large national inquiry on sexual harassment. Our focus right now is 100 per cent on identifying, as a country, how we can change this. We're part of a global conversation about sexual harassment, and we have done as well as the survey. We've got 460 submissions, we've had consultations right across the country in regional and metropolitan centres and we're currently in the throes of writing a significant report that we will launch early next year that goes to the key changes that we believe would make a difference in Australia. We know there is international interest.

I'll give you some headlines of the areas that we will be looking at. Firstly, we've identified that we could make some changes, definitely, on awareness and education right across our community. It's surprising how poorly educated people are on sexual harassment now. Secondly, we're looking at how the laws interact. We have the Sex Discrimination Act. We also have workplace laws and safety laws that have a role to play. We are looking really hard at how they can be strengthened to help prevent sexual harassment. Lastly, we're looking at the role in workplaces of what employers are doing and how they should do it differently. As I describe all that, we've had uniform interest and positive response to what we're trying to do.
It's no longer this view that you're just being difficult. We have definitely heard from government. There's an interest from employers and employees in unions. We feel it's the right time, and we hope—I really hope—that there'll be real traction when that report comes out and that it's really significant and the most substantial piece of work on this topic since the Sex Discrimination Act started.

**Senator WATERS:** Well done. I wish you all the best with the report. Chair, I've got two other really small blocks I could probably knock off in a couple of minutes. I'm sorry I've taken so long.

**CHAIR:** I want to facilitate you being able to go to other committees if you wish, but I'm conscious that I need to share the call around. Labor senators, are you troubled if I—

**Senator KIM CARR:** How about 10 minutes on the Human Rights Commission? I did indicate to you earlier today that we would do our best to get things back on track. To those who are listening in: I will certainly be seeking to put on notice questions to the Inspector-General of Intelligence and Security, the Australian Commission for Law Enforcement Integrity and the office of the Ombudsman so that we can just move this along a bit.

**CHAIR:** Okay. Crossbench senators, I guess, will need to—

**Senator KIM CARR:** I understand that, but it's just to advise other committee members that my intention is to push this at a greater speed.

**CHAIR:** So you've got about 10 minutes here. I've got a few questions here—

**Senator KIM CARR:** Yes, I've got about 10 minutes.

**CHAIR:** Senator Steele-John?

**Senator STEELE-JOHN:** Yes, I've got about 10 or 15 minutes worth of questions.

**CHAIR:** In this context, and given that most of the time in this session has been occupied, without judgement of course, by Greens senators, I'll let you finish, Senator Waters, and then we'll go to Senator Carr.

**Senator WATERS:** Thank you, Chair, and thanks everybody else for your patience. I have a few quick questions on some other topics, Ms Jenkins. Firstly, equal remuneration orders. I understand that various folks can apply for those, including yourself. My question is: have you ever had cause to do so?

**Ms Jenkins:** No, I haven't had cause in my term—

**Senator WATERS:** On behalf of others, of course, not on behalf of yourself—I would hope.

**Ms Jenkins:** No.

**Senator WATERS:** I understand that section 13 of the federal act provides that it doesn't apply to state government agencies because obviously the state laws do, but some of those state laws have got quite restrictive caps on available compensation. Do you keep a record of how many complaints you receive that you can't deal with because of that section 13?

**Prof. Croucher:** May I take that? We could check to see whether that has come up, just as a general matter.

**Senator WATERS:** Okay.
Prof. Croucher: The issue of the relationship of the federal legislation to state legislation is one of the topics that we've included in our discussion paper on federal discrimination law reform.

Senator WATERS: Okay. I'm not across the paper. Has that one been put out already?

Prof. Croucher: Yes; that's part of the national conversation project that I mentioned in my opening remarks.

Senator WATERS: Okay; I didn't quite clock that. I think it's an important topic. Would you mind taking on notice how many folk you have had to say to, by virtue of section 13, 'go elsewhere'?

Prof. Croucher: We may be able to provide a generalised answer to that question.

Senator WATERS: Thank you. And I'll certainly take a look at that discussion paper. An ANAO report has previously recommended that those state based compensation caps be removed. I'm wondering if your office has undertaken any advocacy in that regard.

Ms Jenkins: This question did come up in the national inquiry, and we have considered it. Generally speaking, it's a state jurisdiction and so it's not something we would be involved with, but we have given it some consideration for the national inquiry.

Senator WATERS: All right. Thank you so much for your time, and keep up the good work. Thank you, Chair, for your indulgence.

Senator KIM CARR: I thank you for your opening statement, where you outlined the priorities for the commission, but can I draw your attention to the question of resourcing. Do you have any concerns about the level of resourcing that the commission has to actually meet your work plans?

Prof. Croucher: Resourcing is something that we always welcome. There are as many human rights projects as we could do.

Senator KIM CARR: Yes, I know, and, in one sense, if you ask a public servant, 'Do you have enough money?' there can only be one answer. I asked this in all seriousness, and I want to speak specifically here about the National Anti-Racism Strategy. I don't think you mentioned that in your list, so what's happened to that?

Prof. Croucher: That's still ongoing. What I did in my opening remarks, Senator, was I singled out an example of each commissioner's work, and that, particularly for the Race Discrimination Commissioner, is something that he's developed as a different aspect, as a signature aspect of his early work. The resourcing for commissioners is always an ongoing question, but we have such conversations sensibly with the department.

Senator KIM CARR: Let me come back to this question. The Anti-Racism Strategy was launched in August 2012. It was to run for three years. In 2015 it was extended for a further three years. That has obviously expired, so what's happened to it?

Prof. Croucher: We've absorbed it into our current work plan. It's continuing, but the extent to which programs can be sustained or expanded will go back, always, to a resourcing question.

Senator KIM CARR: All right; so you're saying it's absorbed by other programs. 'Absorbed'—is that a fair description?
Prof. Croucher: The resources that are available have to be absorbed within the commission's resources.

Senator KIM CARR: How much did it cost?

Prof. Croucher: I can't give you that answer off the top of my head.

Senator KIM CARR: You will take that on notice, please.

Prof. Croucher: I certainly can do that.

Senator KIM CARR: So what anti-racism programs are being run?

Prof. Croucher: I mentioned, in response to a question from Senator Kitching, that the commission developed some resources in relation to how to have a conversation about racism. They were produced at the same time as the screening of *The Final Quarter*, the movie concerning Adam Goodes, was released. The commission saw developing those resources as a sensible contribution to anti-racism strategies. The series of conversations that Chin Tan is holding with Muslim communities are a part of that building of social cohesion, as one of the arms for combating racism is to build a sense of cohesion in communities.

Senator KIM CARR: We have an awful tendency in this country, when we talk about these things, to mention Islamic issues; however, the reality is, as ASIO has identified in its annual report, that it's right-wing extremists and extremist groups and Neo-Fascist groups that have been most active in these areas. In terms of racism, it's been white supremacist groups, not Islamic groups. The recent actions in New Zealand, which were actually undertaken by an Australian, if my memory serves me correctly, demonstrated that it was these types of fascist organisations that were of greatest threat. ASIO is making this point too, even belatedly. So to what extent do you think that the failure to act on these anti-racism issues actually poses a serious threat to national security?

Prof. Croucher: I will answer that by pointing to the fact that these issues are of concern. The rise of the far Right extremist propaganda and other related activities are of concern to our Race Discrimination Commissioner. His particular concern with Muslim communities arose in the wake of the Christchurch mosque killings. It was a strategy that he embarked upon that was prompted by those killings, but it is certainly a matter of great concern to him. This is his first year in the role, and he is developing a range of programs and possibilities that can address such concerns as the ones that you've raised.

Senator KIM CARR: But I want to emphasise this point to you; I want to labour this point. Duncan Lewis, in ASIO's 2019-20 annual report, said:

The recent tragic events in Christchurch, New Zealand, earlier this year have brought the right-wing extremist threat back into focus. This threat is not something new, but current extreme right-wing networks are better organised and more sophisticated than those of the past.

He continues:

The threat from the extreme right wing in Australia has increased in recent years. Extreme right-wing groups in Australia are more cohesive and organised than they have been over previous years, and will remain an enduring threat. Any future extreme right-wing-inspired attack in Australia would most likely be low capability and conducted by a lone actor or small group, although a sophisticated weapons attack is possible.
So I say to you: there is a serious issue that does affect national security questions, sufficiently serious for ASIO to pick it up. My question to the Human Rights Commission is: don't you have a responsibility to pick this up as well?

Prof. Croucher: I share your concerns, as does the Race Discrimination Commissioner.

Senator KIM CARR: And that means that resourcing has to be provided. You can't just absorb these questions.

Prof. Croucher: Indeed. And, as with the national inquiry on sexual harassment in the workplace, that has been supported by government funding. A range of our initiatives—we can do more with sensible partnerships, and we welcome them.

CHAIR: What part of the statute that establishes your agency says that your organisation has a responsibility insofar as there is that contact with national security?

Prof. Croucher: The language of the statute is very generalised. The role of each of the commissioners is very generalised in terms of advocacy in the areas that sit within it. The commission works within the framework of international treaty commitments that Australia has signed up to over nearly 50 years now. So it is a general concern. It's not a specific one but a general concern with matters that go to the individual human rights of everyone in this country.

CHAIR: Are you briefed or do you get access to the national security information that would be needed to be able to make informed policy decisions about how we adapt to this problem?

Prof. Croucher: Not specifically, but when matters arise of a parliamentary nature, we are always there putting in a submission and drawing human rights concerns that such legislation may raise.

CHAIR: I interrupted you, Senator Carr. I beg your pardon.

Senator KIM CARR: I want to ask about a matter that is, I think, parallel—that is the issue around the Your Right to Know campaign, which has been launched by media organisations over the weekend. Can you outline, just briefly, the status of the freedom of political communication rights in Australia and how it intersects with other rights?

Prof. Croucher: I can give you an answer on that question. The freedom of political communication is one that is implied in our constitutional fabric. So, in that sense, it's part of our common law and our constitutional interpretation. It invokes a proportionality approach, which is a familiar approach in international human rights jurisprudence as well. It is a key area on which the commission has paid attention. We have been granted leave to intervene on a number of matters that raise freedom of political communication, most recently the Banerjee matter in which we were intervening as an amicus of the court. Is that a sufficient answer to your question?

Senator KIM CARR: I wanted to be clear that you have this on your radar. In terms of freedom of political communication that you've described, that has quite clear implications for our democratic system. It's somewhat opaque, given that we don't have a formalised bill of rights type approach. A lot of this is through implied rights. What work does the Human Rights Commission undertake with journalists and news organisations in terms of their
capacity and journalists’ capacity to investigate matters that might be regarded as the capacity to report on the work of governments?

Prof. Croucher: I’m not entirely sure where that question is going.

Senator KIM CARR: Where is it going? Have you had any involvement at all in the Your Right to Know campaign?

Prof. Croucher: I’m aware of it both in my previous role in law reform where a range of—

Senator KIM CARR: Has the Human Rights Commission had any role?

Prof. Croucher: Not directly. We are involved in the kinds of matters that the Your Right to Know campaign may be involved in, because where they do give rise to important matters of human rights, we are there.

Senator KIM CARR: Recently there have been studies undertaken of Australia’s comparative position in regard to democratic rights. At the centre down here at the Museum of Democracy, there are various approaches that have been indicated. Australia has slipped from 21st in the world in the 2019 world press freedom index quite dramatically in terms of a whole range of indicators. Are you familiar with any of those studies about our position internationally when it comes to democratic rights?

Prof. Croucher: Yes, indeed. And we provided the opportunity for people to be involved in such conversations through the national conversation project I mentioned in my opening marks. One of the key papers we have released goes to a positive framing of rights in Australia, in which it is put that, clearly, an Australian bill of rights or some sort of charter holds the strongest possibility of bringing freedom of speech into a positive legislative framework, rather than relying on the constitutional implied right to freedom of political communication. And there’s a whole range of ways in that where that whole approach of having a positive framing of rights, that starts with the decision-making processes themselves and works through the parliamentary processes and even into the way the decisions are made in court, is a great opportunity. I think right now the time is really ripe for having those conversations about how we improve the way that freedom of speech, press freedom and those matters are balanced in a way that respects national security concerns but also provides the opportunity to have the arguments from a free speech standpoint.

Senator KIM CARR: Has the commission a concern about the growing sense of the culture of secrecy across Commonwealth agencies?

Prof. Croucher: The inquiry that I led in my law reform role was precisely on secrecy, and in that law reform role we made a whole raft of recommendations for changing the way that secrecy provisions, particularly the one in the Crimes Act, are framed. Indeed, it was heartening to see some response to that even last year, with an amendment to the Crimes Act provisions, which were, in very broad terms, about the secrecy provisions imposed in relation to Commonwealth information.

Senator KIM CARR: But have you detected a trend towards less compliance with FOI laws, for instance?

Prof. Croucher: I can’t make an observation about that. The concern about the way that national security can be used, even in a bipartisan way, to intrude upon rights without proper
safeguards and counterbalances is a matter that the commission always draws attention to in
the submissions that we make in relation to particular bills.

Senator KIM CARR: There's also the question of compliance with international human
rights conventions. That's a matter that's been before this the parliament on numerous
occasions. You've put views on that matter.

Prof. Croucher: Indeed. That's the whole framework of the interventions we make in
parliament in relation to bills that are before parliament or parliamentary inquiries. The
framing, in terms of our statutory mandate, is to draw to the attention of parliament where
international human rights obligations would suggest a different framing of the laws.

Senator STEELE-JOHN: I do not believe we have Dr Ben Gauntlett with us this
afternoon—do we?

Prof. Croucher: No, he was not called.

Senator STEELE-JOHN: Would you mind if I put some questions to yourself in your
role?

Prof. Croucher: I'd welcome any questions you would like to put and I will answer to the
best of my ability.

Senator STEELE-JOHN: And if you can't answer them, I'm more than happy to place
them on notice for Mr Gauntlett to respond to.

Prof. Croucher: We'll take them on notice.

Senator STEELE-JOHN: Since he took up his role in the commission, Dr Gauntlett has
published two articles on the AHRC website summarising an analysis of the government's
presentation to the 22nd session of the Committee on the Rights of Persons with Disabilities
that recently concluded in Geneva. The articles flag concerns specifically in relation to the
continued practice of forced sterilisation of disabled people here in Australia. I've got some
particular quotes from Dr Gauntlett speaking to the nature of those concerns. I'm wondering
whether the commission is conducting any further work, research analysis, around the
practice of forced sterilisation in relation to disabled people here in Australia.

Prof. Croucher: As you alluded to, Dr Gauntlett is the newest of our commissioners in
the role, and he's had a very busy early period by virtue of the fact that he had to lead our
appearance before the committee last month, so it's been very rapid. In his first year, he will
be evolving, developing, the program that he will land on, and I am sure that his work will be
informed by the sorts of matters that he drew the committee's attention to, but the particular
areas that Dr Gauntlett seeks to pursue we will explore with him over the next few months.

Senator STEELE-JOHN: Fantastic. As a follow-up to that: a Mr Andrew Walter, a First
Assistant Secretary from the Attorney-General's Department, made quite a few contributions
on behalf of the Australian delegation in relation to this matter; at one point he contributed
that the cessation of a disabled woman's menstrual cycle would take place when it is in her
best interests and would be seen as the only reasonable and practical way of dealing with the
social, sanitary or other problems associated with menstruation. I'm just wondering whether
the commission, in any way, shape or form, had input, or contact with Mr Walter, or indeed
anyone else in relation to the delegation, before he made that contribution on behalf of
Australia?
Prof. Croucher: No.

Senator STEELE-JOHN: No, you don't think they did, or—

Prof. Croucher: We don't know. We'd have to—

Senator STEELE-JOHN: You didn't engage with the delegation?

Prof. Croucher: We'd have to take that as a specific question that I would consult him on.

Senator STEELE-JOHN: All right. Thank you. I'm trying to frame this in a way that doesn't actually solicit a personal opinion. As to forced sterilisation—and I think we have been told now by the Committee on the Rights of the Child, the CEDAW and the United Nations High Commissioner to Australia, who have made the point continually that Australia is a state party to the convention and has an obligation, regardless of a view of the devolution of powers to states, to have laws in relation to the prohibition of forced sterilisation—is it still the commission's position that this is a piece of implementing legislation that the Australian government should pursue?

Prof. Croucher: The issue continues to be of concern to the commission, as was raised during the course of our appearance before the UN committee. The best mechanism for that, whether it's federal or a combination of federal and state laws, is a matter that would need to be considered. But, in terms of the issue, the issue most certainly is one of concern.

Senator STEELE-JOHN: I just might ask a follow-up question of the minister, in your capacity as leader of the Office for Women. Could you let me know whether your office has undertaken any work in relation to the intersections of women and disabled women and reproductive rights, particularly in relation to forced sterilisation?

Senator Payne: I'm not sure if the office specifically has. I'd be very happy to take that up with the director, of course. I did have a very interesting discussion—if I may just elucidate slightly—

Senator STEELE-JOHN: Yes.

Senator Payne: with Carolyn Frohmader as the Executive Director—I believe that is her title—

Senator STEELE-JOHN: Yes, indeed.

Senator Payne: of Women with Disabilities Australia, who attended a roundtable that I held in Hobart about two weeks ago of peak women's organisations, key women's organisations, in Tasmania. That was certainly an issue she raised at the roundtable, and the Office for Women convene or bring together those roundtables for me, so it is a matter which has been placed on our agenda in that context.

Senator STEELE-JOHN: Wonderful. I don't know whether this might be slightly pre-emptive, but is it your intention to advance this issue with the Attorney-General's Department as to whether there is more we could do?

Senator Payne: I think that is slightly pre-emptive, but I appreciate you raising it and certainly note your interest.

Senator STEELE-JOHN: Thank you very much. That will do me.

CHAIR: Thank you very much, Senator Steele-John. Senator Chisholm, are you waiting to ask questions?
Senator CHISHOLM: No.

CHAIR: You're ready for the next session? That is good. I might ask a few questions, unless coalition senators had something to raise? Okay. I'll apply the same standard.

Senator KIM CARR: Chair, I've put questions on for the Inspector General, if we want to move—

CHAIR: We can put them on notice.

Senator KIM CARR: We will?

CHAIR: Yes. Okay.

Senator KIM CARR: Are we—

CHAIR: I'd like to ask a few questions, and then—

Senator KIM CARR: It is up to you. I just sought your guidance on where we want to go for the next section.

CHAIR: Senator Chisholm, you're not wanting the IGIS?

Senator CHISHOLM: No, I'm for the Information Commissioner.

CHAIR: Let's just give Senator Patrick's office an opportunity to respond, because he may have an interest, and then, as soon as we've got confirmation there—

Senator KIM CARR: We've given them plenty of notice.

CHAIR: That's true. I agree. I just wouldn't want to be accused of unfairness. We'll give him that moment and then, with a bit of luck, we'll be able to send those officers on their way too.

I wanted to ask a question of Ms Jenkins in the context of some of the questions that were asked a little bit earlier by Senator Waters about recent reports that have been produced in the context of universities trying to do all they can to eradicate sexual assault and harassment—a cause which is of course very worthy; I wouldn't want my questions to be regarded as suggesting anything but that. What I wanted to ask, though, is: have you read the report that TEQSA has prepared called, Report to the Minister for Education: higher education sector response to the issue of sexual assault and sexual harassment?

Ms Jenkins: Is that the one from January this year?

CHAIR: Yes, that's the one.

Ms Jenkins: Yes.

CHAIR: Has it factored into the work that you've been doing, or did you work with TEQSA in helping them prepare that?

Ms Jenkins: It was the other way round. The information in that report was taken from our website.

CHAIR: So it was about implementing your work in a practical sense?

Ms Jenkins: That's right.

CHAIR: On page 8 of that report, there's a section about what the appropriate procedures are for responding to somebody who makes an allegation that they have experienced this kind of conduct. It quite rightly goes through a whole lot of steps to take to protect the wellbeing of a person who's making an allegation of experiencing that kind of harm—how you care for
their safety, how you make sure that they get access to security and so forth. All of that makes sense to me. What concerns me about the report, though, is that there's no section that provides for the proper way of investigating these types of concerns in a way that both protects the rights of the person making the allegation and also ensures appropriate standards of proof and natural justice to make sure that findings have an intellectual rigour that means they are respected and to make sure that we are getting these calls right—that we're not badging somebody unfairly or in circumstances where there's insufficient evidence of wrongdoing. Did that aspect—the investigatory and university-discipline-and-enforcement aspect—come into your work, which led into the TEQSA report?

Ms Jenkins: I can't speak on behalf of TEQSA.

CHAIR: That's okay.

Ms Jenkins: How the system works is that they're the agency that considers the university as part of the government relationship. At the point that we did our research, TEQSA had not particularly focused on sexual harassment and sexual assault in universities. So, when it was looking at its funding model and whether the universities met the standards that they might set, this was not one of the factors that was a high priority. I'm not sure where it sat. So your concern about TEQSA I can't answer.

CHAIR: That's okay. I'm more interested in the underlying work you did that fed into TEQSA's work.

Ms Jenkins: And the question is a really good one. If I combine the university work with the workplace sexual harassment inquiry, the same issues apply, even though the university work was focused on students. What did come up through the university survey and the submission process—we got over 1,800 submissions—was the frustration about the responses by universities, including investigations. Primarily the complaints were from people who'd made complaints, but we also know of and had heard of fears about a lack of natural justice and how the response was dealt with. Our recommendations broadly were: when it was about responses, it included what is an appropriate and safe way, but it wasn't simply a victim focus; it was also about how you handle complaints and bring them to a conclusion.

So my comment to you would be: what you've raised is absolutely a serious concern. Historically, with corporates—and universities are no different—when a complaint of this type comes up, it goes into the hands of lawyers. I think a few people here would be supportive of lawyers, including the chair, but actually what we've heard through the inquiry is that it then spirals into a major adversarial, major investigation. So what I've heard is that the victims find that very stressful and the people accused find it very stressful and it feels like it's not fair, and the organisations find that it takes up their resources and it spirals out of control.

So some of what I would say in response to what you're saying—and the Human Rights Commission has over time really given guidance on how you deal with complaints, recognising our industrial laws and unfair dismissal laws and all those things—is that we need a new model that doesn't go straight from, 'Here's an issue' to, 'Can we sack this person?' It goes towards misconduct rather than resolving. So part of my answer to you is: I don't think it's as simple as saying we need better legal processes to make sure it works out that you get
the right outcome. Still seeking justice, what you're looking for is an appropriate response that doesn't do more harm than good and a proportionate response to the nature of the issue.

In terms of the report from TEQSA, their focus, which I really welcome, is to be another voice saying, 'Universities, we're watching. We care what you're doing.' But this conversation—and generally I know universities have historically had quite a legal response. I don't think a more legal response is necessarily actually the objective, but an understanding of what the different responses are. But keeping the fairness and natural justice and the focus on the welfare of everyone continues to be important.

**CHAIR:** I accept what you've got to say about it being fraught. It's a really, really hard issue to get right. You're also right to say one size doesn't necessarily always fit all. There will be some things that are smaller and I guess reconcilable in a simpler way, and a bit of a spectrum to ones that might necessitate a legalistic approach. Though, if I were to observe the approach of universities so far, I'd probably make the opposite observation—that is to say, it hasn't been legally rigorous enough in many ways. There has been, in many ways, a well-meaning attempt to approach it pastorally in relation to victims, but in circumstances where a person who faces an allegation can face consequences that rival the consequences of a criminal prosecution, in the sense that they would lose their reputation, lose their ability to join whatever profession they're training for, potentially lose their ability to get a degree, lose their ability to earn an income—these are all really big consequences. And at the moment we've got a system where these things aren't being determined beyond reasonable doubt. In many cases they're not even clearly being determined on the balance of probabilities. There's no requirement for adducing evidence and no opportunity provided for a person to clearly have a right to contest the evidence against them by calling witnesses of their own. I could go for a long time about a number of the concerns that I've got.

Most universities seem to do a fairly good job of giving notice of the adverse case against a person who's accused, and they make something of an effort to allow a person to reply to the adverse case, though the execution is a little mixed. But, even in a civil case, where you're dealing with a really serious allegation, the Briginshaw standard says that the more serious the allegation is, the higher the standard to which you've got to prove it, and we don't have that operating in universities at the moment either. We don't seem to have a clear presumption of innocence. Indeed, much of the pastoral approach that's being adopted means it's probably the opposite—again, not in an ill-intentioned way but just as a consequence of an attempt to be as helpful as is possible to people who have experienced terrible things. There's no general right of appeal in most cases. There's no right to be legally represented when being interviewed for these sorts of things. And there is no internal independence of process by which a person is dealt with according to these procedures.

With that in mind, what do you think is necessary to ensure that we get the balance right in ensuring we are dealing with incidents sensitively and seriously, because they can't be trivialised, whilst at the same time protecting the rights of people who are unfairly accused or for whom the evidence might take a different colour to the form in which it's alleged?

**Ms Jenkins:** My comment would be that I've just spent 18 months on a national inquiry considering this, and I don't for one minute suggest that there isn't an important role for a proper process that should be fair to everyone. So I take on board your comments. I also take on board that the majority of people never raise complaints, including victims of sexual
assault. I would say that, broadly, the system isn't working for most people, whichever side of this equation they're on, and that it has been really important. The national inquiry, in terms of the workplace, does have a section asking, 'What would be lower-level options, but, if it's serious enough, what is an appropriate response?' I think that would go to your concerns.

It has definitely come up in the conversations. Having been an employment lawyer for 20 years, I do know that it feels like it's got worse and worse over time, rather than better and better. I don't think that was anyone's intent, so I think now is a good time to reconsider.

My response is: I hear what you're saying in terms of the concerns. I've come from the point of being a very committed employment lawyer to realising that sometimes going more legal actually hasn't helped us. But that's not to say you absolutely shouldn't recognise everyone's rights in those processes. It really does bother me, actually, that the public reputational damage harms everyone disproportionally to the incident. I hope I can help change that narrative and that conversation.

CHAIR: The work you're doing now is looking closely at how to resolve these matters?

Ms Jenkins: Yes.

CHAIR: That's very encouraging!

Ms Jenkins: Thank you.

CHAIR: Senator Henderson, do you have a follow-up question?

Senator HENDERSON: Thank you, Chair. It's not so much a follow-up question; I just wanted to ask the president a question on another matter. Are you happy if I proceed?

CHAIR: Yes.

Senator HENDERSON: Thank you. Professor, I would just like to ask you about the work of Dr Kay Patterson, particularly her work concerning the risk of homelessness in older women. In raising this issue, I'm talking about women who are 55 years and older being the fastest-growing cohort of homeless Australians, increasing by 31 per cent between 2011 and 2016. In recognition of this trend and the increasing concern—it's something I raised in my first speech, in fact, in the parliament last week, and I was also very concerned about this as the former Assistant Minister for Housing—how seriously do you regard this issue? What do you believe the solutions are? And what sort of focus do you have on this issue?

Obviously, I note that Dr Patterson is not here today. I would have liked to ask her this question directly, but if you could give me a bit of an overview that would be very much appreciated.

Prof. Croucher: I'm very happy to. It is a concern that Dr Patterson, as a key one in her portfolio, has undertaken a range of initiatives with retirement villages. She's had conversations in places that you may not have expected. I think that perhaps the best way of responding is firstly to say it's a matter of real concern. It is something that Dr Patterson has identified not as a sleeper issue but as one of the issues that can be invisible, but is still a real issue. I suggest that she provide you with a briefing personally in relation to the work that she's been undertaking in that area.

Senator HENDERSON: I had certainly been speaking to Dr Patterson in my previous role, but I just wanted to get an update from you today.

Prof. Croucher: Yes.
Senator HENDERSON: But, thank you, I'll take up that opportunity. Could you provide on notice an overview of her work in that regard? I would be really grateful.

Prof. Croucher: Certainly, we'll provide you with that.

Senator HENDERSON: Could I ask one follow-up question. Ms Jenkins—this was raised in passing, and I accept that—you made a reference to Don Burke and what happens in circumstances where people are subjected to sexual harassment on quite a historical basis. I want to ask you to clarify that comment, recognising that people in the workplace have been subjected to serious harassment over a long period of time—and, also, that gives rise to all sorts of issues of fairness and justice in the way in which these allegations are aired. I want to ask you to clarify that, because, as we obviously understand, alleged conduct which may have happened a long time ago isn't any less serious.

Ms Jenkins: That's right. This issue has come up in the sexual harassment national inquiry. As I said, I conducted 60 consultations around the country. I spoke to people who attended those who experienced sexual harassment five, 10, 15 or 20 years ago, and they spoke to me as if it was yesterday. More devastatingly, they were able to articulate the long-term impacts of that experience. The first thing I will say is: it's become really evident to me that even if sexual harassment is resolved, even if it's settled, it can still leave people unable to get jobs in the industry they want to work in, unable to progress in the way they want to, and affected in the long term. That has come up strongly in the inquiry.

To your question: I guess I am anticipating some of that conversation. Part of the reason why the national inquiry is really helpful right now is, first and foremost, to some degree the Me Too conversation that is referenced. It was started out of the US with high-profile media personalities. The question in Australia is: is this a media problem or is this an issue that we need to do better on? The answer is: it's an issue. We've looked at the economic cost of sexual harassment. When we produce our report there will be, for the first time globally, some information on the cost of sexual harassment to individuals and business as well as to the economy.

One of the things that might go to your question is: if I talk about sexual harassment, not sexual assault—so assuming those legal rights continue—it is very clear that, for sexual harassment from a long time ago, the laws don't continue; you don't have a right of action. So one of the questions that is challenging me but I don't have a settled view on yet is: what options do those people have to seek support or help, even if they can't prosecute something that happened a long time ago in the past because of fairness to the parties? That has come up a lot. It is something that is challenging me, and I'm trying to consider how we can offer a solution. One of the things that has happened in this country and internationally is, in the absence of other avenues, people have sometimes turned to the media. That is when we end up with a conversation in the media, which isn't the same as a complaint to the Human Rights Commission. So I'm mindful of that challenge and that issue, but we haven't had the same outpouring of media on issues of sexual harassment in Australia as in other countries.

Senator HENDERSON: Taking up the point that the chair raised—and I'm not reflecting on any individual whatsoever, including the person whose name has just been raised—what is the commission doing in relation to allegations that are raised whereby the person does not have an appropriate opportunity to defend himself or herself? Obviously, if serious allegations are raised in this context—including in the work you're doing—and there is not an appropriate
opportunity to have those allegations tested, that can lead to profound damage also. How do you strike the right balance, including in the context of the inquiry you are running?

Ms Jenkins: The current context is that the Sex Discrimination Act prohibits sexual harassment in certain public spaces—employment, provision of goods and services, and education. If someone experiences sexual harassment in those contexts, they can come to the Human Rights Commission and it's dealt with through our processes. If they don't come to us and they go to the media, that's not a matter that involves us. But I have been considering that and the silencing effect of that process both for individuals and for the people accused.

Senator HENDERSON: What is the result of your considerations?

Ms Jenkins: The national inquiry will be released in February. I'm still considering those matters.

Senator HENDERSON: You don't have any preliminary thoughts in relation to trying to strike that balance?

Ms Jenkins: In terms of the Human Rights Commission and our laws, currently the sexual harassment laws are as they are. We are considering what might happen with the recommendations in relation to that. But this is a global conversation about both silence and publicity, and how you balance transparency as well as confidentiality. So yes, I haven't come to a concluded view.

CHAIR: We're just going to have to sit tight, Senator Henderson, aren't we?

Senator HENDERSON: Thank you very much, Ms Jenkins.

CHAIR: Thank you very much to officers of the Australian Human Rights Commission. We appreciate your assistance today, and you are excused.

Inspector-General of Intelligence and Security

[15:46]

CHAIR: I welcome to the table officers of the Inspector-General of Intelligence and Security. Thank you very much for making yourself available for members of the committee to ask questions. Would you like to make an opening statement before we go to questions?

Ms Stone: Not today, no thank you.

CHAIR: Thank you very much. Senator Patrick, you have the call.

Senator PATRICK: Welcome, Justice Stone. It's always good to see you at estimates. In the absence of an annual report—I'm correct that your report hasn't been tabled?

Ms Stone: It was tabled yesterday, actually.

Senator PATRICK: Was it? I've missed out on that somehow. I normally google it every morning when I get up.

CHAIR: You can be forgiven; you're only one day behind!

Senator PATRICK: The minister and I are alike. I notice, Minister, you don't read poetry like Senator Brandis; you actually work at the table.

Senator Payne: You'd be surprised how creative DFAT can be, Senator!
Senator PATRICK: If I were to have read this report, would I have found any anomalies or concerns in relation to any inquiries that have been undertaken with some adverse findings or any complaints that would give rise to a concern?

Ms Stone: You would find details of inquiries we have done. I don't think you'd find any anomalies, but there are details of inquiries we have done there.

Senator PATRICK: I seem to recall last year some of the inquiries led to findings where matters hadn't been performed properly. In some senses, the whole purpose of you existing is to make sure you do find these things if they are occurring.

Ms Stone: Sorry, I didn't quite understand your question. Inquiries usually follow inspections, or they can be of my own motion, or they can be at the request of a minister. We occasionally do what I might call maintenance inquiries into the assessment agencies just to make sure—we've no reason to think anything is wrong, but we will have a look at whether analytic integrity is being maintained, that they are not subject to pressure and so on. Other inquiries generally arise when a problem has presented itself and we want to enquire more deeply into it. Generally we will find some things that didn't go quite right there. Sometimes we'll find things that went badly wrong, and we look at them and address them and we work out how that happened and we make recommendations. I can say that to date all our recommendations have been accepted by the agencies concerned. In fact, sometimes those recommendations are anticipated, so by the time we get to the end of the inquiry, part of what we would recommend has been partially implemented. Other than that, we will put time limits for progress reports or for a recommendation to be implemented so that the matter is fully addressed.

Senator PATRICK: I don't want to spoil my read tonight, but is there anything that's in the 'badly wrong' category in the reports?

Ms Stone: I'm hesitant to adopt the 'badly wrong'.

Senator PATRICK: I was just using your category!

Senator Payne: The Inspector-General is not required to adopt the senator's language!

Ms Stone: Excellent, thank you! We had an inquiry into ASIO's notification of a noncompliance matter, which involved multi-agency foreign intelligence collection. We found significant problems with the planning and execution of the operation. Most of them stemmed from weaknesses in ASIO's compliance arrangements that became apparent when we looked at this very complicated operation, which was technically challenging, and concluded that there was a likelihood for this problem to arise again, perhaps in a different form, unless these systemic problems were addressed. It involved some problems of poor communication between lawyers and operational officers not quite understanding what each other needed to know. It involved training of ASIO affiliates and so on. So it was quite a big inquiry. It took us a long time to do. But I'm satisfied that the issues are being addressed. They will be addressed, and we will continue to review the sorts of issues that arose until we're satisfied that they have been addressed.

Senator PATRICK: So a happy ending.

Ms Stone: Well, I was happy.
Senator PATRICK: I will read that offline, but thank you for that. Of course you have had a fairly significant budget increase to allow you to increase your staff. I think it was from 17 to 55, or of that magnitude. Obviously that's a challenging task noting the task that your office performs. At the present moment, noting you've got some trajectory in your corporate statement to get to 55, are you satisfied that you have adequate staff to conduct the oversight, noting that you gained a number of agencies, including AFP, AUSTRAC, Home Affairs and so forth?

Ms Stone: We haven't yet got that additional jurisdiction. The legislation to give us that jurisdiction is in progress. It's a matter for the Attorney-General's Department, but we've been consulted at every stage about that legislation. I think it needs finalisation, but we don't have that jurisdiction yet. We did get a big budget increase. A lot of that was a capital grant for new premises, which, given the security requirements, are very expensive. They have been completed. We moved into our new premises in March. We were on time, below budget and all security requirements were met, so we were very happy with that. We are anticipating our increased jurisdiction with a very active program of recruiting, but, I'm sure you've heard this before, in the security area it can be two steps forward and one step back in terms of getting clearances and the right people and so on. We're a little behind where we hoped to be in recruiting at this stage.

Senator PATRICK: How many people do you have?

Ms Stone: We have 34. It'll be 35 on 31 October.

Senator PATRICK: Where do these officers come from? Is it elsewhere in the intelligence community, the secretariat of the JPCIS, the Ombudsman's office?

Ms Stone: We did have the good fortune to recruit two officers from the secretariat of the JPCIS, and I'm not sure that made us many friends. It's a bit of a rat race there! So we have those. We have several new officers who have experience in police forces, one in the London Metropolitan Police Service. We're very keen to get people with police experience, given our impending jurisdiction. We have one or two from the Ombudsman and so we're plucking what we can.

We also have a program of placements. As you're aware, it takes a long time to get a security clearance so we have recruited a number of people who don't have the requisite clearance to work in our office but who have a clearance with sufficiency to work in other offices with which we're associated. For instance, we've had two or three placed with the Australian Federal Police to learn the ropes there, as it were. This is so when their clearance comes through they come back to us and are in a position to help us with our new jurisdiction. And we've had people with AUSTRAC and with ACLEI. Those are good examples.

Senator PATRICK: Thank you, that was very informative. Do you have any staff come from the agencies which you oversee?

Ms Stone: I think we've had one or two, yes.

Senator PATRICK: Just in terms of percentages or numbers, can you just give an indication, perhaps on notice, as to—

Ms Stone: My deputy is a good numbers man.
Mr Blight: I'll have to take that on notice. Do you mean people who come directly from those agencies or who at one point in their career worked in one of those agencies?

Senator PATRICK: I think probably directly, or perhaps both if you're obliging.

Mr Blight: For directly I can answer easily but whether they've been there at one point in their career is more difficult, that's just why I wanted to clarify it.

Senator PATRICK: So what's the answer for directly?

Mr Blight: In the ballpark, around half.

Senator PATRICK: Around half?

Mr Blight: Around half of our staff, but that's a ballpark. I'll take the exact number on notice.

Ms Stone: I think that answer relates to the whole of our staff, not the new recruits.

Senator PATRICK: Yes, sure.

Ms Stone: Just in relation to that, because I can see what might be a concern: where we have people come from an agency, whether directly or in the recent past, if they're investigative officers we would not put them on the team for that agency for some time. We're very careful with that sort of conflict.

Senator PATRICK: And perhaps in terms of conflict also: do any go back to those agencies?

Ms Stone: Some—

Mr Blight: I don't know that I'd call that a conflict.

Senator PATRICK: It can be if people in an oversight position have an aspiration to go back. That can change the way in which they may approach business.

Ms Stone: They don't have an aspiration to go back once they've been with us for a while!

Senator PATRICK: Fantastic! That's what I like to hear.

Ms Stone: I'm serious.

Senator PATRICK: No, that's good. Maybe I should apply for a job! You mentioned time frames for top-secret PD clearances, which I presume you're referring to. You don't get any special priority, so what are the average sorts of times that it takes?

Ms Stone: I think the average time is about 180 days at the moment, mostly. We've had a few come in under that. We have sometimes indulged in some special pleading, when we really needed this person. But the placement program that I just described has worked very well, so we're not losing as many in that process as we used to because we can take them on on a conditional basis, but have them placed where they can do useful work for us. We involve them in as much of the office activities as we can in terms of meetings and that for which they're appropriately cleared. So we're not having the dropout level that we used to have.

Senator PATRICK: You mentioned a British police officer. I presume all of your roles require Australian citizens. Do you have any foreigners in your office?

Ms Stone: We have dual citizens, but all of our staff are Australian citizens.

Senator PATRICK: Okay, thank you.
Senator KIM CARR: There's just one question I've got.

CHAIR: Certainly, Senator Carr. You have the call.

Senator KIM CARR: I understand that this oversight responsibility you have over the other agencies is a matter of concern to you.

Ms Stone: I'm sorry, which other agencies?

Senator KIM CARR: The Department of Home Affairs, for instance, in terms of the construction of new legislation. I understand there have been a number of occasions on which you've been made aware of national security bills through media reports. Is that correct?

Mr Blight: That was true in the past. More recently, it's fair to say we have had constructive engagement with the Home Affairs legislation area and the Attorney-General's Department.

Senator KIM CARR: So you are advised, for instance, of the Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Bill 2019? You were consulted on that matter, were you?

Ms Stone: Yes, we were.

Senator KIM CARR: Did you express any concerns about that bill?

Ms Stone: When we comment on legislation, we are very mindful that we do not make policy. We comment in relation to oversight matters, so our concerns are to make sure that the legislation as proposed would enable us to oversee the activities we need to oversee. We don't comment on policy.

Senator KIM CARR: In what form are you able to express concerns about a bill?

Ms Stone: We will make submissions to the department that has responsibility for the bill. We make submissions to PJCIS. We have members of our office who are involved in negotiating, discussing and liaising with the department responsible for the drafting of the bill.

Senator KIM CARR: When was the last time you found out about a bill through the media rather than through formal departmental communications?

Ms Stone: That was quite some time. In that case—if I'm remembering right, and my deputy will correct me if I'm wrong—it wasn't that we found out about the existence of the bill; it was the most recent iteration of it.

Mr Blight: It's at least six months. Our relationships have improved significantly.

Senator KIM CARR: It's improved in the last six months?

Mr Blight: I said at least six months.

Ms Stone: I would have thought it was a bit longer.

Mr Blight: It could have been longer.

Ms Stone: We have no complaints in that regard at the present time.

Senator KIM CARR: I'm pleased to hear that. It's just that the Department of Home Affairs has had responsibility for these matters now for over 12 months. So it's taken a while to get used to their new role, has it? Or your new role.

Ms Stone: I couldn't comment on that.
Senator KIM CARR: Thank you very much. I will put the rest on notice.

CHAIR: The officers of the IGIS are now excused with our thanks.

Proceedings suspended from 16:03 to 16:15

Office of the Australian Information Commissioner

CHAIR: I welcome officers representing the Office of the Australian Information Commissioner. Thank you for joining us today. Would you like to make an opening statement before we go to questions?

Ms Falk: I would, if the committee has the time. I think it would be useful for me to paint a picture of the work of my office, if that's acceptable.

CHAIR: Thank you. Please do.

Ms Falk: Thank you for that opportunity. The committee would be aware that the role and purpose of my office is to promote and uphold privacy and access to information rights, and of course I'm appearing today at a time when there is great focus on the community's access to information held by government and on the individual's right to have their personal information protected. No-one could miss the national Right to Know campaign across the major media outlets this week. The campaign shares its name with the international movement in support of access to government information, which holds Right to Know Day around the world on 28 September each year. That includes Australia, where it's supported by my office and my counterparts across Australia. Just last week the United Nations General Assembly recognised the importance of this global movement and proclaimed 28 September as the International Day for Universal Access to Information.

My office has recently conducted a survey in relation to freedom of information and the community's attitudes, and it also highlights the value that Australians place on their right to access government information. The survey found that 84 per cent of people said their right to access information held by the government was important and 37 per cent had tried to do so using a range of methods, including, of course, agency websites and freedom of information requests. Most respondents who tried to access information were successful in doing so on at least one occasion, but 15 per cent said they did not get all the information that they wanted.

The community are exercising their right to access information from Australian government agencies and ministers and seeking review of decisions under the FOI Act in increasing numbers. As our annual report shows—it was tabled yesterday—the number of FOI requests made to Australian government agencies and ministers grew by 13 per cent last financial year, to 38,879. The percentage of FOI requests granted in full was 52 per cent, partial access was granted for 35 per cent of requests, and 13 per cent of requests were refused. In 2017-18, there was a significant improvement in the proportion of FOI requests processed within the statutory time frame, from 58 per cent to 85 per cent. However, this slipped slightly to 83 per cent in the last financial year, showing that continued focus is required on the part of agencies and ministers to comply with statutory processing time frames.

An important object of the FOI Act is to facilitate and promote public access to information promptly and at the lowest reasonable cost. So we continue to work with agencies to improve these processing times. We're encouraging agencies to make the system work more efficiently for the community by publishing more information proactively, particularly information that's
frequently requested, and by making personal information available through administrative access schemes. This will also reduce agencies' administrative load in processing FOI requests.

Turning to applications to my office, the number of applications for Information Commissioner review of FOI decisions grew last year by 16 per cent, to 928, and over the past four years the number of IC review applications to my office has risen by more than 80 per cent. Through our early intervention procedures and other measures, we have improved our finalisation rates in response to these pressures, and in 2018-19 we finalised 659 Information Commissioner reviews, which was an eight per cent increase from the previous year. In fact, over the past four years, we have increased our finalisation rate by 45 per cent. Where possible, we're dealing with applications covering similar issues as a cohort, to provide additional guidance to agencies in handling FOI requests and, of course, to influence better practice.

Since I've been in the role, we have extensively reviewed our processing and implemented further workflow management and process efficiency measures, but the substantial and sustained increase in IC review applications over recent years has widened the gap between incoming work and finalisations, and has resulted in increased delays and backlogs. In order to meet the timeliness objective of the FOI Act and provide faster outcomes for the community, additional resources are required, and the IOC continue to work with government in relation to our resourcing needs.

Turning to privacy issues, we're also finding efficiencies to manage the increasing volume of work, particularly in helping people resolve complaints about the handling of personal information. We received 12 per cent more complaints last year. The majority of complaints were driven by privacy practices in six sectors: finance, government, health, telecommunications, retail and, of course, online services. The most common issues raised with us are about use and disclosure, security, access, collection and quality of personal information. Our early resolution processes are continuing to have a positive impact, and we finalised six per cent more privacy complaints than the previous year.

We're in the process of implementing additional changes to the way we handle privacy complaints to further improve our finalisation rates. We're supported by the additional funding provided in the last budget for timely responses to privacy complaints, and we're addressing delays and backlogs in that area. This additional privacy funding will also support a new privacy regime for social media and online platforms that trade in Australians' personal information. Internally, we're also increasing our proactive enforcement capability.

I welcome the government's commitment to strengthening the Privacy Act to protect personal information through measures including increased enforcement mechanisms, and I've also made submissions around the need for a broader review of the Privacy Act to ensure it remains fit for purpose in our current environment.

The past year's focus on digital platforms both here and overseas has demonstrated the scale of the challenges that we confront in safeguarding personal information, and, taken alongside the consumer data right—a major change to our regulatory framework which we're implementing alongside the ACCC early next year—and other recent developments in technology and artificial intelligence, it's timely to consider the scope and settings of the Privacy Act overall.
Of course, there's a global dimension to the work of my office, and so cooperation with other regulatory authorities around the world is critical to mitigating privacy risks. We're actively engaged with international counterparts on regulatory action. We're making progress towards globally interoperable approaches to privacy so that our citizens' data is protected, wherever it may flow, and so that the economic benefits of data innovation can be safely realised. Thank you. That concludes my opening remarks.

CHAIR: Thank you very much. Senator Chisholm, you have the call.

Senator CHISHOLM: Just for your information, Chair, I've got some specific questions, and then Senator Carr's got some follow-up general questions.

CHAIR: Okay. You know we're working in 10-minute blocks?

Senator CHISHOLM: Yes.

CHAIR: Great.

Senator CHISHOLM: Ms Falk, how long have you been in your role? I heard you say 'since I've been here'; I just don't know what year you started.

Ms Falk: I commenced acting in the role on 24 March 2018 and I was appointed on 16 August 2018.

Senator CHISHOLM: Okay. Could you outline the investigation that was undertaken into Wilson Asset Management?

Ms Falk: In relation to that matter, my office did conduct inquiries. The matter was finalised by way of an enforceable undertaking from that particular entity. The enforceable undertaking made requirements to ensure that any data that may have been collected was deleted and also that process and systems changes were put in place.

Senator CHISHOLM: What prompted the investigation in the first place?

Ms Falk: That investigation, I think, is on the public record and known, in terms of an issue that arose prior to the last federal election in relation to the collection of personal information through a particular website.

Senator CHISHOLM: Sure, but what prompted it? What led the organisation to conduct an investigation?

Ms Falk: I made inquiries in relation to that matter because I had had complaints from members of the public who raised issues around the handling of their personal information by that particular entity.

Senator CHISHOLM: So where that ended was with the enforceable undertaking?

Ms Falk: That's correct.

Senator CHISHOLM: Is there any more information you could provide around the details of what that undertaking was?

Ms Falk: The details of the undertaking that was entered into are on the public record on my website.

Senator CHISHOLM: As far as the organisation is concerned, is the issue now finalised, or, as part of that enforceable agreement, is there ongoing action that the commission has to be participating in?
Ms Falk: In relation to enforceable undertakings, there are generally requirements to report on compliance with the undertaking and, subject to that report being made, that would conclude the matter.

Senator CHISHOLM: So that requires you to make that report, or the organisation?

Ms Falk: The organisation—to make the report.

Senator CHISHOLM: Has that been completed yet?

Ms Falk: The last part of the reporting to my office is due in November.

Senator McKIM: Good afternoon. I wanted to ask a couple of questions about the MOU that your office has with the department about the National Facial Biometric Matching Capability. Firstly, can I just confirm this is the latest copy of the MOU, updated on 21 May 2019? That was the most recent one I could find. Is that the most recent version of the MOU?

Ms Falk: I'd need to confirm that.

Senator McKIM: Just for your office's reference, that's the one I'm going to be relying on for my questions. For context, I should say that this MOU talks about the interoperability hub, which we can shorten to mean the hub, which is the router that facilitates the, hopefully, secure exchange of biometric data between Commonwealth, state and territory governments. After the section that deals with the hub, it says 'other face matching services may be added over time'. Can I ask firstly whether any other face matching services have been added over time?

Ms Falk: I think that those questions would be best directed to the department. I understand that the Department of Home Affairs is the agency that administers the hub.

Senator McKIM: In fact, this is an MOU between the AGD and your office.

Mr Moraitis: That was before the machinery of government changes. That would have been the situation, but we no longer run anything to do with that stuff.

Senator McKIM: So why is the Office of the Australian Information Commissioner not able to answer that question?

Ms Falk: In relation to the MOU that you've have referred to, my office did enter into an MOU. The arrangements were that my office would undertake two privacy assessments of the management of the system. That has been deferred.

Senator McKIM: Did you say deferred?

Ms Falk: It has been deferred on the basis that the system is not fully functioning. The legislation has not passed, so it is deferred until such time as it would be appropriate for us to assess the way in which the system is operating in accordance with the privacy safeguards.

Senator McKIM: Would you expect those privacy safeguards to be contained in the legislation? Please, if it's not a fair question for you, just say so.

Ms Falk: The way in which it would operate is that the handling of the information would be authorised by law, and therefore the way in which that information is to be handled would be set out in the enabling legislation. To the extent to which the Privacy Act might still apply, it would apply in terms of data breach notifications that might occur and so on.

Senator McKIM: Thank you. That's helpful. When you say that it's been deferred, had your office done any work in regard to those privacy assessments before the deferral?
Ms Falk: We had not undertaken any assessments, no.

Senator McKIM: Has your office been consulted during the development of the legislation?

Ms Falk: Yes, it has.

Senator McKIM: Is that an ongoing process, or do you think the consultation with your office is now complete?

Ms Falk: In terms of the interaction with my office, we have been engaged with, firstly, the Attorney-General's Department and now the Department of Home Affairs since around 2015, in terms of the development of the capability. There were a series of privacy impact assessments that were undertaken in developing the proposal. My office had some interaction in relation to those privacy impact assessments. We have also commented on the draft bill. I have made submission to the relevant committee in relation to it. My office also participates in committees in terms of the governance of this particular—

Senator McKIM: You mean intergovernmental committees, with other agencies.

Ms Falk: That's right.

Senator McKIM: Thanks. That's really helpful. Mr Moraitis, can I just ask you a quick follow-up. By the way, I should indicate, Commissioner, that that MOU was downloaded off your office's website this morning, so you might want to have a look at that with a view to possibly changing it if it has in fact been superseded. That's what I wanted to check with Mr Moraitis: is it right that this MOU, which was signed between the Attorney-General's Department and the Office of the Australian Information Commissioner, has now been superseded by a new one that's been signed, presumably, by the home affairs department?

Mr Moraitis: It's almost two years since that transition happened. I assume that's what happened.

Senator McKIM: This was last updated on 21 May this year, which was actually after the machinery-of-government changes. I'm just wondering if we can have an explanation.

Mr Moraitis: I don't know. We had an MOU and, as Ms Falk mentioned, we worked very closely back in 2015-16 on this and, in particular, the privacy impact statement dimension of all this. Since the middle of 2017, we haven't been involved in facial biometrics anyway. I can't really speak on how or why the MOU, on the OAIC side, has us as one of the parties. I assume the new MOU—as they say in the law, mutatis mutandis—is the same; it's just that the title's changed. That's my assumption.

Senator McKIM: Thanks. Ms Falk, could you please take on notice whether this MOU that I'm referring to, which is between your office and the Attorney-General's Department and was last updated on 21 May this year, has been superseded by an MOU between your office and Home Affairs. Are you able to answer that now?

Ms Falk: I will take it on notice. I'm advised that the MOU was varied, and it is with the Department of Home Affairs at this point, but I will check the details and make sure I give you an accurate description.

Mr Moraitis: Can I just add that usually, with machinery-of-government changes, things transition to the receiving agency. There are a lot of transitional things, but the instrument and
the content of the instrument are transferred. So, irrespective of the title, the mutual obligations and responsibilities continue. But you're right: it should have a change of title.

Senator McKIM: That's fine. Thanks, Mr Moraitis. Ms Falk, I want to ask questions about another matter. This is a complaint which has been lodged with your office—not about your office, by the way—and I've been asked to raise this by the complainant, Mr Nauroze Anees, who's put a complaint in to your office about Minister Peter Dutton. Mr Anees informs me that he still, despite lodging the complaint many months ago, doesn't understand how he can provide evidence to your office to substantiate his complaint. Are you aware of that complaint?

Ms Falk: In relation to individual complaints, there are of course secrecy provisions in my enabling legislation which seek to protect the confidentiality of parties to matters. The particular issue that you raise is not one that I have particular information to hand about.

Senator McKIM: I think given that answer I will write to you about that, which will enable me to share with you the complainant's concerns in a way that's not public.

Ms Falk: Thank you, Senator. I appreciate that.

Senator KIM CARR: The commission put out a press release on 26 September, the International Right to Know Day. Given that it's an international event, do you have any view about whether or not there is a problem with the right to know in Australia?

Ms Falk: That's a broad question.

Senator KIM CARR: It is. It gives you a chance to give us a broad answer.

Senator Payne: You are asking the commissioner in her capacity as commissioner and not for her personal opinion presumably?

Senator KIM CARR: No, I'm not asking for a personal opinion. The commission put out a press release on 26 September, International Right to Know Day—

Senator Payne: I haven't seen the press release, but I will take your word for it.

Senator KIM CARR: and I'm asking: does the commission have a view that there's a problem about the right to know in this country.

Ms Falk: Perhaps I could take the question in this way: in terms of my role, it's to have the ability to handle Information Commissioner reviews and complaints and to publish statistics on the operation of the FOI Act as it applies to government agencies. In my opening statement, I drew attention to some statistics about the health of the system in terms of Australians exercising their right to know or their right to request government-held information. That right is one that is enshrined in the FOI Act. Individuals do have the right to access documents held by government and ministers in their official capacity in relation to official documents relating to agencies unless an exemption applies. The numbers of matters that go through the system give you a sense of what's happening on the agency side. For the operation of my office, I've set out some workload statistics about the issues that my office is dealing with. But, perhaps to take it at a broader level, the Right to Know Day was an opportunity for me to remind all government agencies of the importance of access to government-held information and the important role of FOI practitioners in ensuring that they're assisting applicants in defining the scope of what they're requesting and ensuring that they're taking a proactive or pro-disclosure approach to providing information.
Senator KIM CARR: Your opening statement said that the percentage of FOI requests granted in full was 52 per cent.

Ms Falk: That's correct.

Senator KIM CARR: Do you regard that as satisfactory?

Ms Falk: As I said, there's a legally enforceable right to access government-held information, subject to the operation of exemptions. What the statistics indicate is that, in a number of cases, agencies are applying exemptions in relation to the requests that are made.

Senator KIM CARR: That's not the question I asked you. Do you think 52 per cent is satisfactory?

Ms Falk: It's difficult to answer the question in a binary way, because of the qualifications that I've set out.

Senator KIM CARR: You've made the statement. You put out a press statement saying that government agencies could do more to make information available for the benefit of citizens. I've asked you if you think we've got a problem, and I didn't hear an answer to that question. So I then asked you if you thought the figure of 52 per cent of FOI requests was good enough, and I don't think I heard an answer there. You said you couldn't answer in a binary way. What's the point of your office?

Ms Falk: In terms of your question around the statement that I put out, it was to encourage the pro-disclosure approach to providing information. You've also asked me whether or not there's a problem with the FOI system. There's always room for improvement and, indeed, they're the messages that I also put out around the Right to Know day. The areas that I have drawn to agencies' attention are the ones that I've outlined; in particular is assisting applicants and ensuring that agencies don't take an overly technical approach to the scope of FOI requests. Also there's room for improvement in terms of timeliness, and I've asked agencies to give that particular focus.

The other aspect of that is for agencies to look at what information is being requested and to look at whether or not that could be made available through administrative access systems—for instance, self-service online portals. Also there's the kind of information that's being requested: can that be grouped and then proactively provided? So we're looking at ways in which the resourcing that's required for FOI processing across government can be mitigated through those proactive mechanisms.

Senator KIM CARR: Let's have a look at this. Do you have any sense in which some departments were better than others in responding to FOI requests?

Ms Falk: The issue around timeliness does vary amongst departments. There are a number of departments, if you take the issue of timeliness, that are 100 per cent compliant. There are processing times that are set out in the FOI Act that must be adhered to. Some of the agencies are not adhering to those time frames, and that's of concern. The FOI Act also sets out mechanisms whereby, if delay is going to be experienced, an applicant can be asked for their agreement to extend time. Alternatively, an application can be made to my office to determine an extension of time request where it's particularly complex or voluminous.

Senator KIM CARR: Which is the worst department for compliance with the FOI Act?
Ms Falk: In terms of all of the departments, the top 20 departments are listed in my annual report. Each of those agencies reports a number of statistics in terms of its FOI processing. The Department of Home Affairs receives the most requests for FOI across the whole of the Commonwealth, currently at around 17,725. So that's a significant number. Timeliness has been an issue with that department. In 2016-17, only 25 per cent of requests were processed within the statutory time frame. That has been significantly improved over the last two years to 74 per cent processed within time. One of the key factors in relation to that, as I reported last financial year, was that the Department of Home Affairs instituted an administrative access program. So it shows you the value of those proactive administrative access programs, but more work needs to be done in relation to timeliness with that particular department.

Senator KIM CARR: I've been advised that in the 2018-19 period there were 4,274 occasions of FOI requests for the Department of Home Affairs and there was a failure to make decisions within the 30-day statutory period on all occasions. Is that the case?

Ms Falk: I'm not familiar with that particular statistic. The statistics that are set out in my annual report refer to financial year, and at the conclusion of the financial year the Department of Home Affairs provided decisions in relation to FOI requests in 74 per cent of matters.

Senator KIM CARR: According to the department's own statistics, in 2013-14 there were 160 failures—that's one per cent of the total number. But according, as I say, to their own figures this has now risen to 98,000 requests, and the failure to make decisions in the 30-day statutory period had increased to some 24,358 occasions, 25 per cent of all requests over that same period. So it's gone from one per cent in 2013 to 25 per cent over the five-year period. That strikes me as a very substantial deterioration.

Ms Falk: The statistics that I have provided today are drawn from the annual reports from my office, and those statistics are required to be provided by agencies under the FOI Act.

Senator KIM CARR: It's not just a guidance matter, though, is it? These provisions that you're referring to are not just there as a bit of a guide; they're actually a requirement at law.

Ms Falk: They're statutory requirements.

Senator KIM CARR: Yes, so in fact it could be said that there have been breaches of the law in at least 25 per cent of cases.

Ms Falk: In relation to how the FOI Act works, where there is going to be a delay in a matter, I've set out the process that needs to be followed. Where that's not followed, an individual can make a complaint to my office.

Senator KIM CARR: Could it be the case that it's a question not just of a culture of secrecy but of a culture of lawlessness in that department?

Ms Falk: That's not a question that I feel I'm able to answer.

Senator KIM CARR: Minister, perhaps you could help me. It goes beyond just a culture of secrecy; it goes to a question of lawlessness.

Senator Payne: Is that a proposition you're putting to me, Senator?

Senator KIM CARR: Yes, I'm putting it to you.
Senator Payne: I don't agree with that. I think you, having formerly been a minister involved in directing and administering departments, would be aware that from time to time there are issues.

Senator KIM CARR: I'd like to think my record was better than that.

Senator Payne: They are not necessarily desirable, I absolutely acknowledge, but from time to time there may be issues around reporting processes and things like that. We would hope that they are addressed and rectified and that reporting comes back to the centre, where it should be and where the commissioner has every right to expect it should be. But I don't have the detail available to me on those instances that the commissioner obviously has had and that you may also have—I'm not sure. I don't have the detail available to me on those instances to make a sweeping generalisation such as you have suggested or particularly to use a word like 'lawlessness'.

Senator KIM CARR: It just strikes me that there have been breaches of the law in at least 25 per cent of cases. That's what I thought the commissioner was saying.

Senator Payne: It's what you are saying.

Senator KIM CARR: Is that not a fair—

Senator Payne: I really wish you would not put words in the mouths of officials or, for that matter, of me.

Senator KIM CARR: You know I wouldn't do that. I thought that was the clear implication: that there'd been breaches of the law—a statutory obligation—in 25 per cent of cases by the Department of Home Affairs. Is that not the case, Commissioner?

Ms Falk: It is a statutory requirement to process FOI requests within 30 days. If they cannot be processed in that time, there is a mechanism to seek agreements or else to seek a decision from my office in relation to that.

Senator KIM CARR: Let me be clear, because you can see I'm having difficulty with this quite startling statistic that you've revealed. Is there not a breach of the law in 25 per cent of cases with the Department of Home Affairs?

Ms Falk: I think it's the use of the word 'breach' that I'm—

Senator KIM CARR: Well, how would you like to describe it? If we say that there's a failure to meet their statutory obligation, would that be a nicer way to put it?

Ms Falk: There has been a failure to meet the statutory obligation.

CHAIR: Senator Carr, we're at more than the 10-minute block. Do you have a lot more?

Senator KIM CARR: I want to pursue this just a little bit in regard to another aspect.

CHAIR: I understand that. Can you be a bit more precise about how much you have to go?

Senator KIM CARR: I've been very precise, actually. The question of lawlessness was a very precise issue.

CHAIR: Precise about the time, Senator Carr.

Senator KIM CARR: I will seek to finish this section in a few minutes if I could.

CHAIR: That is less than five?
Senator KIM CARR: Yes, that's what I believe, but it'll depend on the answers, Madam Chair. As you know, I say this again and again. I just want to be clear about this: the culture of openness across departments and Commonwealth agencies is an expectation, of your office, isn't it, Commissioner? You would expect that?

Ms Falk: The FOI Act has a prodisclosure approach embedded in it, and the objects of the act are to provide access to government-held information in a timely manner at the lowest reasonable cost.

Senator KIM CARR: The Australian Information Commissioner Act 2010 did provide for three separate information officers: Information Commissioner, Freedom of Information Commissioner and Privacy Commissioner. You've actually got to do all of that, don't you? Is that still the way it works, or has it changed?

Ms Falk: I exercise all of the functions that you've outlined.

Senator KIM CARR: Yes. But there was a requirement under the act for there to be three separate officers undertaking that work; is that correct? Certainly that's what the explanatory memorandum set out when the bill was dealt with in 2010.

Ms Falk: The act makes provision for the appointment of up to three commissioners.

Senator KIM CARR: So what's happened? Why has there been a refusal to appoint a Freedom of Information Commissioner? Can you help me understand that?

Ms Falk: I think that's a question for government.

Senator KIM CARR: Minister, can you help me with that? Why has there been no Freedom of Information Commissioner appointed?

Senator Payne: I'll take that on notice.

Senator KIM CARR: It would be a clear breach of the will of parliament, wouldn't it, that that event that has not taken place?

Senator PAYNE: I said I would take that on notice.

Senator KIM CARR: Perhaps you could answer this question on notice as well: is this not a clear breach of the will of parliament, given the explanatory memorandum and the original intent of this bill? We're now some years after the government has had an opportunity to fulfil this bill. The home affairs department is having a little trouble fulfilling its statutory obligations. Surely this is a case where the government's leading on this issue as well. It's failing to meet its obligations, its statutory obligations.

Senator Payne: As I said, I don't have those details with me. I will take that on notice. I might also ask Ms Chidgey or Mr Moraitis if they have anything to add.

Mr Moraitis: I'll just mention a few things. A few years ago there was a suggestion that the commission be abolished and incorporated into the Human Rights Commission. That didn't proceed. Since then—

Senator KIM CARR: You should be pleased about that. Who made that suggestion?

Mr Moraitis: It was around 2014-15 if I recall correctly.

Senator KIM CARR: Yes, but who made that suggestion? Was that the government's suggestion, was it?
Mr Moraitis: Yes, not a departmental one. Since that period, the positions have existed technically; it's just that the same person has been fulfilling those functions. I'll ask Ms Chidgey to elaborate on how that's worked. Some funding that was withdrawn was returned, but there were also some back office functions that were merged, which meant that there was $2 million returned, rather than $3 million.

Ms Chidgey: I'd just add that the act allows the Information Commissioner to perform all the functions and powers of the FOI Commissioner. That model has been operating effectively since July 2015.

Senator KIM CARR: Right. But it's hardly a good model, is it? You can't actually ask departmental officers across the Commonwealth to meet their obligations when the government doesn't meet its obligations under the act.

Ms Chidgey: It is meeting the obligations under the act.

Mr Moraitis: Senator, Ms Chidgey just explained that.

Senator Payne: Ms Chidgey just explained what the act says.

Senator KIM CARR: It's an interpretation you put on it. Did the explanatory memorandum set out three positions to be filled by three separate people? Is that a fact or not?

Ms Chidgey: There are three positions in the act, but they can all be performed by the Information Commissioner.

Senator KIM CARR: Yes, and that's a latter date interpretation.

CHAIR: Senator Carr, let the witness finish her answers before you start speaking over her.

Senator Payne: I'm not sure that it's an interpretation. If it's a provision of the act, it's not an interpretation of the act; it's a provision.

Senator KIM CARR: Was it set out in the explanatory memorandum that these positions be filled by three separate people?

Mr Moraitis: I don't recall.

Ms Chidgey: I don't have the explanatory memorandum.

Senator KIM CARR: Perhaps you could take that on notice for me.

Mr Moraitis: We'll take it on notice.

Senator KIM CARR: You could perhaps correct me if I'm wrong. I'll come back to that, because obviously we're going to need to spend some more time on this. I'll come back in my next round.

Senator HENDERSON: Commissioner, I'd like to ask you about the funding for the Office of the Australian Information Commissioner; in particular, the amount of additional funding committed by the government for the office in the last budget.

Ms Falk: In terms of the operating budget of the Office of the Australian Information Commissioner, the total revenue for this financial year is $23.234 million. That includes appropriation of $20.941 million and a sum which comes to the office through memorandums of understanding of around $2.3 million. In terms of the second part of your question, around the additional funding provided to the office, the 2019-20 budget allocated $25.121 million over three years to undertake functions around the handling of personal information and
taking enforcement action. The purpose of the funding is to ensure timely handling of privacy complaints, also particularly focused on regulating the online environment. It is envisaged that my office would create a regulatory code that would apply to online providers such as social media companies, and it would set out particular protections in terms of vulnerable Australians, including children.

**Senator HENDERSON:** Could you go into a bit more detail as to why you are particularly focused on investing more in the online environment? Obviously that has added to the demands on the role of the office. Could you expand on that a bit more?

**Ms Falk:** It has. We can see globally the use of personal information increasing exponentially. Of course there are great economic benefits to be achieved by the use of personal information, but at the same time it needs to be kept secure and handled appropriately. In terms of the online environment, a number of incidents have occurred that have heightened the community's awareness about the collection of personal information, some relating to Facebook, for example. Also the ACCC conducted an extensive inquiry into digital platforms. That report was released earlier this year. I understand that the government is considering those recommendations.

**Senator HENDERSON:** In regard to the particular challenge faced by the online platforms, how have you been able to combat that challenge and, in particular, better safeguard the privacy of Australians in this difficult global environment?

**Ms Falk:** For this financial year and the coming years one of the key regulatory focuses of my office, outlined in the corporate plan, is regulating the online environment. In terms of how we intend to tackle the issue, firstly, at the global level I am a member of the executive committee of an international grouping of my counterparts around the world. My deputy commissioner is currently in Albania at our annual meeting. What I am seeking to do there is to ensure that we have information-sharing frameworks and cooperation in place so that I can regulate and enforce privacy with my global counterparts internationally.

On the domestic front, I should go back one step: we undertake education in terms of the community understanding how their information is being handled, and we work with other government agencies or regulators in increasing the community's knowledge so that they can take control of their personal information, and at the same time educating entities in terms of their obligations. The government has announced earlier this year its intention that there be legislation so that a code particular to the online environment will be made. That's a code that my office would be tasked with developing. It would involve extensive consultation, both with the community and with the online social media and other regulated platforms. Then there would of course be regulatory action that could flow, should the requirements of that code not be met.

So one of the big shifts in my office at present is shifting from an organisation that has predominantly been, in terms of privacy, an alternative dispute resolution body focused on conciliation, with administrative decisions being made in only some cases. It's clear that the community expectation of regulators—also the government has announced its intention to increase penalties under the Privacy Act and the enforcement mechanisms available to me—that a strong enforcement approach is required. That means increasing our capability. We are increasing the ASL, up to 124 staff, this financial year. We are currently at around 90 and we will be looking particularly at increasing our capability to act in that enforcement role.
Senator HENDERSON: In terms of your enforcement, you're talking about breaches of individual privacy, but also in relation to failure to comply with FOI requests?

Ms Falk: I'm particularly talking about privacy in relation to what I've just said. In relation to FOI, I also have the ability to deal with complaints around processing and also to conduct investigations on my own initiative. But in terms of the budget funding, it was specific for privacy regulation. The enforcement that I'm talking about can range from, for instance, working with regulated entities to have enforceable undertakings, to improve practice and ensure that the handling of personal information is improved, through to me being able to make a determination that's enforceable in the Federal Court, through to seeking civil penalties in the Federal Court. All of those enforcement actions can exist in a systemic way, and I can take that action on my own initiative.

Senator KIM CARR: In terms of the review of FOI decisions, you'll notice that there's been an increase in the number of direct requests to you. How many concern the Minister for Home Affairs?

Ms Falk: In relation to Information Commissioner reviews and the requests for those reviews that involve the Minister for Home Affairs, I don't have that information to hand. I'd need to take that on notice.

Senator KIM CARR: I take it that these were matters in regard to what's termed deemed refusals? Is that right?

Ms Falk: In relation to deemed refusals, what that is referring to is that where an agency does not meet the statutory time frame they are deemed to have made a decision refusing access to documents. Some of those decisions come to my office for Information Commissioner review, but they are one part of the matters that come to my office for Information Commissioner review.

Senator KIM CARR: So you can't tell me how many have come before you relating to the failure to meet the 30-day statutory period? Do you have that figure with you?

Mr Solomon: No.

Ms Falk: I don't have that to hand. I'd need to take that on notice.

Senator KIM CARR: So you don't have a ballpark figure on you?

Ms Falk: I don't. I'm sorry.

Senator KIM CARR: You'll be able to tell me if there's been any occasion where the minister has actually met his 30-day statutory obligation?

Ms Falk: My annual report reports statistics in terms of the Department of Home Affairs. I don't have specific statistics in relation to the minister. I'd need to look at whether we could provide you with those statistics under notice.

Senator KIM CARR: You deal with ministerial offices all the time, don't you? That's part of your role?

Ms Falk: In what regard?

Senator KIM CARR: I take it that before you have to make decisions, wouldn't it be the case you engage with ministerial officers to find out what's happening with an FOI request?
Ms Falk: Staff of my office would engage with whoever the decision-maker was in relation to FOI requests.

Senator KIM CARR: Is the Minister for Home Affairs' office cooperative?

Ms Falk: I don't have information to hand in relation to that. I don't engage specifically with ministers or government agencies specifically in relation to matters. I'm the independent decision-maker.

Senator KIM CARR: How do you gather information, then?

Ms Falk: Staff of my office would issue information requests from the decision-maker, and that would be provided.

Senator KIM CARR: So they'd gather information for you to make an independent decision?

Ms Falk: That's right.

Senator KIM CARR: Did I hear you correctly in your opening statement? Did you actually say that you're under-funded?

Ms Falk: I did raise the issue of resourcing in terms of FOI. It's a matter that's been discussed before this committee on a number of occasions, where I've indicated that really where the stresses in the system lie, from the OAIC's perspective, are with the need for more staffing. I've set out the fact that we've had an 80 per cent increase in Information Commissioner reviews and I have worked very purposefully since being in the role on looking at how we can increase our efficiency. Over that same period of time—the four-year period—we have increased our efficiency by 45 per cent. But I've formed the view, having conducted a number of reviews of the way in which we're carrying out our work, that the only way in which the gap is to be bridged is for additional staffing resources to be provided.

Senator KIM CARR: I see. I was just trying to reconcile the line of questioning from Senator Henderson with your statement, that's all. When was the first time you requested additional funding?

Ms Falk: I'd need to take that on notice.

Senator KIM CARR: Are you sure you need to? Most officers in your position would be able to tell very quickly when they first sought additional resources, given the growth in the workload.

CHAIR: The question's asked and answered. She's taken it on notice.

Senator KIM CARR: I'm just surprised that you need to take that on notice. Because what—

Ms Falk: It's been a matter of discussion with this committee and also, of course, with government during my term. I'm just unable to recall, with accuracy, the first occasion on which that occurred.

Senator KIM CARR: I see what you mean. I do apologise. In my experience, officers in your position are able to identify at least the year in which they asked for additional resources.

Ms Falk: I have asked for additional resources since being appointed to the position in August last year but, in terms of the first occasion subsequent to that date, I would need to check.
Senator KIM CARR: I see. That's where the confusion lies. So, since August last year, you've been seeking additional support?

Ms Falk: Sometime after that date, Senator.

Senator KIM CARR: And what was the government's response?

Ms Falk: The government has acknowledged my request and is working through it in terms of normal budget processes.

Senator KIM CARR: I appreciate that agencies will ask for additional resources and it won't necessarily be the same amount as the ERC thinks you're entitled to, but what is, in your assessment, the requirement? How much do you need to do your job in terms of the report that you've given to us today about the additional demand on your agency?

Ms Falk: The amount of additional resources depends on the objective which is sought to be achieved. Of course, the more staffing resources that you have for processing Information Commissioner reviews and complaints, the quicker they can be processed.

Senator KIM CARR: So you don't have a figure?

Ms Falk: I think that there needs to be an increase in the staffing resources, and the quantum of that does depend on the time in which the backlog is sought to be addressed and also the ultimate goal in terms of how quickly Information Commissioner reviews should be handled.

Senator KIM CARR: So how much did you ask for?

Ms Falk: Senator, you appreciate that the information I've provided to government is through budget processes. I can give you an indication that, at present, my funding envelope allows for around 19 case officers to work on FOI reviews—there are additional staff who work on the FOI function more broadly—but just looking at FOI reviews, there'd need to be at least a half increase in the number of those staff.

Senator KIM CARR: What you mean by 'a half'?

Ms Falk: A half again.

Senator KIM CARR: So—

Ms Falk: Another nine staff.

Senator KIM CARR: What will that cost in terms of your normal profile?

Ms Falk: I'd need to see if we've got any figures to hand in relation to that, but it would be the cost of those staff.

Senator KIM CARR: It depends on what they're paid, doesn't it? Those nine staff are not all SES staff, are they?

Ms Falk: No, they're case officers.

Senator KIM CARR: So you'd be able to indicate roughly what it would cost to fund nine staff.

Ms Falk: I've put forward to government the cost of that and also any capital costs that might be needed to accommodate those staff.

Senator KIM CARR: Can you take that on notice, please?

Ms Falk: Thank you.
Senator KIM CARR: In terms of the data breaches, there's a requirement for six-monthly reporting. Is that the case in terms of agencies to provide you with information on data breaching?

Ms Falk: In relation to notifiable data breaches, there's a requirement for any entity covered by the Privacy Act—which includes many government agencies, and also the private sector—to report to me, and also to notify affected individuals, in certain circumstances. Where there is a likely risk of serious harm to affected individuals occurring, that reporting needs to occur. It needs to occur as soon as practicable after becoming aware of that situation. Sometimes entities need to undertake further investigations to be satisfied that a notifiable breach has occurred. Ordinarily, that should occur within 30 days.

Senator KIM CARR: I see. How many data breaches have been notified under the scheme in the second quarter of 2019?

Ms Falk: The second quarter of 2019 might be something that my colleague has to hand. Otherwise, I can take it on notice—

Senator KIM CARR: Could you, please?

Ms Falk: but I can advise that in the first year of the scheme we received 950 notifiable data breaches.

Senator KIM CARR: Can you outline where these 950 incidents came from?

Ms Falk: Yes. I have produced quarterly reports which set out both the sectors that are reporting and also the main causes of data breaches. The main sector is the health sector, followed by the financial sector. The causes of data breaches are predominantly through malicious and criminal activity, particularly the use of phishing attacks and other methods to compromise credentials such as usernames and passwords.

The second major cause of data breaches is what we've called the human factor, or human element. That's individuals sending information to the wrong recipient in error, or otherwise an error that's caused by human intervention.

Senator KIM CARR: Has there been a growth in the third quarter of 2019?

Ms Falk: My recollection of the numbers we've received each quarter is around 245, but my colleague has advised me that in the quarter ending at the end of September this year we received 134 notifications. So that's quite a decrease.

Senator KIM CARR: Let's just be clear, and I'm sorry if I'm obtuse on this: this is from Commonwealth agencies and the private sector?

Ms Falk: That's correct.

Senator KIM CARR: Right. So are there hospitals? You said health and finance.

Ms Falk: Yes, that's right. I should point out that under the Privacy Act, in general, small business operators are exempt. However, health service providers, regardless of size or annual turnover, are covered. So it would cover all private sector health providers, regardless of size.

Senator KIM CARR: Have you done any benchmarking about how we compare as a country with other countries?

Ms Falk: We have looked internationally. In terms of the reporting per population, the amount of reporting that's happening in Australia is in line with global trends. The health
sector is one of the key reporting areas internationally. If you look at the UK position and also the Dutch position, you'll see that's the case.

In terms of international reporting, the threshold for reporting a notifiable data breach differs a little to the Australian threshold. So the requirement to report occurs more frequently under the General Data Protection Regulation, which is in force in the European Union.

Senator KIM CARR: I see. If I can be clear about this: you said there were 134 in the third quarter of 2019—that's 134 incidents?

Ms Falk: Yes.

Senator KIM CARR: How many people do you think might have been affected by that?

Ms Falk: I don't have those statistics to hand, but I can provide that on notice.

Senator KIM CARR: Thank you, if you wouldn't mind. I've asked for the second quarter and the third quarter, and could you follow that up with how many people you think might be affected in those incidents?

Ms Falk: Yes.

Senator KIM CARR: Thank you very much. And in regard to the comparison, the comparative figure per capita, are you able to give us any indication of how we're comparing with, say, the United Kingdom, Canada and comparable countries?

Ms Falk: I do have statistics on comparability. As I said, the system is not directly comparable, but to the extent to which I'd need to put some qualifiers around it, I can still provide you with what I think could be some useful information.

Senator KIM CARR: How many commission led investigations have you undertaken into the data breaches notified under the scheme in 2019?

Ms Falk: Perhaps I'll just quickly explain the context in which we deal with notifiable data breaches. Our first priority is to ensure that individuals are notified and the information that's required to be provided to individuals is so provided. We will then work with the entity to make sure that the incident has been contained and that remedial steps have been put in place to prevent a recurrence. Where the incident raises concerns around the security of the entity, then we may make additional preliminary inquiries. I can also undertake investigations on my own initiative. The number of matters that we have made preliminary inquiries into would be a matter that I might need to take on notice.

Senator KIM CARR: If you wouldn't mind. In the case of the United Kingdom, the United Kingdom information office imposed a fine of $223 million on British Airways over circumstances where 500,000 customers' details were stolen following a web hack in 2018. And in the United States there was a $123 million fine issued to the Marriott Hotel as a result of data breach with its Starwood subsidiary. Do we have any similar circumstances in Australia?

Ms Falk: There have been breaches notified to my office that have affected large numbers of Australians, and I have a number of investigations that are currently active.

Senator KIM CARR: Yes, active investigations, but the credit reporting agency Equifax, for instance, reached a settlement with the US Federal Trade Commission and their Consumer Financial Protection Bureau for a data breach within its organisation which cost the company
more than half a billion US dollars. Are we looking at any similar matters at law within Australia?

Ms Falk: I do have a number of active investigations that are in hand. I previously outlined some of my regulatory powers. They include making a determination, which can make declarations around agencies or organisations changing their practices.

Senator KIM CARR: I'm sorry to labour this, but you have said now a couple of times that you have investigations. What enforcement options are available other than to investigate?

Ms Falk: I'm outlining those. I can make an enforceable determination that's enforceable in the Federal Court that would require the organisation, for instance, to improve its security practices. I can also take an enforceable undertaking from an entity that would also be enforceable in the Federal Court if it's not complied with. I can also seek civil penalties from the Federal Court.

Senator KIM CARR: Have you undertaken any action at law through courts to have an enforceable action undertaken?

Ms Falk: Not at present. I mentioned the additional funding that's been provided to the office from 1 July and the fact that I'm increasing the enforcement capability of the office. It's very important that we're able to exercise all of the regulatory powers, and it's that capability that I'm looking to develop.

Senator KIM CARR: Is it your intention to actually seek legally enforceable undertakings with penalties such as of the type that I've indicated that are occurring in the United Kingdom and the United States?

Ms Falk: I would take the most appropriate regulatory outcome in the case. Sometimes that can be achieved through an enforceable undertaking. At other times it's more appropriate to make a binding decision or to seek enforceable penalties. I have a regulatory action policy that sets out all of that regulatory action that I might take. I would decide which was most appropriate given the facts and circumstances. In all cases I'm looking for what is going to be of the most benefit to the Australian community.

Senator KIM CARR: So you have the legal capacity to have fines imposed of the type that I've indicated?

Ms Falk: I can seek civil penalties through the courts. I cannot impose a fine myself.

Senator KIM CARR: Not individually, but through the court system. That exists?

Ms Falk: Yes.

Senator KIM CARR: And it is a matter that you are actively considering now?

Ms Falk: Yes.

Senator KIM CARR: You've moved to a six-monthly reporting requirement—is that correct?

Ms Falk: Yes.

Senator KIM CARR: Why?

Ms Falk: I made an administrative decision, an operational decision, to report quarterly for the first year of the operation of the notifiable data breaches scheme, so that I could give
transparency to how the scheme was operating, the causes, the sectors. The real purpose for that was to identify where the effort needs to be put by regulated entities in improving their security posture. What we found is great consistency through that 12 months, and I determined that we could move to a six-monthly reporting requirement, which would still give that transparency, given that the issues that we're seeing remain constant, and that our efforts be put into our educative efforts in terms of prevention, which is always better than cure.

Senator KIM CARR: So is it a funding constraint?

Ms Falk: No, it's not. It's an operational decision in terms of the best utilisation of the resources of the office.

Senator PATRICK: Just to get an idea in terms of performance or delays in terms of IC reviews, do you have the numbers there for IC reviews that have taken more than 12 months? Just the outstanding ones at this point in time? The number of IC reviews that are currently on your books that have taken longer than 12 months?

Ms Falk: The statistics that I have at hand will tell me the 2018-19 financial year statistics in terms of the numbers that were more than 12 months that we finalised, which was 177 matters and 27 per cent.

Senator PATRICK: I'm interested in the ones that haven't been finalised. You might recall that at one time I asked for statistics on those that were still outstanding after a year, still outstanding after two years, and I remember there was one that was really quite lengthy in that you'd had the matter for a number of years.

Ms Falk: May I take the specific question on notice? I might be able to provide you with some other information that goes partway to answering that question.

Senator PATRICK: Okay.

Ms Falk: At the end of quarter 1 we had 850 matters on hand. In terms of the numbers awaiting allocation, you'll recall that when we receive a matter, it's triaged and we seek to resolve the matter through earlier resolution. For those matters that are unsuccessful and require a deeper analysis through to potentially a decision by myself, we have 330 matters awaiting allocation.

Senator PATRICK: I might put some questions on notice to get the exact statistics that I'm after. It'll be consistent with the previous question on notice that I asked. In a previous estimates you talked about a company called Synergy coming in to do a review. Can you tell the committee about the output of that review and what's happened?

Ms Falk: There have been a number of endeavours undertaken by my office to review processing times and the way in which we handle IC reviews and complaints in order to increase efficiencies. One of the things that we've done—and I will certainly come to your question specifically about the Synergy report—is to conduct some modelling so that we're very clear around case management times. The second thing that we have done is some internal restructuring. The third thing that we have done is have an external consultant come in to give an external view of our processes. We've mapped those processes, looked for areas for efficiencies, and instituted some changes as a result. The report has been finalised and the team has undertaken a three-month trial. The focus of the trial has been to focus our efforts on
both the early resolution but also the older matters that you mentioned. We sought to resolve as many of the older matters as possible within that three-month time period.

Senator PATRICK: And how did you go?

Ms Falk: We didn't quite meet our goal. My deputy would describe it as an ambitious or stretch goal. We wished to seek to resolve 50 per cent of the older matters within three months, and we managed to resolve 25 per cent of those matters.

Senator PATRICK: I think it's fair to say that the statistics show there are improvements, but your case load is increasing and that's led in some sense to the call for greater resources?

Ms Falk: Yes. Over the past four years, there's been the 80 per cent increase in Information Commissioner review applications to my office. If I compare that same period of time in terms of increasing efficiencies, we've increased efficiencies by 45 per cent. But notwithstanding our very best efforts and the very best efforts of my staff, to whom I'm very grateful and appreciative, a gap remains between the volume of the work coming into the office and the staff that's needed in order to process those matters.

Senator PATRICK: Ms Chidgey, you mentioned that all was fine and dandy before in response to Senator Carr's question about three commissioners.

CHAIR: I don't remember that language, but I like it!

Senator PATRICK: It was along those lines. That seems inconsistent with some evidence that was taken by the Legal and Constitutional Affairs References Committee in relation to a proposed bill, where Mr Walter said that there are undoubtedly stresses in the system. You seem to have an optimistic view about the situation.

Ms Chidgey: I'm not sure what Mr Walter was referring to. My evidence was that the Australian Information Commissioner Act allows the Information Commissioner to perform the functions of the other commissioner roles and that that was working.

Mr Moraitis: I think Mr Walter was correctly alluding to what are stresses, as Ms Falk has pointed out. She's been in consultations with us about her budget pressures. We're cognisant of those and aware of the parameters of her needs. Ultimately it's a matter for government to deal with resources. That's the best I can say at this stage.

Senator PATRICK: Sure. I was just querying the comment that had been made.

Mr Moraitis: We didn't say it was 'fine and dandy'.

Ms Chidgey: It was very specifically about the ability of the Information Commissioner to perform the functions of the FOI Commissioner.

Senator PATRICK: So you don't think that if you had additional resources to make independent decisions—like an FOI Commissioner—that, indeed, some of the backlog that we've just discussed wouldn't be resolved?

Ms Chidgey: There's a question about the resources for the office as a whole, whether that's an extra commissioner or other staff.

Mr Moraitis: Conversely, you could argue that you could have nine extra FTE and you have a single person doing all three functions, and that achieves the objective. That's an alternative.
Senator PATRICK: I think I FOIed the commissioner's diary at some stage. She looked pretty busy and didn't seem to have a lot of time to do independent decisions, actually. Going back to the matter that was raised by Senator Carr in respect of Home Affairs, Home Affairs did provide statistics that said they had received applications in 2017-18 and had—I'm just rounding here—15,000 applications; and closer to 19,000 applications in 2019-20. And they were running, in both those years, 3,721 and 3,746 deemed refusals. That goes to the question Senator Carr was asking. In some respects it isn't a breach of law in the context that there's a statutory provision that says it is a deemed refusal. It's at that point that people are now entitled to come to you, to conduct a review, with an understanding that they've been denied access. Is that the correct interpretation of the act?

Ms Falk: If the FOI request is not processed within the statutory time frame, the agency or minister is deemed to have refused access, and that triggers the ability for my office to conduct a review for—

Senator PATRICK: So, in some sense, the statute cleans up the mess from Home Affairs. However, in many instances, the person FOIing Home Affairs wouldn't necessarily be privy to or understand their rights, in relation to a deemed refusal, or wouldn't understand the concept. They'd just say, 'It's late. They're not responding and they're really hard to get hold of. For me to get access to the status of an FOI I've had to ring the minister's office for them to get in contact with us, because they only have an FOI email address.' Is there anything you can do, by way of training or other mechanisms, particularly in relation to Home Affairs, to either encourage extensions of time, for which everyone is informed, and/or some intervention that allows, in the case of a 30-day deemed refusal, a letter to go out to advise people of their rights?

Ms Falk: Thank you, and I'll give close consideration to the matters you have raised. I had a recent meeting of information contact officers in September, which was all of the FOI practitioners across the Commonwealth. A number of the issues that you've raised we've sought to lay out to practitioners, in terms of the importance of communication to the public around where their application is up to and ensuring that individuals do understand their rights. In terms of issues of training, I'll take those matters on notice and give it close thought.

Senator PATRICK: It goes to my next round of questions, which relate to the activities of Professor McMillan, the first Information Commissioner, who had a program of training for FOI officers across each of the agencies. Would it be fair to say that the effort that he put in, at the time, is not being replicated by your office, perhaps on account of a lack of resources?

Ms Falk: I mentioned the information contact officers network. We meet twice a year. My staff, then, convene a round of meetings with all of the 20 top agencies, individually, discussing their issues and making clear the expectations of my office. That has proved to be very effective. In between those times, we use our online mechanisms to ensure that IC reviews, updates to the guidelines and other guidance is provided to information officers. We do think that there's more that can be done from a proactive, educative position of the office. We are particularly looking at the kind of induction that's provided to new recruits across the APS, in terms of their FOI responsibilities. One of the things that's important, I think, to remember is that FOI is a whole-of-agency obligation, including line areas who have to provide the documents. It's not just the FOI practitioners who are responsible for ensuring the
timeliness issue, in particular, is addressed. These are matters we are moving forward with, and we're doing that in the best way we can on the resources we have.

**Senator Patrick:** Once again, this is not a criticism; I'm just trying to understand the situation. You'd be aware of a couple of media reports. I'll just go to two of them. One was in relation to an SBS journalist who sought application to the Department of Defence on some costs associated with Minister Price's travel. They got a response back, saying: 'We'll give you that answer if you front up $2½ thousand.' That sort of thing, I would have thought, would disturb you. They weren't asking for invoices, just an adding of the total cost. I think section 15 allows someone to go in and add up a number and send that number to an FOI applicant.

**Ms Falk:** Charges do not need to be levied. They are a discretionary matter for government agencies and ministers to consider. My guidelines set out the kinds of factors that should be considered when deciding whether to levy a charge—for instance, the information that's sought and the public interest, the nature of the request and so on. When I look at the agency statistics in terms of charges overall across government agencies, there has been a decrease, if you look at the holistic scale, in the amount of charges that have been levied by government agencies. However, there has been an increase in the collection of those charges by agencies.

**Senator Patrick:** I just wonder, if you see a media article like that, whether it doesn't raise your eyebrow and make you think, 'Right: I'd better go and have a bit of a look at that.'

**Ms Falk:** I was concerned about the matters that were raised, and I was pleased to see that they were rectified. I should say, in terms of broader messages to the APS, that we are updating our FOI guidelines in relation to charges, in relation to drawing out those matters that I've particularly raised in terms of the discretionary nature of charges and how they should be used.

**Senator Patrick:** Finally, you will have seen an article about a whistleblower inside PM&C who had basically initiated a PID stating that across 25 FOIs there was basically flagrant disregard for the law in responding to FOI applicants and that had caused the department to conduct a review. Are you privy to the outcome of that review? Have you looked at what happened, noting that it is a PID and there are secrecy provisions around PIDs? But, once again, it is an alarming allegation, and I'm just wondering whether or not you pick up the phone, whether you execute a power of some sort to go and also examine what might be going on.

**Ms Falk:** I've not had any personal involvement in relation to the matter you raise.

**Senator Patrick:** But you're aware of it?

**Ms Falk:** There's been a lot of media in recent times. I have some recollection of the matters you're talking about, but I'd need to consider it more carefully.

**Senator Patrick:** All right. Thank you.

**Chair:** On that optimistic note, I thank the officers from the Office of the Australian Information Commissioner who are at the table.

**Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability**

[17:38]
CHAIR: Welcome. Before we get started, I might just remind committee members that this is an opportunity to ask questions relating to the organisational arrangements, the funding, the staffing and so forth of the royal commission. It is not appropriate to delve into the substance of the matters that are being dealt with by the royal commission, given the potential for overlap there. I will be quite firm on efforts to go in that direction. Ms Pirani, would you like to give an opening statement before we go to questions?

Ms Pirani: Yes, I would like to make a short statement. Senators would be aware that the letters patent establishing the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability were issued by the Governor-General in April this year. On 16 September this year the royal commission held its first public sitting in Brisbane. During the sitting the commission provided insight into its establishment and how it will proceed with its inquiry. The full video and transcripts are available on our website, along with a summary that has also been produced—in Easyread, for accessibility purposes.

We are currently emerging from our establishment phase in a strong position. We now have seven commissioners, seven counsel assisting, four special advisers and 105 staff across the three locations of Brisbane, Sydney and Canberra. We will be holding our first hearing from 4 to 7 November in Townsville. The focus of this hearing will be inclusive education. This hearing will be conducted by Dr Kerri Mellifont, QC, who was appointed to the royal commission ahead of its first public sitting. Dr Mellifont is Queen's Counsel at the Queensland bar, with a broad range of legal experience, including appearing before a number of commissions of inquiry. Dr Mellifont was one of the senior counsel assisting the Queensland Floods Commission of Inquiry in 2011.

The second hearing is expected to be held in Melbourne in December. The focus of this hearing will be accommodation, including group homes. It will be conducted by Ms Kate Eastman, SC. Ms Eastman is working closely with Dr Mellifont, and they are supported by a number of experienced junior counsel. Ms Eastman is counsel assisting at the New South Wales Bar Association, and has a distinguished legal career working in human rights, equality and discrimination law, among other areas of the law. She has appeared as counsel in many disability discrimination cases. Among other positions, she is the chair of the Law Council of Australia Equalising Opportunity Committee. Work is underway on preparing a schedule of hearings for 2020.

We have also developed an extensive research program, and a number of projects are well underway. These include an analysis of the remarkable number of existing reports of official inquiries relating to people with disability. This is required by our terms of reference. We are also compiling available statistical data bearing on the nature and extent of violence, abuse and exploitation experienced by people with disability and a survey of the legal framework governing the rights of people with disability, incorporating an assessment of the extent to which Australia has yet to implement the rights of people with disability recognised by the Convention on the Rights of Persons with Disabilities.

In relation to engagement, the royal commission opened its submission process on Monday 29 July 2019, and had received 177 submissions as of close of business last Friday. Our information line has received more than 600 calls since it was established on 29 July. We have also received more than 900 inquiries via email. Our official website has been viewed 185,388 times, and its mailing list has 3,561 subscribers. We have held a successful
community forum in Townsville, which contributed to the decision to hold the first hearing in this location, commencing 4 November. Further community forums will be held around Australia in both regional and metropolitan centres, with the next forums to be held in Adelaide, Gawler and Hobart in November.

Commissioners have held nine workshops with stakeholders, including two with First Nations people in Darwin and in Sydney. The workshops have generated useful discussions in areas such as the justice system, education and issues specific to First Nations people, who are a particular focus of the commission. We are planning to develop issues papers on particular topics to generate submissions that will inform any future workshops.

The commission is committed to ensuring all our processes and engagements with the public are trauma informed. Having appropriate advocacy, counselling and legal supports in place for people who have experienced violence, abuse, neglect or exploitation is essential. We are pleased to see the National Counselling and Referral Service has commenced operations. The service, being delivered by the Blue Knot Foundation, offers free counselling support for people with disability, their families and carers, and anyone affected by the disability royal commission.

Witnesses and attendees at our first hearing will also be supported by our internal counselling and support team, which includes social workers and counsellors. Witnesses called to appear at the first hearing will be provided with separate legal representation through the Legal Financial Assistance Scheme operated by the Attorney-General's Department.

The disability royal commission's draft accessibility strategy states the principles that will guide the royal commission in its engagement with people with disability. It commits the royal commission to putting people with disability first in everything we do, and explains how this objective will be achieved. It is important that this strategy is led by the needs of our stakeholders in terms of how they would like us to engage with them. A draft strategy was made available for public consultation, and comments on that draft strategy are currently being incorporated. The strategy will be made available on the royal commission's website once finalised. It will be reviewed and updated periodically as a result of ongoing feedback throughout the duration of the commission.

In conclusion, commissioners remain extremely mindful of the critical function that they have been tasked to perform on behalf of those people with disability who have experienced injustice. We are dedicated to undertaking our work with integrity and in a way that is appropriately inclusive and accessible to all stakeholders. Thank you, I hope that this overview has been very useful for you.

Senator WALSH: Thanks, Ms Pirani, for your opening statement. You outlined there the schedule of public hearings that are coming up. I think you held your first public sitting on 16 September. At around the same time on that day there were a number of media reports about the potential for advocates and people with disability to threaten to boycott the commission process. Do you recall those media reports?

Ms Pirani: I do.

Senator WALSH: Those reports were around the potential for a conflict of interest for two of the commissioners in particular—John Ryan and Barbara Bennett—both of whom
have held roles in the management of some of the programs that may be under investigation by the royal commission. Is that a fair characterisation of the media reports and the concerns?

Ms Pirani: That is a fair characterisation of the concerns.

Senator WALSH: Have you received complaints about commissioners Ryan and Bennett remaining as commissioners? And, if so, how many complaints have you received?

Ms Pirani: I'm not sure if we have received particular specific complaints in relation to them. I'd have to take that on notice and analyse the calls that we've received. But nothing springs to mind—it hasn't been an overwhelming theme that's leapt out for us.

Senator WALSH: If you could take that on notice, that would be great.

Ms Pirani: We can certainly take that on notice and get you some details.

Senator WALSH: In a similar vein, have you heard from people—perhaps a more general way of putting the question—that they will boycott the royal commission as a result of those appointments?

Ms Pirani: We're aware of the media reports and we're also very aware that it's very important that the commission has the confidence of the public, because we've got very important responsibilities and we are very keen that the commission will operate independently, be thorough and operate transparently. The chair of the commission has actually made a statement, which is available on the commission's website, which sets out in some detail how the commission proposes to deal with conflicts of interest that can arise for any commissioner sitting on a royal commission. We have well-established procedures around how those will be managed. The chair of the commission is a very experienced judicial officer—he's been a judge for many years—and he is very confident of his ability to manage conflicts of interest. The act itself gives the chair powers to decide who does and does not sit on a particular hearing that's being held by the commission, and he will determine who will be authorised to participate in any hearing.

Senator WALSH: Sorry, I'll just cut you off. You're being very helpful in giving me a very detailed answer there, but I am just wondering if people have got in touch with the royal commission to let you know that they intend to boycott and, if so, how many?

Ms Pirani: As I said, I would have to take that question on notice, but—

Senator WALSH: That's okay, you're entitled to do that.

Ms Pirani: It hasn't been a big thing.

Senator WALSH: You mentioned in your opening statement that this commission is all about putting people with disabilities first, and there's a lot of work going into the processes and making it accessible and facilitating people and providing support. You started to go into how the chair intends to deal with potential conflict of interest, in relation to these commissioners. I guess, whether the chair regards that there's a conflict of interest or not, it does seem that there are a number of people with disabilities and their advocates who do think that there's a conflict of interest. That seems to mean that some people won't participate in the royal commission process. Do you think that's a real possibility, and what do you think should be done about that?

Ms Pirani: I think if you have a look at the material that's available on our website, each of the commissioners—not just the two that you've mentioned, but each of our
commissioners—have published their conflict-of-interest statements on our website. It is something that will have to be managed throughout the commission, for all of the commissioners, and they're all very well aware of their obligations in that regard. In terms of people engaging with the commission, we do have quite some time to run. We're also aware that, for a range of reasons, we will need to really build trust with the community before they will be willing to come forward and engage with us and tell us about the terrible things that have happened to them.

The sorts of measures that I was talking about in my opening statement are the sorts of things that we are doing to try and build trust with the community and build trust with people with disability, their carers and their advocates, in order to make them aware that we are an organisation that they can trust and that they can come forward and talk to, and we will continue to develop those measures, going forward. We don't take that for granted.

**Senator WALSH:** I'm advised that there are over 50 disability organisations who have called for Mr Ryan and Ms Bennett to reconsider their positions, which seems like a significant number. Is it your evidence that you're not concerned that these appointments will provide a barrier to people participating in the royal commission?

**Ms Pirani:** The commissioners have all participated in a range of different workshops with different stakeholders, including many of the organisations that raised those concerns. I'm certainly confident that as an organisation we can build trust with those organisations, going forward. I don't see it as a barrier at this stage. We will keep an eye on it, obviously, and continue to put measures in place to make sure that it doesn't become a barrier.

**Senator WALSH:** You've mentioned some of those measures and that there's been some material published on the website. Can I ask how it is that you intend to deal with it, if programs that Ms Bennett or Mr Ryan oversaw at a certain time do come under discussion?

**Ms Pirani:** Yes. The conflict statement that's published on our website explains that under no circumstances would a commissioner participate in a hearing or in deliberations concerning any matter that might bear, in any way, on what they've done in the past or anything that they've done in a previous role. So the chair would not authorise a commissioner in that situation to sit on the inquiry being heard. And a commissioner who is not participating in a particular public hearing also would not participate in the making of any recommendations or report arising out of that deliberation. As I said, that information is publicly available on our website.

**Senator WALSH:** Just a final question from me: I'm interested in whether anyone from the government has had contact with the chair of the royal commission—and it's maybe a question that you'll need to take on notice—about Mr Ryan and Ms Bennett and about their positions. In particular, I'd like to know whether anyone from the Prime Minister's office or the Prime Minister himself has had contact with the chair about those two positions.

**Ms Pirani:** That would probably be a question best addressed to PM&C. I don't know.

**Senator WALSH:** Minister, is that a question that you're able to answer?

**Senator Payne:** No, I can't answer the question, but I'll take it on notice.

**Senator WALSH:** Thank you.
Senator STEELE-JOHN: Ms Pirani, let me start by thanking you for your time a couple of days ago in relation to a lot of these questions. It's shortened the amount of time we'll spend together this evening! So that's great. We're probably going to be doing this for about three years, and it was a great way to start it off. I want to first take you to a couple of bits and pieces referenced on the commission's website, to get a bit of further clarification, if I could. Your website, in relation to legal services currently available to witnesses wishing to make a submission, refers to a hotline which is being run by National Legal Aid, which informs you that you're able to ring to access 'basic information, assistance and referrals'. It then goes on to say that you can register your interest in 'a full range of legal services' which will be available soon prior to the commencement of hearings. Given that, I'm just wondering whether you can confirm for me that the hotline is currently the only legal support available to participants that is provided by the commission and the full range of legal services referenced there have not yet been rolled out.

Ms Pirani: There are two different layers of assistance for legal assistance. One is the general hotline, if you like, that has been established with National Legal Aid. That's offered to people broadly who may wish to engage with the commission. The other category is where the commission invites a person to come to give a statement to the commission or to appear as a witness. In those cases, those witnesses can access the legal assistance scheme that's provided through the Attorney-General's Department.

Senator STEELE-JOHN: I am aware of that, yes. What I'm referring to there, though, is your reference to a full range of services which will be available soon, which leads me to believe—perhaps wrongly—that there are additional services that will be rolled out in that first category.

Ms Pirani: In that first category—I'd probably ask the department to answer that question about the progress on those services.

Senator STEELE-JOHN: Thank you.

Ms Hermann: To coincide with the first public hearing of the disability royal commission on 16 September, the service established the hotline that you speak of. As at 18 October, that helpline has received 158 calls, and 124 people have registered their interest in accessing legal advice. In the week commencing 14 October the service commenced contacting clients registered to commence receiving that legal advice. Two clients have now received legal advice from that service, and there are a further five clients who are booked in to receive advice this week. At the moment the service is triaging the remainder of the clients registered for legal advice to arrange for them to have advice sessions. The reason they're triaging at the moment is that they're in the process of recruiting, and we want to make sure that they're recruiting the most appropriate staff—

Senator STEELE-JOHN: Of course.

Ms Hermann: to deliver those services.

Senator STEELE-JOHN: Just to clarify, then, when you refer on the website—I'm not sure whose responsibility the website is—but when you refer to those range of services being available soon, what exactly is being referred to there?

Ms Hermann: The services that that particular service will provide are our national legal advice service that people that want to engage with the royal commission—
Senator STEELE-JOHN: And that currently exists now?

Ms Hermann: They are in the process of scaling up. At the moment they are in the process of recruiting staff nationally to be able to deliver that service. At the moment it's what we would call a limited service while they recruit.

Senator STEELE-JOHN: So you've set up the waiting room, and you're just waiting to hire the actual people that would participate.

Ms Hermann: I wouldn't say the waiting room is set up, because they have commenced providing those legal services. They are undertaking a triage model at the moment. For example, with the hearing coming up in Townsville they are prioritising people that will be engaging.

Senator STEELE-JOHN: But you are saying that there are more people to hire before that service is fully set up.

Ms Hermann: Absolutely.

Senator STEELE-JOHN: And that's what's being referred to when we talk about 'will soon be available'.

Ms Hermann: Yes.

Senator STEELE-JOHN: It's not at full scale yet.

Ms Hermann: Exactly.

Senator STEELE-JOHN: Fantastic. Do you have a date for when that will be at scale?

Ms Hermann: We are hoping that in the next six to eight weeks that service will be at full scale.

Senator STEELE-JOHN: Fantastic. That is my first question done. Staying on the website, can I take you to the question of emotional and counselling support. I thank you for detailing some of that already in your opening statement, Ms Pirani. For people willing to make submissions to the commission, as you've said, you've given us the national counselling and referral service that will be led by Beyond Blue on behalf of the commission. That commenced on 17 October—is that correct?

Ms Pirani: Yes, that is correct. Last week.

Senator STEELE-JOHN: Fantastic. Can you confirm that at this time this phone based service is the only emotional support service available to participants, their families and carers and those affected by the commission outside of those specific supports which I understand you will be providing to folks that are actually giving evidence before the hearing?

Ms Pirani: I might get Ms Carey to answer that question in more detail.

Ms Carey: We do have an internal counselling and support services team that also have been providing support to people engaging with the commission, including through our hotline. They have been acting as a referral point for people experiencing distress or with complex issues.

Senator STEELE-JOHN: What's the name of that team?

Ms Carey: The counselling and support services team.

Senator STEELE-JOHN: And that's within the AG's department?
Ms Carey: No, that's within the royal commission.

Senator STEELE-JOHN: How many folks are there? How many FTE?

Ms Carey: We have two in Sydney and three in Brisbane at the moment, but we are upscaling. Eventually we hope to have nine in total.

Senator STEELE-JOHN: How do those services interact with what Blue Knot is doing?

Ms Carey: We provide immediate support to people engaging with the commission. Blue Knot will offer a really critical complementary service for people, especially people with more medium-term needs and with more complex characteristics. For people who have those really complex needs, up until Blue Knot coming on board we've been holding those cases internally. Now that Blue Knot has come on board, we are in the process of referring some of those cases through to Blue Knot for that more complex support.

Senator STEELE-JOHN: Again, still phone based, or in person?

Ms Carey: Phone based.

Senator STEELE-JOHN: And your aspiration is for nine?

Ms Carey: Our aspiration is for nine, yes.

Senator STEELE-JOHN: When do you hope to be at nine?

Ms Carey: We are actively recruiting at the moment. We have five on board at the moment, two that are coming on board, and hoping for a further two to three.

Senator STEELE-JOHN: So you are not planning on providing in-person counselling support?

Ms Carey: There will be an element of in-person counselling for witnesses as part of the support provided to them at hearings. When private sessions start, there will be an element of in-person support provided to people participating in those private sessions before, during and after the private sessions. We also have members of our counselling and support services team that attend our community forums, for example, and other engagement activities as required to make sure that people in those forums, if they do start experiencing distress, have someone to talk to.

Senator STEELE-JOHN: But from a trauma informed perspective, I'm just trying to clarify—at the moment there is no structure if I experience a breakdown, which is totally reasonable in the context, due to making a submission. There's no way for me to access in-person counselling.

Ms Carey: Not through the royal commission service. I understand that the aspiration is for Blue Knot to provide face-to-face services in the future, but questions around that would have to go to DSS.

Senator STEELE-JOHN: Of course there are the time constraints, which I understand are nine to five, weekends and public holidays.

Ms Carey: In terms of support services, or—

Senator STEELE-JOHN: Both.

Ms Carey: I couldn't answer for DSS. In terms of our support services, yes, we are restricted to normal business hours of operation. I would add that we have put in place referral pathways with outside agencies. We have had arrangements put in place with Beyond Blue
and Lifeline for people who we are concerned about, and we have referred people through those processes.

**Senator STEELE-JOHN:** In relation to confidential submissions, who can tell me when it will be possible to make them?

**Ms Pirani:** We would hope by later this year, but we are working through some of the issues on confidential submissions.

**Senator STEELE-JOHN:** And not currently available now?

**Ms Pirani:** No, although we are not publishing our submissions yet either. We don't guarantee a level of confidentiality, but we are also not publishing them.

**Senator STEELE-JOHN:** I understand. Could you quickly give us a picture of the protections currently in place for whistleblowers who might be appearing before the commission or indeed seeking to give evidence?

**Ms Pirani:** That is probably starting to go a little bit into the substance of how the commission might want to conduct its inquiry.

**Senator STEELE-JOHN:** Of course. Could I rephrase that? Is there a pathway for whistleblowers to give evidence to the commission?

**Ms Pirani:** I think it would be fair to say at the moment that there is not a clear one, but it's certainly something we would be mindful of.

**Senator STEELE-JOHN:** Is there a timeline for when there might be a clear pathway?

**Ms Pirani:** Hopefully by later in the year.

**Senator STEELE-JOHN:** Can I also confirm, in relation to the Disability Access and Inclusion Strategy to which you referred earlier, that currently we do not have a finalised document published on the website?

**Ms Pirani:** No, we do not have a finalised document. I would hope it would be available within the next couple of weeks. It's very close. In the meantime we'd be relying on the draft one, which, as you'd be aware, is quite well developed.

**Senator STEELE-JOHN:** Of course. Could you also confirm for me that Michael Fordham and Chris Ronalds are no longer counsel assisting for the commission?

**Ms Pirani:** They have both returned their briefs, so they are not working for the commission.

**Senator STEELE-JOHN:** Resigned, yes. Thank you. Given some of the answers to those questions, I am going to turn to the question of the upcoming hearing in Townsville to which you referred. That was announced yesterday as being from 4 to 7 November. That's correct, isn't it?

**Ms Pirani:** That's correct.

**Senator STEELE-JOHN:** Fantastic. You've given us a bit of a picture of a commission scaling, I think, and you've also confirmed for me the absence of two senior legal minds in the commission. It does leave me a little bit concerned about the timeline the commission has set out for its first hearing. However, in these things, I always try to defer to the views of organisations who have spent a very long time representing disabled people. Before the
announcement of the hearing date, of 4 to 7 November, did disability orgs reach out to the commission and echo or add any concerns around that date?

**Ms Pirani:** We are certainly aware that organisations did express some concerns about the date and that they thought, perhaps, it was a bit soon. The commission has been operating since April, so we've been setting up for about six months. We've run a successful first sitting in Brisbane, and I think we are very confident that we are ready to conduct our first hearing.

**Senator STEELE-JOHN:** So organisations did reach out to the commission.

**Ms Pirani:** Yes. We're certainly aware of the concerns.

**Senator STEELE-JOHN:** Which organisations?

**Ms Pirani:** I might get Ms Carey to answer that.

**Ms Carey:** I would have to take it on notice just to ensure that I can give you a proper answer. There were a few organisations. I don't have the correspondence with me, but I would want to make sure that I get the right ones.

**Senator STEELE-JOHN:** Do you know whether the Australian Federation of Disability Organisations were among those correspondents?

**Ms Carey:** I don't recall them being amongst the correspondents, but, again, that's why I'd like to check.

**Senator STEELE-JOHN:** Can you give me an idea of the concerns that they raised in their correspondence with you?

**Ms Carey:** The concerns have been mainly centred around the timing of counselling and support services that are being funded externally through DSS and advocacy services and the legal advice services. The concerns are really around those three areas.

**Senator STEELE-JOHN:** Were there additional concerns raised to those three areas?

**Ms Carey:** My recollection is those were the particular concerns raised.

**Senator STEELE-JOHN:** So they corresponded with you. Did they interact with the commission in any other way, other than a piece of correspondence?

**Ms Carey:** I've spoken to a couple of organisations as well.

**Senator STEELE-JOHN:** Has the chair engaged with those organisations?

**Ms Carey:** Yes.

**Senator STEELE-JOHN:** Could you also take on notice as to whether any meetings between the organisations and the chair took place?

**Ms Carey:** In relation, specifically, to the timing of the forum?

**Senator STEELE-JOHN:** Yes, indeed.

**Ms Carey:** Yes.

**Senator STEELE-JOHN:** Was the timing flagged with organisations before the announcement was made?

**Ms Carey:** There was a workshop held specifically in relation to education, and the timing of the hearing was flagged during that workshop. A number of organisations and experts in the area of education were present there.

**Senator STEELE-JOHN:** At that forum, did they flood concerns?
Ms Carey: I can't recall any concerns being flagged specifically at the forum, but I would need to review the transcript.

Senator STEELE-JOHN: Thank you very much. You seem to have told me that you have legal and emotional supports that are currently scaling but not at scale. You've also told me that you have an accessibility strategy that is in formation but not finalised. You've told me that two senior legal figures have handed in their briefs. You have also told me that organisations representing disabled people have flagged concerns, in relation to this time line. All of these things lead me to ask the question: on what basis did the commission make the decision to hold its hearing in the time line that you have outlined?

Ms Pirani: As I said, I think the commission is confident that the issues that have been raised are ones that can be resolved in time for the first hearing, with the fact that we have the legal advice service that is providing legal advice to people focusing on this area of the first hearing and the fact that witnesses who will appear at that hearing will have separate legal representation. The counsel that we have appointed have been appointed for some time. They're very experienced. They're very well advanced in their preparation for the hearing. The commission is very confident that we are ready to go ahead and conduct the hearings.

Senator STEELE-JOHN: So you don't feel that the warnings given to you by the disability sector—and I'll just read the names of these organisations: Disabled People's Organisations of Australia, Disability Advocacy Network Australia, Australian Federation of Disability Organisations, Children and Young People with Disability Australia and VALID. I believe these concerns are also backed up by All Means All and the Independent Advocacy association of Queensland—that is, the people that you will be working with in the execution of this commission. Basically the entirety of the disability sector flagged with the commission on 8 September—this is in a letter to Chair Sackville—that they had:

… express concerns regarding the opening of public consultations and hearings of the royal commission prior to adequate supports and safeguards being put in place for people with disability. We respectfully request the opportunity to meet with you as soon as possible to discuss our concerns in detail.

They go on to add, quite rightly, that not a single one of their organisations had yet received a penny in their bank account to do any advocacy or support around the royal commission. So this is the entirety of the sector, again, telling the commission not to do something, and it would appear to me that you have charged ahead and done it anyway. Do the concerns of these organisations not raise significant red flags in your mind?

Ms Pirani: We've certainly had regard to the concerns that have been raised. As you note, that letter dated 8 September—that's about six weeks ago—

Senator STEELE-JOHN: These views haven't changed.

Ms Pirani: That may be the case, but we've certainly seen a lot of things develop very significantly since that time, including the Blue Knot service being operational, the legal advice services being operational. The issue that you raise in relation to the funding for the advocacy services—

Senator STEELE-JOHN: Has not been resolved.

Ms Pirani: is not something that we can comment on. It would be something best addressed with the Department of Social Services.
Senator STEELE-JOHN: Okay. I'll just leave you with the closing statement from the letter, which is:

At this time, we are advising people not to engage with the commission until the processes of supports are available.

They have asked you specifically not to go ahead with this time frame, in the spirit of putting disabled people at the centre of everything the commission does. It is not a good look, folks.

Ms Pirani: I'm happy to pass your concerns on to the commissioners, Senator.

Senator STEELE-JOHN: Abso-bloody-lutely.

Ms Pirani: But ultimately it is a decision for the commissioners.

Senator STEELE-JOHN: It is indeed.

Senator HENDERSON: Ms Pirani, I want to begin by saying that I was the assistant minister for disability services at the time that the royal commission was announced and I'm absolutely delighted that the government has committed so substantially to this royal commission and made such a substantial financial commitment, of $527.9 million. I contrast this with the commitment initially made by Labor, which was for a disability royal commission with funding of $26 million. What's your opinion of that $26 million commitment? Have you spent that already? Would that have done the job? Clearly, given what the government has now committed, it was very much under measure.

Ms Pirani: I can certainly give you a figure for what the commission has spent so far. In combined operational costs and capital costs to the end of September the commission has spent $11.1 million. We are certainly very well resourced.

Senator HENDERSON: So it's fair to say that $26 million would not have done the job?

Ms Pirani: It would have been a very different commission.

Senator HENDERSON: Could you perhaps just inform the committee about the scope of the work, given the very substantial financial commitment to the royal commission and obviously your objectives over the next three years?

Ms Pirani: Yes. As I outlined in the opening statement, we are very focused on ensuring that the commission is accessible to all. That has led us to do a number of things very differently to the way other commissions have been able to operate, like ensuring that our premises are fully accessible, ensuring that the places where we choose to have public forums, workshops and hearings are fully accessible, making sure that we are able to translate documentation into easy-read formats, having Auslan interpreters at all of our events and the level of support and counselling that we have put in place to ensure that people can engage with us.

Senator HENDERSON: Could you provide a little bit more detail in relation to the funding commitment to support those seeking legal advice and also advocacy supports that are being provided through the Department of Social Services.

Ms Pirani: I don't have those figures. That would probably be information best obtained from DSS. The Attorney-General's Department could probably elaborate on the investment in relation to the legal advice service.

Senator HENDERSON: I've got some figures here. Maybe you could just confirm that they are correct. I'm informed that $17.194 million has been allocated for a legal advisory
service to provide legal advice and information for people engaging with the royal commission, and more than $20 million has been allocated for a legal financial assistance scheme to provide financial assistance for individuals providing evidence to the royal commission. There's also over $100 million allocated to the Department of Social Services to fund advocacy supports and counselling services and $46 million to fund agencies' portfolio costs to respond to the inquiry. Based on those figures, there's obviously very substantial support—a far cry from the $26 million in total that Labor committed to the royal commission. You've talked about the information to manage conflicts of interest. Could you just expand on how the commission would do that.

**Ms Pirani:** As I said, the chair of the commission would decide in any particular hearing as to which commissioners would be authorised to conduct and participate in those hearings. As a very experienced judicial officer, our chair would not authorise a commissioner to participate in a hearing if their participation in that hearing would give rise to a conflict of interest or even to a reasonable apprehension of bias. Under no circumstances would a commissioner participate in a hearing or deliberation concerning matters that might bear, in any way, on their past conduct or the discharge of duties that they may have had in the past. And, when a commissioner does not participate in a public hearing for that reason, they would not participate in the preparation of any report or recommendations arising as a direct result of that hearing.

The chair has also pointed out that, when authorising commissioners to hold private sessions, his overriding consideration would be the safety, security and comfort of the person wishing to engage with the commission, and under no circumstances will anyone be asked to tell their story to a commissioner with whom they do not feel comfortable.

**Senator HENDERSON:** Finally, could you perhaps just give a brief overview of the scope of the commission's work in terms of the geography that will be covered and also the focus on providing people with disability and their families and others who have suffered with the justice that they need, in terms of not just the matters that will be considered by the royal commission but the access to justice?

**Ms Pirani:** Yes. As I mentioned, we are commencing a program of engagement right around Australia. We have some community forums planned next month in South Australia and in Tasmania. Over the three years of the commission, we will be ensuring we travel right around the country, both to regional and to metropolitan areas. We are very aware that there may be times when we need to go to people rather than expecting people to come to us, and we are very focused on ensuring that everyone who wants to tell their story to the commission can do so. We are very open in how we are doing that. People can communicate with us on the telephone, they can put in a written submission, they can send an email, they can use the form on the website, they can put in a video, they can make a submission in another language—we won't be turning anyone away. We are very interested to hear what everyone has to say and to give everyone the fullest opportunity to engage with us in the way that they want to.

**Senator HENDERSON:** Ms Pirani, do you have any idea as to how many people you anticipate will be making a submission to the royal commission in any way, as you mentioned, so that they can tell their story?

**Ms Pirani:** It's very difficult to estimate, but we—
Senator HENDERSON: But it's open-ended?
Ms Pirani: It is open-ended. We expect thousands and thousands of submissions over the three years.

Senator HENDERSON: Thank you very much, Ms Pirani.
Senator STEELE-JOHN: Earlier this year—I forget the date, but most recently—the letters patent that guide your existence were amended with the following language in respect of the chair:

… without limiting the generality of the immediately preceding responsibility and as required during the conduct of your inquiry, We further direct that, other than making recommendations arising out of the inquiry … the Chair is authorised to give binding directions to, assign duties or functions to, or restrict the duties or functions of, other appointed Commissioners."

Who is able to tell me whether the chair has so far utilised that power?

Ms Pirani: As far as I'm aware, the chair has not utilised that power.

Senator STEELE-JOHN: Could you provide that information to me on notice? Could you clarify that for me and provide it on notice?

Ms Pirani: I could clarify that. As I said, as far as I'm aware, no, but I will certainly clarify that with the chair.

Senator STEELE-JOHN: Fantastic. Just referring to the letter you were kind enough to send through to me recently, you mentioned that it is your aspiration for the commission to have a workforce roughly similar to the population proportion of disabled people in Australia. Am I to take it that your aspiration is the commission have a roughly 20 per cent employment rate of disabled people?

Ms Pirani: We haven't set a specific target, but we certainly have specific measures in place in our recruitment to prioritise the recruitment of people who identify as having disability.

Senator STEELE-JOHN: All right. So why don't you have a target?
Ms Pirani: We've certainly had discussions around having a target, and there are a range of views on that.

Senator STEELE-JOHN: When you say 'we', do you mean the department or the commission?

Ms Pirani: Within the commission. And I think that where we got to was that we didn't think it was particularly useful—we wouldn't want to stop because we got to 20 per cent, for example.

Senator STEELE-JOHN: Right.
Ms Pirani: And so we're very focused on trying to get as many people, and encouraging as many people with disability to apply for roles within the commission.

Senator STEELE-JOHN: But, again, your letter—I'll read it directly: 'It is our intention that the commission should be at least as representative of the incidence of disability in the Australian population.' Are you there referring to 20 per cent? Is that the incidence in the population?
Ms Pirani: Yes. We would endeavour to get to that.
Senator STEELE-JOHN: So, it's your intention?
Ms Pirani: It's our intention.
Senator STEELE-JOHN: To get to 20 per cent.
Ms Pirani: Without putting a definite figure on it.
Senator STEELE-JOHN: And that's the incidence in the population?
Ms Pirani: Yes.
Senator STEELE-JOHN: So, in that frame, why not articulate that in a target? You can exceed a target, as you well know, but it's standard practice to have a disability employment target of some level.
Ms Pirani: I'm happy to take that feedback and explore that again.
Senator STEELE-JOHN: Could you take that direct question on notice—
Ms Pirani: Yes.
Senator STEELE-JOHN: and provide me, in writing, with why you have decided against targets?
Ms Pirani: Yes.
Senator STEELE-JOHN: Thank you. You also referred, really helpfully, to the fact that 'all employees of the commission will receive extensive disability access and awareness training via internal and external support sources in order to support our understanding of disability inclusion. This includes education provided by disability advocacy organisations and the HRC.' Can you tell me which organisations you've engaged for this training?
Ms Pirani: I would need to take that on notice. I don't have that detail in front of me.
Senator STEELE-JOHN: Okay. Could you additionally take on notice the exact nature of that training and who it has been provided to? So, all employees: is that an aspiration, or is it your understanding that to date, at this point, all employees have undertaken that training?
Ms Pirani: We have a lot of employees starting very regularly at the moment. It is certainly our intention to ensure that all employees do. I know that a very large proportion have, but I could not guarantee that every single one of them has.
Senator STEELE-JOHN: Is it an online module?
Ms Pirani: No, it's face to face.
Senator STEELE-JOHN: Face-to-face training?
Ms Pirani: Yes.
Senator STEELE-JOHN: Okay. Perhaps you could provide additional information. I do have a couple more questions that I want to clear up, but I know we have reached the dinner break.
CHAIR: Thank you to the officers who have given evidence. You are excused.
Proceedings suspended from 18:32 to 19:34
Australian Commission for Law Enforcement Integrity
CHAIR: Welcome. Thank you for making time to give evidence at this committee. Would you like to make an opening statement before we go to questions, Commissioner?
Mr Griffin: Not an opening statement in general terms. I thought it might be helpful if I were to directly address two issues that arose during the course of the committee's deliberations yesterday so that I can describe—

CHAIR: Be on the front foot? Sure.

Mr Griffin: And then questions can follow rather than toing and froing.

CHAIR: Go for it.

Mr Griffin: I should mention in respect of one of those issues that a person was named during the proceedings. I have to be very careful because my legislation constrains the release of information once I have it. Unless the committee require me to, I don't propose to identify the person by name. I simply refer to the fact that questions arose about them yesterday.

CHAIR: Okay.

Mr Griffin: The other issue relates to the question raised in respect of the Crown casino matter. I thought I would tell the committee what I'm doing in respect of both of those matters.

The Attorney-General, the Hon. Christian Porter, referred to me under section 18 of the act matters in connection with interactions between the Department of Home Affairs and Crown casino. Those matters were described in media broadcasts and in media articles, and there have been more of those since. We undertook, as we always do, an evaluation of the referral, which involves an intelligence work up. We then commenced investigations fairly quickly, within the week. We opened the hearing phase of the investigations on 20 August. We are gathering information in a very wide net from relevant bodies, law enforcement and anticorruption, in all the states and territories.

We will embark on the next phase of hearings next week. They will be public hearings for the first time in ACLEI's practice. We will conduct them in Melbourne next week. We've issued a release in respect of that. We've engaged on social media, but I'll repeat the request that's contained in that release, which is that we'd invite any members of the public, or indeed any members of any organisation, in possession of material that they want the commission to know about to contact us. If they go to the website, they'll find different media by which they can contact us. That can be done in confidence with the full protections that are provided under the Law Enforcement Integrity Commissioner Act.

The second matter relates to a set of complaints made by a person in immigration detention. I understand that the Department of Home Affairs have written to the committee today correcting an error that was on the record yesterday. What I can tell the committee is that that particular person raised two matters. One was indirectly, which came to us through the Department of Home Affairs in what is called a section 19 notification, where the secretary must inform me of any matter that raises a corruption issue. We received that in March and we sent it back on 2 April. We received another one, this time directly from the person concerned, in June. We again turned that around very quickly. It came in late June and we sent it back to the department in July. Why did we send them back to the department? We did so because section 16 of the act requires me to direct the resources of the commission to serious or systemic corruption.

In respect of the complaints from this person, we were able to assess them with the benefit of the broader information and intelligence base we have from a series of other operations. I
think this may be helpful for the committee to know, because I haven't made it public before. In 2016 we became aware of a number of threads that related to potential areas of corruption in both the immigration detention space and in the visa processing area.

CHAIR: What do you mean by 'threads'?

Mr Griffin: Pieces of information of different types. You'd appreciate that we receive everything from direct referrals of intelligence reports from security agencies through to people who ring us in the middle of the night on our hotline and leave messages and everything in between. Those various threads caused me to seek from government a funding package under the Proceeds of Crime Act to establish what we called the Visa Integrity Taskforce. That kicked off in 2017. That involved recruiting a number of specialist people. As you would probably appreciate, it's not a matter of putting a job ad on SEEK or LinkedIn for the type of people that we need. We couldn't get the funding on 1 July and have it running on 4 July; it doesn't work that way. So we set about recruiting the right people, and we got them. It took some time. And then we ran that project. I'm pleased to say it's still running. It was so successful that we sought approval to continue the money that we hadn't expended, and we continue on. I anticipate we'll wrap it up towards the end of this year.

The Visa Integrity Taskforce focused on the issue of potential corruption in the issuing of visas, mostly offshore. That caused us to have a very good look at the systems and the people involved in that process. We selected a number of countries. We chose two in Africa, one in Europe, two in the Middle East and several in Asia. We went in and had a look at them with a full intelligence workup and investigation process. We disrupted a fairly significant syndicate in one of those countries. We were able to disseminate that information to the relevant law enforcement and security agencies, who were able to sweep up those people. In the other countries that we identified, we found a number of corrupt systems and people in place who were entirely what are known as locally employed staff. They were employees of the Department of Foreign Affairs and Trade exercising authority under the Migration Act in respect of the issuance of visas. By and large, it involved the payment of money for a visa which was granted on the basis of documentation that was fraudulent. Whilst it covered the whole range of visas, it was mainly in the student environment, because that is the sort of visa that gives you long-term access to Australia rather than the short-term visa.

We're pretty confident we found it all. We were able to work closely with Home Affairs and Foreign Affairs and Trade. We were able to interdict the syndicates, particularly the bigger one. That resulted in code of conduct action in respect of the locally employed staff, because, as you'd appreciate, the criminal sanctions available to me under the act do not apply extraterritorially. What we're really interested in is getting rid of the risk and cauterising the wound so that normal processes can be underway. We then engaged in an extensive education process in collaboration with Foreign Affairs and Trade and Home Affairs to go and retrain the officials in those places in how to go about their business. We think we've got a very good understanding of that visa issuing space in those countries that we looked at. We also had regard to China, one of the largest markets for visas. We assessed that because it was one of the largest markets and, in our consideration of the department's processes, it was very robust. My hearings that are commencing next week will explore and test that proposition quite significantly.
The parallel aspect of the task force related to other operation that we undertook in the immigration detention space. I initiated an own-motion investigation three years ago in respect of matters of public consideration arising out of Manus Island. We had a good look at that. We reached the conclusion that there was no corruption issue. Whilst there may be other issues that are criminally related, they don't fit within the definition of corruption provided for in this act. It may be helpful if I remind the committee of that definition. It's three-fold. The first limb is abuse of office. You may be familiar with the criminal law aspect of abuse of office. It entails the prosecution proving the element of dishonesty. That is easier said than done on the criminal burden of beyond reasonable doubt. So we do do that and we have had several prosecutions of abuse of office. The second limb is effectively obstructing justice or perverting the course of justice. The third limb is conduct which, having regard to the duties and office of the person in question, amounts to corruption of any other kind.

We then looked at the immigration environment. As I mentioned, initially we looked at Manus Island and we felt that that test wasn't satisfied. I might also mention to the committee that when I look at considering those corruption allegations, the test in the act is very broad, particularly if you consider it against, for example, the state agencies such as the New South Wales provisions, which run for pages, which were found by the High Court in the matter of Cunneen to be beyond power. In our act the hurdle is a very simple one. Corruption jurisdiction for me is information that raises a corruption issue. It doesn't say anything about a prima facie case. It doesn't say anything about reasonable cause. It doesn't say anything about reasonable suspicion of the commission of an offence. It just says information that raises a corruption issue. So, as you'd appreciate, that is not a great hurdle for me to get over. Having crossed over that hurdle, the next question is: does it fall within jurisdiction? The Migration Act allows for the minister, to specify, in addition to Border Force and Home Affairs staff, people such as, at the relevant time, the Serco employees who worked as the officials within the detention centres. So they fall within our jurisdiction. So we decided to have a good look at them.

How did we do that? First of all, I visited them all myself. You might realise, as I did, that nothing bad is going to happen while I'm there, but it sent a message that we were having a look. We then sent investigators in overtly and made their presence felt. Then we utilised the covert powers that are available to us. We did identify corruption—people on Christmas Island who were prosecuted and people in the Perth Detention Centre who were prosecuted. In other detention centres we were unable to reach the criminal burden but we did reach the administrative law test of the balance of probabilities, so we were able to draw that to the attention of the department. I met with the Border Force commissioner on several occasions and with the senior management staff of Serco. Our intelligence was disseminated to them and they dealt with the people that we had identified. That's been ongoing for three years, and I am as confident as we can be that we have put the appropriate resourcing into having a look at the detention centres and the visa issuing process, at least in the countries that we looked at. That included the person who was discussed yesterday. I understand, I think I have already said, that Home Affairs have corrected the record, but we looked at that particular person and we were satisfied that that all the intelligence work and the investigative work had been done in relation to the two matters that he raised, and that—in terms of my obligation of serious and systemic corruption—it was appropriate to refocus my resources on that more significant
material, because I had confidence that this person was not at personal risk. That was a key issue that we referred back to the department and we knew that they were apprised of that.

Thank you, chair. We are available for any questions that the committee may wish to ask.

Senator McKIM: Thanks for your opening comments, Mr Griffin. They have raised a number of questions in my mind that I will now begin to ask you. I suspect we will run out of time in my first tranche. So we might have to come back to it. The first matter I would like to discuss is the matter that Home Affairs have corrected the record on today. You may be constrained from mentioning names, and that's fair enough, but I am not, so I will place on the record that this is in regard to a complaint made by Mr Nauroze Anees that this committee had previously been told was referred to your organisation on 6 March. Can you remind me when you said you referred that back to Home Affairs?

Mr Griffin: I believe it was 2 April.

Senator McKIM: So when Ms Noble from Home Affairs said on 4 April to this committee:

… the secretary referred the matter to ACLEI on 6 March and it remains with them.

That's wrong, is it?

Mr Griffin: I can only tell you what we did. That is—and my staff checked today—the message containing my letter went on 2 April.

Senator McKIM: Are you able to provide the committee with a copy of that letter?

Mr Griffin: Yes.

Senator McKIM: Are you able to do that in real-time or would you need to take that on notice?

Mr Griffin: We would need to take that on notice.

Senator McKIM: Thanks, Mr Griffin. I look forward to reading that. In the course of your opening statement, you mentioned—I'm sorry, I can't remember the name—the task force that was established, I think you said to deal with potential corruption around, firstly, immigration detention and secondly, visa processing, is that right?

Mr Griffin: I'm sorry, I've conflated the two.

Senator McKIM: It may be my misunderstanding, Mr Griffin, so no need to apologise. Perhaps you could just clarify what the task force is investigating.

Mr Griffin: I will. The one to do with visas has the acronym VITF, and it's the Visa Integrity Task Force. It was specifically directed, largely, to the external issuing of visas—outside Australia.

Senator McKIM: Offshore?

Mr Griffin: Yes, offshore. The second one was a group of operations that were divided up between my teams. They had separate operational names, but in the end we rolled them all together because they were all so related.

Senator McKIM: Okay, and that was into immigration detention?

Mr Griffin: Correct.

Senator McKIM: Did that one include Manus Island?
Mr Griffin: No.

Senator McKIM: That was a separate matter?

Mr Griffin: Manus predated—

Senator McKIM: It predated it and was a separate matter. I'm going to park Manus Island for a minute, but we will come back to it. Can you remind me what VITF stands for again?

Mr Griffin: Visa Integrity Task Force.

Senator McKIM: Thank you. Is that still ongoing as of today?

Mr Griffin: It is.

Senator McKIM: Okay. Could you try to encapsulate why you made the decision to refer Mr Anees's complaint back to home affairs? Was it a resourcing issue? I think you alluded to that in your opening comments. Would that be a fair—

Mr Griffin: That was a significant part of it. It relates to section 16 of the act, which obliges me to direct the resources to serious or systemic corruption. As you'd appreciate, there are gradations of how serious something is and, indeed, how systemic it is, so it's a triage process

Senator McKIM: Thank you. But, ultimately, what you've done is refer complaints made against home affairs back to home affairs for investigation, haven't you?

Mr Griffin: Yes.

Senator McKIM: So, by referring it back, you've initiated the department investigating itself?

Mr Griffin: Yes, I have.

Senator McKIM: But you've said you have oversight of the investigation?

Mr Griffin: That's correct.

Senator McKIM: Firstly, why it was Mr Anees not told that the matter had been referred back? I've just checked with him and he had no idea—this is all new. He's watching and this is all news to him.

Mr Griffin: Typically, we don't engage with people who have referred matters to us in the first instance, particularly where we've taken the decision almost straight away to refer it to the agency. The act actually comprehends that agencies really have the first responsibility for the maintenance of their own internal integrity, and it's a fine balance. You've identified one of the issues, which is sending something back to the people who an individual may conclude, 'Well, these are the people who've done this to me,'—

Senator McKIM: My word.

Mr Griffin: why have they sent that back?'

Senator McKIM: My word.

Mr Griffin: I fully appreciate and understand that, yes. What we did do, and what we have done consistently in those particular centres, as I alluded to earlier, is that we showed the flag, if you like. I went there, to the people who were there—

Senator McKIM: So was this in the context of that complaint or the broader work of the—
Mr Griffin: No, the broader one.

Senator McKIM: I'm specifically trying to ask questions about the specific complaint.

Mr Griffin: Specific, yes.

Senator McKIM: In fact, I think you said in your opening statement that there were actually two complaints referred.

Mr Griffin: Yes.

Senator McKIM: Where they both referred by Mr Pezzullo?

Mr Griffin: No. One came directly from the gentleman in detention himself, and it was about himself. The first one wasn't about him.

Senator McKIM: I understand that. I don't know what the second complaint was, but I do know what the first one was; it was a matter of visa integrity, was it not?

Mr Griffin: Yes, it was.

Senator McKIM: So why didn't you ask your task force, which was in operation at the time, to investigate that?

Mr Griffin: Because it was part of the total package that we were investigating. We were looking at allegations in relation to the payment of bribes for the processing of visas.

Senator McKIM: That was—

Mr Griffin: So we captured that—

Senator McKIM: Sorry, Mr Griffin. Are you speaking there about that specific complaint or the broader work of the task force?

Mr Griffin: We captured that specific piece of intelligence into the broader work of the task force.

Senator McKIM: This might be a silly question—and apologies in advance if it is—but if the task force was up and running and ongoing, surely the resourcing issue wasn't a huge one for you, because you already had a task force investigating visa integrity and another complaint came in right in the scope of that task force. Why was the resourcing such an issue, in your mind?

Mr Griffin: Because, at that time—and, indeed, throughout the period since 1 July 2017—we had chosen those countries offshore with a vast volume of visa processing. We had looked at the particular matter that this person had raised, in terms of the broad context within Australia of visa processing, and we were confident that we had a good read on the visa processing internally. And allegations of—I won't name the geographical area, but there was a particular office that was said to be involved in that. So I had a team dedicated to looking at that office, and the full range of our suite of powers. Again, because of the triaging process, I've got to look at the greatest risk—where is the biggest risk?

In respect of the person we're talking about, I was comfortable, at the time of the first issue he raised, that there was no risk to him, because it wasn't about him. Dealing with that aspect of risk for a whistleblower, which we take very, very seriously—it's my experience, in excess of 100 hearings that I've done as the Integrity Commissioner, that whistleblowers don't want to be known. They are fearful, often, with very good reason. So we take that seriously and we protect them.
In that first matter, with that person, he was not at risk on all the indicia that we had. In the second matter, we had already gone into that particular place. That's where I mentioned to you that we'd had discussions with Border Force and Serco about people we had concerns about, who were involved in the management and maintenance of that centre, and we were pretty comfortable that the risk had been removed. Therefore, it was again a triaging process that the level of risk and seriousness for that matter was such that we could, with reasonable confidence, refer it to the department to look at.

**Senator McKIM:** Okay. The situation is that in the matter of Mr Anees, he'd blown the whistle publicly on his allegations. You are aware of that?

**Mr Griffin:** I am now, Senator. Thank you. I'm not second-guessing the decision for the person to make themselves known. They might feel comfortable, but there are other people we have to worry about.

**Senator McKIM:** I fully appreciate that, and I make no adverse comment in regard to that. But I just want to place on the record that, in some circumstances, it is possible to conceive that publicity would help keep somebody safe rather than secrecy.

**Mr Griffin:** I wouldn't quibble with that proposition.

**Senator McKIM:** Perhaps that's where Mr Anees found himself. He doesn't feel safe. He's still in immigration detention today, and he doesn't feel safe. In fact, he believes he's being victimised because he's made this complaint. And after at least two manifestly false statements to this committee by Department of Home Affairs officials—one on 4 April this year and another one yesterday—we've just found out today that, in fact, this matter has been with Home Affairs for many months. Yet Mr Anees has not been contacted by Home Affairs. I've just checked with him. No-one's contacted him. So given you have oversight of the Home Affairs investigation, could you encapsulate where that investigation is at for the committee, please, if that's possible for you to do?

**Mr Griffin:** We've made inquiries ourselves, having identified the error. We are in a position to oversight what they, we understand, have planned. We will do that now. I might also draw to your attention, if I may, section 220 of the Law Enforcement Integrity Commissioner Act. It makes it an offence to victimise any person who raises issues with ACLEI. I will park that alongside what you've just raised with me, and I will treat it just as any other matter that comes to us. It's come to us in this forum, but we'll give it the appropriate response. I assure you of that.

**Senator McKIM:** Thank you, Mr Griffin. I very much appreciate that. I really do. Can I follow up on one comment you just made. You said that you'd had oversight of what Home Affairs has planned. Does that mean that they're yet to commence an investigation?

**Mr Griffin:** We don't actually know that. We know an investigator is identified. What we typically do when we oversight is that we will provide our own intelligence work up to the relevant agency. They will develop an investigation plan. They will run it past our senior investigator who's allocated to it to provide advice and guidance, if you like, on how the investigation unfolds.

**Senator McKIM:** But, at the moment, you're unable to inform the committee that the Home Affairs investigation has commenced?
Mr Griffin: I know that they have identified an investigator and that they have taken steps, but I can't speak to the detail of that.

Senator McKIM: But this was referred back to them in early April. That's six months ago, effectively.

Mr Griffin: It's quite reasonable that because it related to the alleged purchasing of visas, that matter, it was pretty much subsumed in our visa process. I can't say the same about the matter that was alleged concerning the man himself, which was in July.

Senator McKIM: I understand that. The point I'm making is that, on your evidence, it's an inevitable conclusion for this committee that after six months, after you referred the first complaint that was referred to you back to Home Affairs, the investigation appears not to have even commenced. That's a long time for the department to sit on an investigation, particularly as twice, in my view, they've given false information to this committee, albeit one of them has been now corrected. But in a way that's prevented me from asking Home Affairs questions about this investigation because they're not coming back.

Mr Griffin: I understand the point you're making, but I would go back to the timeline. That first one, which was the six months, isn't about the gentleman himself.

Senator McKIM: No.

Mr Griffin: And it is about a matter that, quite reasonably, could be considered as part of what we're doing in the visa task force. If you're going to start the clock running, I think it would be from July, when we sent it back—the second one. And Home Affairs will speak for themselves, of course.

Senator McKIM: In about six months when we get them back in! Are you aware of whether Home Affairs is investigating the two allegations separately or in a combined way? I'm only asking to the level of your awareness about that.

Mr Griffin: No, I don't know.

Senator McKIM: There's a lot of new information before the committee, as I'm sure you can appreciate, Mr Griffin, so I'll just move to the investigation you say you conducted on Manus Island. Did you say that was own-motion investigation?

Mr Griffin: It was an own-motion investigation.

Senator McKIM: Information came to light or, to your mind, was enlivened as to the potential for corruption in the Manus Island RPC? Is that fair?

Mr Griffin: Yes. As you'd appreciate, we take a very close look at all avenues of information, not least being open-source reporting.

Senator McKIM: Yes.

Mr Griffin: I saw the reporting. I thought that the public would want me to have a look at that, so I did. We did an intelligence work-up. We didn't send investigators in. It was an extra jurisdictional matter. But we did a very detailed intelligence analysis of it. Then we went to school on one of my predecessors—Mr Philip Moss, who was an integrity commissioner. He conducted a review and we had a look at the material he gathered, and I think, with the greatest respect, Mr Moss would recognise a corruption issue as soon as he saw it. Having looked at his considerations, our own intelligence analysis, we were satisfied that it didn't raise a corruption issue. There were other issues, potentially, of criminality. But as far as the...
three-pronged test that I referred you to earlier was concerned, we didn't feel that it crossed that threshold.

Senator McKIM: What were the issues of criminality that it raised?

Mr Griffin: My recollection is that there were matters in the press article about potential violence or perhaps verbal violence. I can't recall, I'm sorry, and I would be misleading you if I said I remembered.

Senator McKIM: Sure. When did that investigation end?

Mr Griffin: It was before the task force was stood up. I'd have to take that on notice, but I think it was the second half of 2016.

Senator McKIM: Do you recall whether it investigated allegations that detention centre staff who were involved in the murder of Reza Barati were flown out of the country before they could be interviewed by Papua New Guinean police?

Mr Griffin: No, it did not.

Senator McKIM: That's raised a number of questions in my mind. Perhaps the easiest thing for us to do at this stage is for me to have a bit of a think about that. There is a process to put written questions on notice through this committee. As you've pointed out, you're obviously operating in accordance with your act and other statutes on the books, and obviously I don't want you to breach your responsibilities. But I have a number of further questions, some of which I would like to ask tonight. Chair, I've had a fair old crack at it, and thank you. I know Senator Lambie's got questions, but I will just indicate that I do have a further tranche of questions for ACLEI.

CHAIR: Okay. You've had 15. I'll send the call over to Senator Lambie.

Senator LAMBIE: Thank you, Chair. I understand that ACLEI has written to my colleague Andrew Wilkie MP asking for him to reveal the identity of a whistleblower who is a driver for Crown Casino in Melbourne. This whistleblower agreed to speak with Andrew only on the condition that he remain anonymous. As you have already pointed out, whistleblowers do not want to be known. Andrew agreed to honour this, as he would. So, can I ask—rather than spending time trying to discover the identity of this driver—when do your officers intend to go down to Crown Casino and interview all the drivers? You're sitting there, but when are you going to interview all the drivers from Crown?

Mr Griffin: In due course.

Senator LAMBIE: Is your office going to do that, or are you going to pass that over to the Australian Federal Police or the Victorian Police?

Mr Griffin: I'll assess that when we see how big the task is.

Senator LAMBIE: Okay. Obviously this is out there. Wouldn't you want to move on this as quickly as possible? Do you have somebody advising you on how to do this the policing way, or are you just using your integrity—do you actually have someone who's been in policing advising you on how to tackle these issues?

Mr Griffin: Yes.

Senator LAMBIE: You do?

Mr Griffin: Yes.
Senator LAMBIE: So, what do you think your time frame's going to be before you actually get down to those drivers and interview every single one of them? Drivers have a lot to say, by the way.

Mr Griffin: I look forward to hearing from them.

Senator LAMBIE: That'd be great. So, do you have any time line on that whatsoever?

Mr Griffin: We typically don't telegraph our operational activities.

Senator LAMBIE: There seems to be a lack of sense of urgency about it, that's all. I'm just trying to get to that. Is there a lack of a sense of urgency, or do you just not have the resources to be able to carry it out?

Mr Griffin: I'm not sure where you get the lack of a sense of urgency from. We commenced hearings within three weeks of receiving the referral, and our investigations have been quite extensive. You would perhaps understand that there are a number of other agencies who are running on this track at the moment, and there are issues of deconfliction. But what we will do, as we always do, is undertake the investigation painstakingly and thoroughly. We're doing that.

Senator LAMBIE: I take particular note that Crown Casino seems to have some sort of power over the Labor Party and the Liberal Party—

CHAIR: That's outrageous!

Senator LAMBIE: so can I ask you, what powers does ACLEI have to investigate members of parliament?

Mr Griffin: I have powers under section 75 and 82 of the Law Enforcement Integrity Commissioner Act to summon any person present within the borders of Australia to answer questions under oath on pain of criminal sanction for failure to do so. They apply to everyone.

Senator LAMBIE: Have you investigated any members of parliament yet?

Mr Griffin: I'm not going to go into the operational details of my inquiry in public.

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Senator LAMBIE: Have you investigated any members of parliament yet?

Mr Griffin: I'm not going to go into the operational details of my inquiry in public.

Senator LAMBIE: There are a lot of allegations swirling around about Crown concerning Victoria Police. What powers does ACLEI have to investigate VicPol if needed?

Mr Griffin: As I indicated, under sections 75 and 82 of the Act, I can summon any person in Australia and any organisation in Australia, subject to the Commonwealth/state legal divide, to provide information. I can tell you that we have excellent relationships with all of the state law enforcement agencies and anticorruption agencies, and we are engaging in gathering a vast body of material from those agencies. I'd go so far as to say that it may be the first time that a helicopter view of the material that's held by different state agencies will be considered.

Senator LAMBIE: Is it, though, when it comes to people like VicPol and politicians, that these powers will only apply when it is known that laws have been broken and only then you can start your investigation?

Mr Griffin: I'm sorry, I didn't quite follow that.

CHAIR: Senator Lambie, I'm going to interrupt you there and just caution you not to cast reckless aspersions upon members of parliament and parties in circumstances where you are
lacking in evidence for doing so. If you have evidence for doing so, I suggest you present it rather than doing what you are doing.

Senator LAMBIE: I'm simply asking about a law: whether or not they can investigate before they know the law has been broken or after. I have every entitlement to ask that, Chair.

CHAIR: You can ask questions about when laws are broken, but in doing so you are making accusations.

Senator LAMBIE: What am I doing, breaking the law?

CHAIR: You have cast aspersions on parties and members of parliament—

Senator LAMBIE: I'm simply asking—

CHAIR: I ask that you do this with civility, focus on the issues, focus less on casting claims for which you have presented no evidence. Focus on the issues and we won't have any problems.

Senator LAMBIE: I'm simply asking, once again, when it comes to politicians and police, or Federal Police, or anyone else—those three in particular—do you have the powers to investigate before you know that laws have been broken; or once the laws have been broken can you then come in and you have the evidence that the laws have been broken, do you then go in and investigate, or do you have the powers to investigate before it gets to that?

Mr Griffin: We can investigate before the law is broken. I should qualify my response to you about summoning 'any person'. Summoning any person relates to me being satisfied, or having reasonable grounds to believe, that they have or may be in possession or know of information that is relevant to my inquiry. So politicians going about their business in parliament is parliamentary business, and we would of course respect parliamentary privilege in that regard. Similarly with statutory officials and others under state legislation: their personal knowledge and things that they had done in their non-professional activities would be subject to my jurisdiction. But the carriage of their official capacity would be a matter for their state corruption bodies. But we would refer that to the state body.

Senator LAMBIE: That's interesting. Do you believe that you are the best organisation—and we have a lot of them here in Australia—to be investigating what's going on with Crown?

Mr Griffin: I think it's helpful to define what my role is. My role, as referred to me by the Attorney-General, is to inquire into allegations of corruption involving interactions between the Department of Home Affairs and Crown. So anything that is relevant to interactions between Home Affairs and Crown we will inquire into and investigate. In respect of Home Affairs, that probably divides into two separate components. One is the Border Force officials, who put on their hats and go to the plane and clear the people and look at their passports and luggage and that sort of thing—so those officers responsible for the people coming in and out. Also, at the other end, as you heard about the ALOs—the Border Force officers at the departure point in another country—is there any corruption in what they're doing?

The separate, parallel component is the visa process of the officials in China issuing visas to what we are told are referred to as high rollers, and what happens to them in respect of the immigration officials when they arrive in Australia. So there are two components and their interactions with Crown. What I would do, and what I would imagine you would expect me to
do, is cast the net wide and then draw it back in to see what we turn up and investigate that. That may involve, where it doesn't involve the interactions between those two bodies—that is, those people in my jurisdiction—referring that to one of the state or other federal agencies.

**Senator LAMBIE:** So you're like a private investigator, then, on the outside. You go gather as much intelligence as you can then pass it off to one of the departments and hope like hell, I suppose, that they get the job done? Is that where I'm coming from here? I'm just trying to work out your role precisely.

**Mr Griffin:** My role is to investigate corruption.

**Senator LAMBIE:** And once you have all that evidence, you'll then do what? You'll pass it over to the agency that—I'm just trying to work it out—are you more like a private investigator, where you say, 'I've got all the evidence here, and now I'm going to pass it over, I think it belongs in Home Affairs, I think it belongs with the Federal Police—'?

**Mr Griffin:** I see your point. There is some parallel to the metaphor you've used except that, rather than passing it over to the agency, we will assemble that evidence. If we're satisfied that it gives rise to a prima facie case—that is, if the evidence is admissible—we'll give it either to the Federal Police to prosecute but, more usually, to the Commonwealth Director of Public Prosecutions to determine whether or not a criminal prima facie brief of evidence is there. Failing that, it may be that we would give it to a state law enforcement agency such as the Independent Broad-based Anti-corruption Commission in Victoria, ICAC in New South Wales, or the New South Wales Director of Public Prosecutions. But I'm required—once I reach the trigger point of having what I think is sufficient evidence to give rise to a criminal prosecution, then I give it to those prosecuting authorities, who are independent, and they make that decision. So it doesn't go back to the agency, it goes to the law enforcement bodies.

**Senator LAMBIE:** So basically, it doesn't go back to the agencies, not ever?

**Mr Griffin:** It does if I haven't got a criminal case. What parliament decided in the Act was to have a two-step test. Section 142—which comes first in priority—deals with criminal law. If I don't get over the criminal hurdle, then section 146 says, have you got a balance-of-probabilities case here that can be used? You'd be familiar with the code of conduct and the disciplinary side of the house. Can this be used to deal with this person under code of conduct? So that's my second trigger point.

**Senator LAMBIE:** Considering that you can't prosecute or charge, and you're doing the investigation, and you'll know it back to front better than anyone before you pass it off, because you would have done all that groundwork, do you think that maybe it's time to give you guys more powers to be able to follow that through from beginning to finish? Passing cases from one person to another is never, never, a good idea, especially when it's dealing with criminal law and visas and what's going on, whether you're laundering money.

**Mr Griffin:** You'd appreciate that it happens all the time, where the Federal Police do an investigation, just as I am, and then they give that to the Director of Public Prosecutions. It's not an unusual process.

**Senator LAMBIE:** Yes, but you don't have the same powers as the Federal Police, though.

**Mr Griffin:** I've got more powers than the Federal Police.
Senator LAMBIE: Your department does not have the same powers as the Federal Police. You can't go in and prosecute, and you can't go in and charge. They can certainly go in and charge and walk that through.

Mr Griffin: We have considerably more powers than the Federal Police. For example, we can compel people to give evidence even if they might incriminate themselves in doing so, which the police can't do. I can have people in, they'll take the Bible or whichever holy book they believe in, or they'll make an affirmation that they'll tell the truth, and they have to answer every question, even if it leads to self-incrimination. So yes, we've got considerable powers. Your question is, should a body with that degree of powers that takes away all those common-law rights, should that body also have the power to charge? There are many who take the view, as did the framers of this act and the parliament, 'Maybe that's a bit strong. Maybe we should have an independent body that decides whether or not to charge.' That's the situation as it is at the moment.

Senator LAMBIE: It would be much easier for everyone if we had a federal ICAC. That would clear all our matters up. What do you think about that, Mr Griffin?

Senator Payne: That's a statement of your view, Senator.

Senator LAMBIE: I would have just liked what he thought.

CHAIR: This is a time for questions. You can reframe that as a question, but you can't give a speech.

Senator LAMBIE: So I guess my last question is, would it be preferable to have a federal ICAC in these situations, rather than having what I would say is the next level down? I'm not trying to be mean there, but if we had a federal ICAC with massive amounts of powers, wouldn't we get much better results?

Mr Griffin: I think one of the issues that arises four square there is, say for example I was a federal ICAC and there was a state royal commission underway, as there is in New South Wales, and another inquiry underway in Victoria; the deconfliction of that would give rise to very significant constitutional law issues. That doesn't mean that's wrong. I just flag that there are a whole range of issues that can arise there. Of course the decision is a matter of policy and is one for government.

Senator HENDERSON: Commissioner, a couple of questions. Does ACLEI have sufficient powers to investigate the broad nature of the allegations referred to it by the Attorney-General in relation to Crown Casino?

Mr Griffin: Yes. As the explanatory memorandum to the act and the second reading speech made plain, in fact we have the powers of a royal commission. We couldn't have any more power under the Australian Constitution under law. We've got the full suite.

Senator HENDERSON: Why did you choose to hold public hearings in relation to Crown?

Mr Griffin: Section 82 sets out a four-limb test that I have to consider each and every time I've held those 104 hearings I've had to date. I do this every single time. I have to look at the four limbs.

The first limb is: does this matter involve confidential issues? And 'confidential' is not defined in the act, but, as you would know, it comes under a whole range of titles—medical-
in-confidence, legal-in-confidence, psych-in-confidence, commercial-in-confidence and so on. I have to consider whether it raises an issue of confidence. The second part of that first limb is: does it raise issues that are potentially criminal in nature? Could there be a criminal offence here? As I understand it, what the parliament was concerned with there was the primacy of the courts. An executive function like mine shouldn't run the risk of interrupting or perhaps being in contempt of the court. So I have to look at that. That's a balancing act. That's just the first limb.

The second limb is couched in these terms: is it possible that a public hearing would create unfair prejudice to the reputation of the person? What's interesting about that formulation of words is the use of the adjective 'unfair'. It doesn't say: would it create prejudice to the reputation of the person? It says: would it create unfair prejudice to the person? Again it is not defined, but it's part of the exercise that I have to go through.

The third limb is: is the public interest in this matter of such significance that it warrants a public hearing? The fourth matter is: any other relevant issue. So, looking at those four and noting that the referral that came to me from the Attorney-General included reference to at least one media television program and several newspaper articles, on balance the potential unfairness to anyone, the prejudice to particularly those who will be in the public hearings, is way and truly outweighed by the public interest because the public have already heard quite a bit of this story. In the normal course of events, just like the police, we don't telegraph that we're coming. We don't say that there's going to be an investigation. We do it behind closed doors. We don't want to tip off people. But in this matter the issue is already over, by and large—the allegations are known to everyone—so any criminality would have found another avenue by now. So in that exercise I've come down on the side of the public interest outweighing those other considerations.

**Senator HENDERSON:** Why did you write to the Australia Institute about their public statements in relation to the Crown matters?

**Mr Griffin:** That particular document published by the Australia Institute had so many flaws in it that I felt it was incumbent upon me to bring it to the attention of the senior management of the institute.

**Senator HENDERSON:** And what were those flaws?

**Mr Griffin:** One that immediately springs to mind is that it said that we didn't have sufficient powers. In fact, here it is. I wrote back to them and said that the first error that they had made was that they said that ACLEI does not have the full investigative powers of a royal commission. Then I set out the explanatory memorandum and the legislation. That was the first one.

The second one was that our definition of 'corrupt conduct' in the act is more limited than the definitions in the state based anticorruption commissions. It is, in fact, the reverse. Ours is very broad, as I indicated earlier. Does the information raise a corruption issue? They said, 'ACLEI cannot make findings of corrupt conduct but only refer misconduct to agency managers.' That's patently wrong. We've had 10 prosecutions just this year alone. We have made findings of corrupt conduct and the court has found the individuals guilty of abuse of office or other forms of corrupt conduct. They're criminal sanctions.
They said, 'ACLEI cannot refer cases to the DPP but only to the Federal Police Commissioner.' Again, almost everything goes to the DPP, either federal or state, so that's just plainly wrong. 'ACLEI does not have the power to investigate ministers or former ministers, ministerial staff, MPs, government contractors or the judiciary.' As I've indicated, the act gives very extensive powers to question any person who has evidence that is relevant to the corruption investigation that I have underway. And finally: 'ACLEI is under-resourced and relies on the AFP to carry out its major investigations.' Well, no, that's not true. We use what we refer to as the concertina model. We are a relatively small agency—at any given time, we have roughly 60 to 65 people—but we bring in resources, as we did for the task force. We will second people from a variety of agencies, both state and federal, who then are authorised under my act and who then carry the full sanctions of the criminal law to protect what they hear and learn while they are working with ACLEI. We can bring those resources to bear reasonably quickly and they are quite significant. That is what I wanted to correct, Senator.

Senator HENDERSON: Thank you very much.

Senator PATRICK: Chair, could I have one supplementary question?

CHAIR: If it's one, sure.

Senator PATRICK: Mr Griffin, this goes to your statement that you can require someone to give evidence that is self-incriminating. Is that admissible in a court in later proceedings?

Mr Griffin: With respect, that's an interesting question. The parliament clearly decided that the need to gather that information was of such critical importance that it interferes with or removes those common law protections. The trade-off for that—and it is a significant trade-off—is that evidence cannot be used against the person themselves in criminal proceedings.

Senator PATRICK: And that, I think, is proper. I just wanted to clarify that. That is normally the situation for royal commissions and other—

Mr Griffin: Indeed, and it is a very important point.

Senator McKIM: Mr Griffin, do you have the exact dates that the two complaints from Home Affairs were received by ACLEI and then, in each case, returned back to Home Affairs?

Mr Griffin: I'd need to take that on notice if I can. My recollection is that the first one was received sometime in March and the second one was received sometime in June and they were turned around in the following month in each case.

Senator McKIM: I think you gave evidence earlier that the first of those was referred back to Home Affairs on 2 April. I think you said earlier that you had checked that.

Mr Griffin: Let me just confirm that. Yes, it was 2 April.

Senator McKIM: I think you have agreed that you will provide that letter on notice. Could I extend that to both of the letters. Were they referred back by letter? Is that how these things are done?

Mr Griffin: That's how they are done, yes.

Senator McKIM: Could you please provide on notice each of the letters that referred each of the matters back to Home Affairs?
Mr Griffin: Yes.

Senator McKIM: Thank you.

Mr Griffin: Might I qualify my grandiose statement that we can provide that to you. I would need to add the qualification that it may require—and I don't know—the redaction of individuals. But, given that you have already indicated the person's name, I think that's unlikely.

Senator McKIM: All right. Thank you. But my next question does go to individuals. Were the letters addressed to Mr Pezzullo, who does have some statutory responsibilities in this area?

Mr Griffin: I always write to the agency heads.

Senator McKIM: So both of those letters would have gone to Mr Pezzullo?

Mr Griffin: Correct.

Senator McKIM: In regard to the current role that ACLEI has on both of those matters, which is to oversight the Home Affairs investigation, I've reviewed the correction provided to the committee today by Mr Brown from Home Affairs. He says that the matter—and I am sure he is referring to the first of the two referrals—is currently under investigation. But ACLEI is not aware of that. So what sort of oversight are you running if there is an investigation underway but your organisation is not aware that there is an investigation underway?

Mr Griffin: We oversight when we receive the investigation plan. To my knowledge, as advised today, we haven't seen the investigation plan yet.

Senator McKIM: So Home Affairs says there's an investigation underway, but ACLEI is yet to receive an investigation plan?

Mr Griffin: It may simply be the disjunct of time, that they have commenced something. I can't speak for them. What I can say to you is that we are yet to sight the plan.

Senator McKIM: Do you know as part of your oversight when Home Affairs commenced the investigation? I have realised halfway through the question that you don't because you didn't know there was an investigation underway.

Mr Griffin: That's right. We don't know.

Senator McKIM: So the situation is that the person who made the complaint, Mr Anees, has been waiting patiently since it was made public that the matter was referred to ACLEI in the first place by Mr Pezzullo back in March this year to provide investigators with extra evidence that he wished to furnish them with that was not part of his original, public allegations. So since March he has been waiting for about six months. I have checked with him; he has not heard from you, which you've confirmed, because you are not investigating. I understand that. That's not an adverse reflection. But he hasn't heard from Home Affairs. Given that Mr Anees has alleged to me that he has received death threats inside the immigration detention system, given that he's alleged to me that he was physically assaulted inside the immigration detention centre as a result of making these allegations, what would be your advice to Mr Anees at the moment? How should he go about making himself safe, firstly? Secondly, how should he provide the further information he says he has to Home Affairs when in fact they haven't even told him that they are investigating?
Mr Griffin: I'll just get the sequence right in my head to answer your question as best I can. I have just been corrected: the oversight extends to the first matter. That's because it was rolled into the whole Visa Integrity Task Force. I shouldn't speculate, but it would not be unreasonable for Home Affairs to conclude that, because that's part of the Visa Integrity Task Force and because it didn't relate to him and he had given the information, there is nothing more to get from him. I don't know. We are oversighting it as part of that—

Senator McKIM: I understand that, Mr Griffin, but the awkward position I am in is because of the wrong information provided to this committee yesterday by Home Affairs, which they have now corrected. I have been deprived of an opportunity to ask Home Affairs these questions.

Mr Griffin: Yes. I understand—

Senator McKIM: That is not an adverse reflection on you in anyway, just to be clear.

Mr Griffin: What I can circle back to is the issue I raised with you about section 220 about vilification of people if they make complaints to my commission. We will take that away from this hearing and consider how we would deal with that.

Senator McKIM: Would publicly providing false information about someone as a result of them making a complaint fall into the category of victimisation?

Mr Griffin: It may well do. Section 220 has two limbs, as many of the sections do. I might just refresh my memory, if you will bear with me while I have a look at the actual provision. It's in these terms: a person commits an offence if the person causes or threatens to cause detriment to another person on the ground that the victim or any other person has referred the matter to ACLEI. And it carries the sanction of imprisonment for two years.

Senator McKIM: Thank you. If you're unable to answer this, please tell me, but could 'detriment' include reputational detriment?

Mr Griffin: It's a term that would need to be interpreted in the consideration of the alleged offending. I wouldn't rule it out.

CHAIR: Senator McKim, I'm concerned that, given that the letter we have been provided by Home Affairs tells us that we have a current investigation, this line of questioning may prejudice that, and I ask you to exercise appropriate care.

Senator McKIM: All right. I'll keep that in mind. Thank you.

CHAIR: Thank you.

Senator PATRICK: In relation to someone who feels that detriment may have been caused in respect of that last section, I presume they'd bring that to your attention and that you, in ensuring that there's confidence in your organisation, would then investigate that and make a referral if necessary.

Mr Griffin: It's entirely likely that we would consider ourselves conflicted if the person was a witness to us and we had taken it and then something had happened to that person—that we would form part of the prosecution or police case. I think I would probably refer that to the Federal Police.

Senator PATRICK: But you would specifically, prima facie, say, 'Look, I think this needs to be looked at by the police.' And you wouldn't leave it to the person to go somewhere looking for help?
Mr Griffin: That's correct.

Senator KIM CARR: But these are events that—are you suggesting occur—

Senator PATRICK: No, that was just a question in response to—

Senator KIM CARR: Yes, because officers are covered by parliamentary privilege as well.

Senator McKIM: I'm not suggesting that. I'm suggesting that he's had false information made public by Minister Dutton outside the parliament.

Senator KIM CARR: Outside the parliament.

Senator McKIM: That's right.

CHAIR: Senators, we're running about four hours behind. We've got two hours to go. Can I encourage brevity, laser-like focus and wrapping up this set of questions as quickly as we can, please?

Senator McKIM: I appreciate that, but I'm sure you appreciate that there's been a range of new information placed before the committee this evening that requires appropriate examination. Mr Griffin, thank you. I just want to ask—and I am nearly done for tonight—I think you said that the Manus Island investigation ended in 2016.

Mr Griffin: That's my general recollection.

Senator McKIM: Could you take on notice to provide the dates that it started and ended?

Mr Griffin: Yes.

Senator McKIM: Thank you. When you originally raised that investigation in your opening statement, according to my notes an element of that investigation was into obstructing the course of justice. Is that right?

Mr Griffin: No.

Senator McKIM: My apologies. But you did say that although the investigation did not uncover corruption issues it did uncover issues of criminality.

Mr Griffin: No—we identified that there was reporting of issues that were potentially criminal.

Senator McKIM: What did the investigation conclude?

Mr Griffin: We only made a conclusion in respect of whether or not there was corruption. We didn't pursue the issues of criminality.

Senator McKIM: Did you refer those off to anyone else?

Mr Griffin: No, because it was open-source reporting that had already been canvassed in Mr Moss's inquiry, and he felt there was nothing to add there.

Senator McKIM: Was that in regard to the issues of criminality, or the corruption?

Mr Griffin: The entirety of what Mr Moss considered in respect of Manus Island.

Senator McKIM: I think I have misunderstood you here. So Mr Moss did his inquiry.

Mr Griffin: Yes.

Senator McKIM: Post that, you did an own motion inquiry.

Mr Griffin: Yes.
Senator McKIM: Were the matters covered in your own motion inquiry covered or not covered by Mr Moss's inquiry?

Mr Griffin: Of the parts of our inquiry that we looked at and that Mr Moss had covered, he looked at the full range of behaviours, as I understood it, and we focused on if there was a corruption issue or issues revealed in that material. We didn't look at criminality per se.

Senator McKIM: Did Mr Moss's inquiry look at criminality?

Mr Griffin: Sorry, I cannot recall.

Senator McKIM: It is probably outside your jurisdiction anyway.

Mr Griffin: Yes.

Senator McKIM: Just so I'm clear, was your Manus Island investigation associated with the Nauru RPC or just Manus Island?

Mr Griffin: Just Manus.

Senator McKIM: Did the course of your Manus Island inquiry satisfy you that there was no corruption issue on Manus Island?

Mr Griffin: It didn't raise a corruption issue.

Senator McKIM: It didn't raise a corruption issue on Manus Island. I'm still a little confused, Mr Griffin, because Mr Moss's inquiry was, at least in part, relating to potential corruption, was it not?

Mr Griffin: I can't recall what the terms of reference were, but we were satisfied from what we saw in his report that he had not identified corruption, just as we had not on the open source reporting. Because of his status as a former integrity commissioner, we didn't go behind the material that he had gathered.

Senator McKIM: You simply took it on face value—

Mr Griffin: Indeed.

Senator McKIM: which I make no adverse reflection on, by the way.

Mr Griffin: Thank you.

Senator McKIM: Well, you've given the committee a lot to think about Mr Griffin, so thank you for your evidence.

CHAIR: Commissioner, are you able to tend or provide to us a copy of your opening statement?

Mr Griffin: No, I regret not. I chose not to make an opening statement but to address the two issues that came up yesterday.

CHAIR: You're a special person for being able to freestyle your opening statement. You're doing very well. Thank you very much for appearing before the committee. We excuse you, and do so with our thanks.

Commonwealth Ombudsman

[20:54]

CHAIR: Welcome, representatives from the Commonwealth Ombudsman's office. While ordinarily I would invite an opening statement, unless there is something you're particularly
burning to put on the record, I might suggest we go straight on to questions, given the hour. Is that something with which you're comfortable, Mr Manthorpe?

Mr Manthorpe: Entirely comfortable. We tabled our annual report yesterday. It's all in there. Over to you.

CHAIR: Excellent.

Senator KIM CARR: I will put my questions on notice, given the hour.

CHAIR: Thank you, Senator Carr.

Senator PATRICK: Ombudsman, in your act under section 9 you have powers to command production of documents and the tendering of information. Has that power been used over the last couple of years?

Mr Manthorpe: On a small number of occasions, yes. I can think of a couple of occasions, two or three. It's rarely used because, generally speaking, when we approach agencies that we oversee—to remind you, we oversee most agencies in the Commonwealth, the exception being the tax office, where the Inspector-General of Taxation has a role that is akin to ours, and the intelligence agencies, where the Hon. Margaret Stone has a role. So we look over the rest of Commonwealth administration as well as a number of other places.

Typically, we investigate matters that come to us by way of complaint. We also do own-motion investigations and the like. Typically, when we ask for information without exercising the powers that you refer to we get that information. We exercise the powers in circumstances where either we think something might be being withheld from us, which is unusual, or in circumstances where we're seeking, sometimes in consultation with the person seeking the information, to provide the appropriate protections for that person to provide the information to us.

Senator PATRICK: If necessary, on notice, can you provide the committee with, over the last three years, how many were issued and whether it was issued through a member of an agency or some other person? I presume you can require anyone who might have information, including people who are not government agencies, to provide you with information.

Mr Manthorpe: Yes. I will check that point of detail in coming back to you, but we will come back to you on notice on that matter.

Senator PATRICK: To give you some context to my question, the economics committee is looking at matters related to the IGT or the IGTO. By way of section 15 of their act they have the same provisions, or section 9 applies to the IGT. One of the reasons they choose to issue a notice might be to provide protection, by way of their section 39, to anyone that is producing that information. I looked through your act, briefly, and I couldn't see a similar provision to their section 39. Does your section 9 offer a protection in circumstances where someone applies retribution of some sort or victimises someone on account of them complying with a section 9 direction?

Mr Manthorpe: I will correct this on notice if I am wrong, because I don't have the act in front of me; my colleague does. My understanding of the layman's working of the act is that if I issue a direction it does provide certain protections to the person to whom I am issuing the direction. But I'm happy to clarify that. If Ms Hinchcliffe has a more detailed answer, we could provide it now. If not, we'll take it on notice.
Ms Hinchcliffe: We'll take it on notice.

Senator PATRICK: To your recollection, have you ever been required to exercise that protection? For example, someone has come to you and said, 'I was doing what you said, Sir—

Mr Manthorpe: And something terrible has happened.

Senator PATRICK: and something terrible has happened. My boss kicked me out of the office,' or something like that.

Mr Manthorpe: Not to my recollection, no.

Senator PATRICK: In circumstances—

Ms Hinchcliffe: Sorry, Senator Patrick. The protections that are in our act are protections that go to immunity from criminal prosecution, and civil immunities, in effect.

Senator PATRICK: I'm more interested if someone applies retribution to someone who is assisting you with an investigation, by way of section 9, and someone decides they don't like that in some way, and punishes them—

Ms Hinchcliffe: Some sort of reprisal action, I think is what you're asking.

Senator PATRICK: Some sort of reprisal action.

Ms Hinchcliffe: We'll go away and have a look at that on notice.

Senator PATRICK: That's the protection I'm looking for. I'm happy to take this on notice. In those circumstances, if you got to a point where you felt retribution had occurred, assuming your act provides that protection, how would you seek to exercise or enforce that protection? In some respects it might depend whether there's a criminal sanction associated with it or some other remedy. Could you explain that on notice.

Mr Manthorpe: I think it would depend on what it was that was being done. It's always dangerous to hypothesise, but, if some grave harm was being done to someone that was in the nature of a criminal harm, off the back of the fact that they had revealed something to us as part of an investigation we were undertaking under the Ombudsman Act, then I can imagine we would refer such a matter to the relevant law enforcement authorities. That might be the AFP in a corruption manner, covered by ACLEI. It might be the gentleman who was here five minutes ago. But I'm speculating because it would really depend on the circumstances, and I'm not aware that the circumstances have arisen. Then, in parallel to all of that, there's the PID Act, which we also have oversight of.

Senator PATRICK: But obviously this is dealing with a matter that's not associated with whistleblowing rather to someone who's been required to assist you. I'll just give you the context, which might help you answer it better on notice. The Economics Committee has looked at a case of a Mr Ron Shamir, who was issued with a notice some time in May 2015, and on 9 June the tax office became aware that he had been issued with a notice. On 10 June he was marched out of the office. It's conflated with a workplace issue. I asked the IGT—and I'm not being disrespectful; she's new—what would normally happen in those circumstances? She has taken that on notice. I'm just trying to work out what you might do in those circumstances. That might be helpful.

Mr Manthorpe: I appreciate that her legislative framework is similar and in some ways based on mine, but not the same.
Senator PATRICK: Yes.

Mr Manthorpe: So I am happy to take that on notice and provide you a full response.

Senator PATRICK: Thank you.

Mr Manthorpe: No problem.

CHAIR: Are there any other questions for the Ombudsman? Thank you very much for sticking it out this long. We do appreciate you making yourselves available.

Attorney-General's Department

[21:02]

CHAIR: Would you like to make an opening statement for this section?

Mr Moraitis: Actually, I would like to make an opening statement, would you believe!

Senator Payne: You're really stretching the friendship!

CHAIR: That's okay. I'll give you the same advice I gave Senator McKim: brief and focused!

Mr Moraitis: The reason I do so is because the committee may not be aware there was a recent machinery of government change involving the Attorney-General's Department. This is an attempt to provide you with a short overview of what that all means and how we're going to operate with this committee and other committees, given our new responsibilities. I just want to outline some practical initiatives we've also undertaken to achieve that machinery of government change to ensure that the organisation is able to provide advice to the Attorney and to the Attorney in his role as Minister for Industrial Relations.

The Administrative Arrangement Orders were signed on 29 May this year, and they affected the transfer responsibility for industrial relations functions from the Employment portfolio to the Attorney-General's portfolio. As a result of that there was a transfer of finances and staff, and these were all settled within the time frame set by government to implement these changes. The date of effect of this transfer was 25 July this year, and the full-year ASL average staffing level transfer was 325.2 FTE, including four ASL from the service delivery office of Finance department. The full-year departmental funding transfer was $62.6 million. Administrative program funding was also transferred.

The funding and staffing of the industrial relations functions will form a separate outcome within the departments for the portfolio additional estimates statements. In addition, seven agencies have been transferred to the portfolio, and they will be included in the additional estimates statements. In addition to the work that's undertaken within the department and with which you are already familiar I hope, this change resolves in new transfer responsibilities for industrial relations policy program and legal initiatives and work, health and safety to our department. This includes, for example, matters such as work health and safety policy; industry engagement; international labour, including the International Labour Organization, the ILO; wages policy and minimum standards; workers' compensation; migrant workers; and industrial relations programs, including the Fair Entitlements Guarantee, the FEG. I don't intend to speak further on these areas of responsibility, as they fall within the purview of the Education and Employment Legislation Committee, which this department will appear before tomorrow. However, I think it's useful to be aware of the scope of the policy program and legal initiatives for which this department now has responsibility.
When the announcement was made about the machinery-of-government changes, obviously we did not have much involvement with those matters. We've generally fully appreciated how the subject matter would, in fact, complement the existing work of our department. There are strong similarities in the type of work performed by the AG's industrial relations portfolios, whether it be focusing on policy, programs and legal matters; the contested nature of some of these initiatives; and the broad consultation and range of stakeholders, including from states, territories unions and industry bodies through to citizen of the direct interested in the effect of government policies and services on their lives. We, as a department, look forward to the opportunity of becoming more involved in this important subject matter—I do, personally, having been reappointed as Secretary and having helped develop and drive some positive policy outcomes for the department, for the Attorney, in his role as the Attorney-General and as Minister for Industrial Relations, and for the government.

Obviously, in the process of machinery-of-government transition and changes, getting the people and culture of the organisation right is critical to supporting the government in a consistently-high and professional standard. We're well aware this can be unsettling for many people, and we've taken the effort to ensure that the changes can meet some of these challenges so they can benefit from the perspectives that the industrial relations group has undertaken to join with us.

From the very start, we've made it clear we want to facilitate a smooth and effective transfer of employees to the department and foster a positive culture amongst us. I've met with the staff at the beginning of the process. We've had regular, if not weekly, communications through emails. My chief operating officer provided employees with regular updates on other practical matters. We organised corporate information sessions for all staff. We even set up a kiosk for three weeks over at the department of industrial relations to answer all the questions that they had on how we work, issuing credit cards and getting security clearances done, to ensure that the transition is as positive as possible. We had meet-and-greet sessions for all new staff so that they got to know one another, particularly the lawyers from the two portfolios. It's always a useful opportunity for lawyers when they first meet.

I, of course, met with all portfolio agencies in August. We intend to replicate that forum in early December. We think this has gone a bit of the way to ensuring we can forge integrative, cohesive and functioning organisations. There's a lot of work to be done still, particularly having all staff done in a single building and getting IT right, as always, but I think there's a solid foundation at this stage to build a strong portfolio to support the Attorney, both in his role as First Law Officer but also in his role as Minister for Industrial Relations. That was a bit of a speed read, but I've done it. Thank you.

**Senator KIM CARR:** You said 'the relations with this committee'. Are you anticipating that the industrial relations division will appear before this committee?

**Mr Moraitis:** No.

**Senator KIM CARR:** So you said you'll appear tomorrow at—

**Mr Moraitis:** I'll be appearing at the Education and Employment Legislation Committee.

**Senator KIM CARR:** Do you expect that, in the future, this division will appear here?

**Mr Moraitis:** My understanding is it's up to the parliament. We understand that through the machinery-of-government process our two committees were going to be maintained. I've
arranged to be available for both committees, as I have today and tomorrow. I will be appearing tomorrow afternoon in front of the employment—

Senator PATRICK: The Senate passed a resolution that, even though it's within the Attorney-General's Department, the industrial relations section would appear before the education and employment committee.

Senator KIM CARR: All right. No worries. There are a series of matters that I would have normally pursued with you following the discussion with a number of agencies, but given the hour, I'll have to put a lot of that material on notice. So can I perhaps truncate my questions. It is our intention to keep to the agreement we have, Chair.

CHAIR: You're an honourable soul.

Senator KIM CARR: We'll do our best. Can I turn to this question of whistleblower protections and the Moss report?

Mr Moraitis: Yes.

Senator KIM CARR: You'd obviously be familiar with statutory independent review. That review was completed some time ago. In fact, I'm advised it was back in July 2016. That's correct, isn't it?

Mr Moraitis: That's correct.

Senator KIM CARR: So what's happened to that?

Mr Moraitis: We've provided advice to government and it's under consideration by government.

Senator KIM CARR: It has obviously been considered for some time.

Mr Moraitis: Yes, that's correct.

Senator KIM CARR: Minister, can you tell me why the government has not responded?

Senator Payne: I don't have any advice on that, Senator, but I'm happy to take it on notice for you, of course.

Senator KIM CARR: It has been three years.

Ms Chidgey: At the moment there are inquiries into press freedom in which whistleblower protections have been raised. The government will consider that alongside the Moss review recommendations.

Senator KIM CARR: Consideration of press freedoms has come along fairly late, hasn't it? They've had three years to consider this report. It hardly explains why there has been a delay of this length. Are you able to cast any light on that?

Ms Chidgey: I've got nothing to add.

Senator Payne: I will follow that up, Senator Carr.

Senator KIM CARR: Thank you. Minister, while you're there can you get some advice as to whether or not the government actually takes whistleblowing seriously?

Senator Payne: I can actually answer that. Of course I can. Yes, we do take whistleblowing seriously.
Senator KIM CARR: The review report has been there since 2016. That suggests to me that the government is not taking it seriously. It has taken this long and is yet to reply. We're now told that it might be tied up with some other inquiry.

Senator Payne: As I said, Senator, I will get some advice on that for you.

Senator KIM CARR: Perhaps you can remind me of the recommendations.

Mr Moraitis: There are about 30 recommendations.

Ms Chidgey: There are 33 recommendations that go to the practical operation of the act and in particular clarifying the extent to which employment matters should be dealt with through the public interest disclosure scheme.

Senator KIM CARR: I'm told that the first recommendation was that the act be reviewed every three to five years. It has taken that long to even get a reply to the recommendations made in the last review. It does raise the question of how serious the government's response is.

Mr Moraitis: It would be fair to say that that's correct, but it's also fair to say that the act is quite complex. It has been a while since I've read the recommendations—

Senator KIM CARR: No doubt that's true.

Mr Moraitis: so I can't recall the details.

Senator KIM CARR: But you have a deputy secretary there who can remind us. How many submissions were there?

Mr Moraitis: I can't recall.

Senator KIM CARR: Do you have that on your brief?

Ms Chidgey: Submissions to what, sorry?

Senator KIM CARR: To the Moss review.

Ms Chidgey: No, I don't have that.

Senator KIM CARR: The Commonwealth agencies spend quite a lot of time and resources preparing submissions to the statutory reviews. If the outcomes of those statutory reviews are then ignored, it could be argued that the Commonwealth is wasting resources. I wonder what Mr Moss would think of it.

Mr Moraitis: We wouldn't agree with that. We as a department have been examining this and have put advice to government about this. It's a matter for government to respond.

Ms Chidgey: My colleague Ms Galluccio has the number of submissions made to the review.

Ms Galluccio: I understand that 46 submissions were received.

Senator KIM CARR: They were across Commonwealth agencies, were they not?

Ms Galluccio: Actually in the review there's a list of the 46.

Senator KIM CARR: That's good, so you can help me here then, given that you have them in front of you. There were Commonwealth agencies that made submissions to this review.

Ms Galluccio: That's right.

Senator KIM CARR: And it's fair to say that the review has been ignored.
Ms Chidgey: No, that's not fair to say, Senator. The government is actively considering it.

Senator KIM CARR: It's just that in June this year the Attorney-General said that he had an intention to overhaul public sector whistleblower protection to make it simpler and more accessible. What exactly did he have in mind, given he has had this review for three years?

Ms Chidgey: That's a matter for the Attorney and the government to make final decisions on.

Senator KIM CARR: Are you working on legislation?

Ms Chidgey: There has been work done on potential amendments.

Senator KIM CARR: So the department does have some plans then?

Ms Chidgey: It's a matter for the Attorney and the government to make decisions.

Senator KIM CARR: I understand that it's a matter for them, but if you're working on proposed amendments you must have some grasp of what he's thinking.

Ms Chidgey: We have considered the Moss recommendations and have obviously provided advice to the Attorney.

Senator KIM CARR: When will legislation be ready for introduction to the parliament?

Ms Chidgey: It's a matter for the Attorney to decide.

Senator KIM CARR: We've got two press freedom inquiries running at the moment in the parliament. There's the intelligence and security committee and the Environment and Communications References Committee. Did the department make an independent submission to those inquiries?

Mr Moraitis: We made a submission to the PJCIS inquiry. I think it was a joint submission with the Department of Home Affairs—

Senator KIM CARR: A joint submission, that's what I understand. It's joint with Home Affairs?

Mr Moraitis: Yes.

Senator KIM CARR: Can you please explain to me what your thinking was in making a joint submission with Home Affairs, the well-known bastions of whistleblower protections?

Senator PATRICK: And press freedom.

Senator KIM CARR: I haven't even started on that, but I'm just wondering—

Mr Moraitis: We just thought it would be useful to have a joint submission that outlines all the issues from various perspectives of the two portfolios. There's an overlap, but there are also differences. We're comfortable with our views being reflected in that paper. We also followed up with a supplementary submission, which was a departmental submission—

Senator KIM CARR: So it was independent. It was your own submission, was it?

Mr Moraitis: Our joint submission was also independent. The suggestion that it wasn't independent, I don't accept.

Senator KIM CARR: Well I'm just wondering, it was on the—

Mr Moraitis: There are times when agencies actually cooperate with each other and try to achieve—

Senator KIM CARR: I've heard this.
Mr Moraitis: We also followed up with a second submission, which responded to some queries from the PJCIS and the department provided—

Senator KIM CARR: Was that a joint submission as well?

Mr Moraitis: No, it was a separate submission, as I said.

Senator KIM CARR: From AGD—

Mr Moraitis: The Attorney-General's Department, yes.

Senator KIM CARR: Who suggested that the original submission be a joint submission?

Ms Chidgey: The two departments together decided that that would be appropriate.

Senator KIM CARR: Spontaneously?

Ms Chidgey: And I think we did a follow-up one together, because many of the issues that'd been raised by those who are interested in the inquiries cut across the two portfolios and departmental responsibilities.

Senator KIM CARR: I see.

Ms Chidgey: Indeed, many of the questions on notice that the Parliamentary Joint Committee on Intelligence and Security asked to Home Affairs, there were quite a number of those that they transferred to us, I suppose, as an example of the fact that many of the issues cross the two departments.

Senator KIM CARR: Okay. It's as though you spontaneously reached this conclusion, did you?

Ms Chidgey: Yes, we did.

Mr Moraitis: I don't know about 'spontaneously', but after consideration.

Senator KIM CARR: In terms of the religious discrimination—the two inquiries—you've heard the conversation we had this morning with the ALRC's review and that matter being put back. What's the role of the department in the development of the Religious Discrimination Bill?

Mr Moraitis: We work with the Office of Parliamentary Counsel in preparing the draft bill in consultation with the Attorney. I think it'd be fair to say that Ms Chidgey's team has been in pretty close consultation, working and advising the Attorney on the bill and its various permutations, and reflecting consultations that he's had with many stakeholders over the last few months. We continue to provide advice to the Attorney, to assist him.

Senator KIM CARR: When will we see a finalised bill?

Ms Chidgey: That's a matter for the Attorney, but he's indicated that he expects to introduce legislation before the end of the year.

Senator KIM CARR: End of this year?

Ms Chidgey: That's correct.

Senator KIM CARR: How many weeks have we got? Three weeks, have we not? The Senate-only sitting week plus two? Can you give me a date, when we'll see it?

Ms Chidgey: No, I've already given you the advice on that. I don't have a particular date.

Mr Moraitis: We can't give you a date.

Senator KIM CARR: You don't have a date. But the end of the parliamentary year?
CHAIR: Senator Carr, I distinctly remember you canvassing these matters with these very same witnesses earlier in the day.

Senator KIM CARR: They were not the same witnesses, Madam Chair. We actually—

CHAIR: If I'm wrong about that, then I'll be a little more accommodating. Who were you asking it to beforehand, if not to these ones?

Senator KIM CARR: There was a question about the reports that were due in from the agency, and that was the date at which they were suggesting—that's why I suggested to you it was actually coming next year, at the end of the parliamentary session. We've just been told that the new legislation will come this year. They're two separate matters and two different, separate sets of officers.

CHAIR: We'll agree to disagree, but I'll give you a little bit of latitude.

Senator KIM CARR: I don't think you need to, because what I've said is correct. Can the department advise whether elder finance abuse is on the agenda for the next meeting of the attorney-generals?

Mr Moraitis: Yes. On elder abuse and the working groups there are several agenda items on the next meeting of the attorneys-general on 29 November in Adelaide. In fact, we had consultations with state and territory counterparts last Tuesday to go through all those items for the next meeting. I can confirm that.

Senator KIM CARR: What's the department doing on that matter?

Mr Moraitis: Quite a bit. I'll ask Mr Anderson and Ms Mathews to outline the work that we're doing in protecting the rights of elder Australians.

Ms Mathews: There is quite a program of work underway under the National Plan to Respond to the Abuse of Older Australians. In addition to that, the Attorney has also this year launched a number of initiatives such as 1800 ELDERHelp and over $18 million investment in front-line services. In relation to enduring power of attorney, that is matter that is before the Council of Attorneys-General, and the Commonwealth Attorney-General has indicated that he will be bringing a detailed proposal back to the November meeting.

Senator KIM CARR: There's a campaign being run by the Australian Women's Weekly and the Australian Banking Association. I'm sure you'd be aware of that.

Ms Mathews: Yes.

Senator KIM CARR: The key demand of those organisations is the establishment of Australian power-of-attorney register to check to see if power-of-attorney documents are legitimate. Does the department support that proposal?

Ms Mathews: It is a proposal that's before the Council of Attorneys-General. We did receive some seed funding to develop a proof of concept, and that work is underway. Whether or not the Council of Attorneys-General supports the development of a national register would have to be considered at the November meeting.

Senator KIM CARR: Is the department supporting the call for consistent laws to stop financial abuse of vulnerable older Australians?

Ms Mathews: Again, that's something to be considered by the Council of Attorneys-General in November.
Senator KIM CARR: What about the issue of the establishment of a place to make it easier for bank staff and others to report suspected abuse? If you do support such a measure, if that matter is under consideration, what actual specific details are being considered?

Ms Matthews: Again, all I can say is that that is to be considered at the November meeting.

Senator KIM CARR: Could I turn to the issue of the Personal Property Securities Act. The Personal Property Securities Act is obviously of interest to insolvency practitioners. It's also of interest to Australian businesses who have to register security interests on the Personal Properties Securities Register. Is that correct?

Mr Anderson: I'm not sure I understand the question.

Senator KIM CARR: You'd be familiar with the Personal Property Securities Act?

Mr Anderson: Yes.

Senator KIM CARR: As I understand it, it's mostly of interest to insolvency practitioners, but it's also of interest to businesses that have to register security interests on the Personal Property Securities Register. Is that correct?

Mr Anderson: When the Act was passed, it was really a piece of micro-economic reform because it brought together 70 different acts that dealt with the securitisation of a range of interests and made it much more readily accessible. So it makes it easier for people to securitise a much wider range of interests.

Senator KIM CARR: The Whittaker report was tabled in parliament on 18 March 2015. You may not have a brief on that, but is that your memory of the matter?

Mr Anderson: I believe that's correct. Mr Whittaker did a very, very exhaustive review. He made 394 recommendations.

Senator KIM CARR: Your memory is very good.

Mr Anderson: It has been taking a while to work through it.

Senator KIM CARR: So you're working through those?

Mr Anderson: We are addressing that.

Senator KIM CARR: That's 4½ years to work through them—is that what you're telling me?

Mr Anderson: We are progressing work on that.

Senator KIM CARR: No formal response from government?

Dr Smrdel: There hasn't been a formal government response yet to the Whittaker review. As Mr Anderson pointed out, it was a rather compendious review, with 394 recommendations, and it's a very complex subject matter as well. To assist in terms of the government being able to progress it, there was some additional funding provided in the 2019 small business package which gave the department extra resourcing to be able to progress the Whittaker review, which is now in train.

Senator KIM CARR: I won't tax you with the obvious point that it does take a long time to get a response again, as another example. You'll tell me it's obviously a complex matter, but 4½ years! Are you able to provide the committee—and take this on notice—with what
progress you've made on each of the 394 recommendations from that review, given that
you've had 4½ years to work on it?

**Dr Smrdel:** It's still an issue for government as to whether there will be a formal
government response to the Whittaker review. Currently the plan is to release an exposure
draft in response to the recommendations of the Whittaker review, which is in train. We
would expect it's a decision for government, but we would expect an exposure draft to go out
early next year.

**Senator KIM CARR:** So you can't provide me with a progress report on those
recommendations?

**Dr Smrdel:** It will be a decision for the Attorney and the government in terms of whether
there will be a formal government response. But the focus of the work currently has been in
terms of working through the report in implementing that through legislation. Whether there'll
be a separate government response to the individual recommendations will be a matter for the
Attorney and government.

**Senator KIM CARR:** Thank you. Madam Chair, that concludes my questions in general.

**CHAIR:** Are there any further questions in relation to corporate and general matters?

**Senator WATERS:** I've got some questions about the Lobbying Code of Conduct and
also about the unescorted security access to the building. I might start with the second one
first.

**Mr Moraitis:** Which building?

**Senator WATERS:** The orange passes, as they're colloquially called—the
unaccompanied passes to this building—the parliament.

**Mr Moraitis:** That's the Department of Parliamentary Services.

**Senator WATERS:** I asked them. I have a question that I believe is for you. My question
to them, which they weren't able to answer, was, if there was a change to—currently that list
isn't public. No-one knows who's on it. My question was, why? They didn't really answer. My
question was, who would change that rule if the government was so minded to change it?
They said it would probably be the AG's. So I'm interested in if that's correct.

**Mr Moraitis:** If that's the requirement, we're not aware of this. We're in charge in the
protection of security policy framework, but we're not, I think, responsible—it's never come
across my desk, ever.

**Senator KIM CARR:** He's not responsible for the parliament.

**Senator WATERS:** Which agency do you think would be responsible for implementing
any such change, if you can speculate?

**Mr Moraitis:** If you ask me, I'd say it's the Department of Parliamentary Services.

**Senator WATERS:** I'll go to qons.

**Mr Moraitis:** I'm happy to follow up with them and find out what exactly the situation is.

**Senator KIM CARR:** Ask the President.

**Senator WATERS:** I did. He wasn't terribly helpful. We've been here all week and we
haven't got many answers yet. I'll move on to the lobbying code, which I understand you are
responsible for. Has that process of transitioning over, so you folk now have responsibility for the lobbying code, been completed now? How long did it take?

Mr Moraitis: As you'll recall, that transferred the week before the May election. The last time we spoke—

Senator WATERS: I was a little bit busy then. I didn't know that's when it happened.

Mr Moraitis: It happened two or three days before the election.

Senator WATERS: How long did the transfer take? Was it six or eight months?

Mr Moraitis: Not that long, I think. I could be corrected. Something like six months.

Senator WATERS: What are the staffing arrangements, now that it is in place?

Mr Moraitis: We had some transfer of staff, a very small number, but I don't know exactly how Ms Atkinson's branch is handling that. She handles quite a few other things, such as the Foreign Influence Transparency Scheme, so I assume they find ways to have synergies of staff.

Senator WATERS: In February I was told there were two. I am keen to know whether there are still two folk administering the lobbying register.

Ms Atkinson: It depends. As you might be aware, the lobbying code has several mandatory update periods during the year. We have been through our first one of those since the code came across to AGD. I think it is fair to say that during the peak time we have moved from other projects onto assisting with that process. From time to time we will continue to do that, but for the most part it's probably between one and two staff.

Senator WATERS: When you have those, I think they are six-monthly updates—I will ask you about the technical difficulties that were experienced this time around—how many extra staff did you add on to deal with the twice-yearly updates?

Ms Atkinson: As you have alluded to, we had some technical difficulties, so when the code transferred across to AGD we also inherited a new IT system that had been developed by the Department of Prime Minister and Cabinet. When that was deployed into our environment, there were some issues with how the system operates in the AGD environment. As a result the update period was much more resource intensive than had originally been hoped. Probably we had up to four staff at any one time within my area working on that. But we also had resources from within our information division, so between 1.5 and 2 staff at any one from information division working on the technical side.

Senator WATERS: How many of those basically six people would have been required if there had not been the technical difficulties?

Ms Atkinson: I would say probably more like two or three within my team, but it is quite difficult to say, given that was our first experience of that process.

Senator WATERS: Is that problem now fixed?

Ms Atkinson: The issues persist. There are a range of technical issues which the system is demonstrating to us. We have got a business analyst who is working through those issues and we are obviously working quite closely with our clients and stakeholders as issues are brought to our attention to remedy them as quickly as we can.
Senator WATERS: What has been the practical impact of those technical difficulties in terms of the ability of people to comply with the code, if the updates aren't showing?

Ms Atkinson: There have been some cases where, for example, some of the data that was brought across from PM&C into our system has wrongly copied across, so we have had to manually update the data. There have been some issues where the portal through which users enter their data has not been linking to the public register, or when my staff have been interacting with the data, for example, to approve and make changes to people's records, that has not been showing on the public register. As soon as we are made aware of those issues we have been making sure that we do what we can to manually fix those data issues. In the cases where we have not been able to do that in a really immediate fashion, my staff have been providing certification by email, which lobbyists can then take as proof that they have complied with their obligations.

Senator WATERS: With that process, I have two points on that. Firstly, the certification by email: has that been at the behest of the particular lobbyists?

Ms Atkinson: Yes. When the lobbyists have experienced this difficulty and we've been unable to fix it manually, then we have provided them with an email to say—

Senator WATERS: Has it been clear to those lobbyists that their update, for example, has not been synced with the register? How has the error been detected and by whom?

Ms Atkinson: In some cases, they have been able to tell because when they've logged on to their own profile they haven't seen what they had expected and therefore they've checked the public register and come to tell us. In other cases, I understand, where they have tried to make meetings with government representatives, those representatives have looked at the lobbyists register and identified that they're not on the register, and that's how they've become aware of the issue.

Senator WATERS: You said: when the errors had been drawn to your attention—was there an internal checking process where you proactively look for errors before waiting for someone else to point them out?

Ms Atkinson: Yes, absolutely. As we've gone through the update process—and you'll appreciate there's a very large number of individuals on the register.

Senator WATERS: There is a lot of lobbying that goes on in this building, it's true.

Ms Atkinson: As my team have been processing those updates, they have also been manually checking, once they've approved the update, that it is showing on the public register. Unfortunately, then, because of some of the technical issues, if the lobbyist has, for example, logged on after that update has been published, in some cases that has caused a break in the data exchange which has then led to the public register becoming incorrect in a later fashion.

Senator WATERS: This sounds like a total debacle. It doesn't seem like it's been a very good transfer. One wonders what information's been lost in the whole process of moving it over. I know it was a part of machinery-of-government changes but not only have a lot of resources been dedicated to mopping up an issue that's, as you say, still not quite fixed, but the lack of transparency of that information during that period is pretty unacceptable. What's going to be done to make sure that these problems are ironed out and transparency is restored?
Ms Chidgey: We would absolutely agree that the situation hasn't been satisfactory. That business analyst review is to look at the options to get the system issues fixed as soon as possible and whether there are some adjustments we can make to the system as it currently stands or whether we need to do something more significant. We're working to do that as fast as possible. As Ms Atkinson said, we're doing everything we can to provide assistance and fix issues manually in the meantime.

Senator WATERS: When I asked in February about this process of the A-Gs now taking over the administration of the code itself and the register, there was reference to some policy functions that might have also come over. I asked at the time whether there were any policy changes proposed that the department might have started working on. The answer at the time from Mr Walter was, 'Well, we don't really know yet, we'll see.' I'll ask again: is there any proposal to change the parameters of the lobbyists code?

Ms Chidgey: We're giving consideration to that, but no decisions have been made as yet.

Senator WATERS: What sort of information sources are you looking at in order to form a judgement on the possible changes to the code?

Ms Chidgey: Obviously, particularly as a priority, we're considering the ANAO recommendation.

Senator WATERS: Can you remind me of their relevant recommendations? It's been a long day.

Ms Atkinson: Sure. This was a review when PM&C were the owners of the code. The ANAO recommended that:

The Department of the Prime Minister and Cabinet review the appropriateness of the current arrangements and Code requirements in supporting the achievement of the objectives established for the Code. To better support the ongoing regulation of lobbyists, PM&C should:

a. implement a strategy to raise lobbyists' and Government representatives' awareness of the Code and their responsibilities;

b. assess risks to compliance with the Code and provide advice on the ongoing sufficiency of the current compliance management framework; and

c. develop a set of performance measures and establish an evaluation framework to inform stakeholders about the extent to which outcomes and broader policy objectives are being achieved.

Senator WATERS: Are all of those recommendations being considered?

Ms Chidgey: Yes, we're considering the ANAO's report in general.

Senator WATERS: Is there a time frame on when the department's investigations will conclude and, presumably, you'll then brief the minister on the options?

Ms Chidgey: No.

Senator WATERS: Is that a body of work that you've undertaken of your own volition or has the minister asked for it?

Ms Chidgey: We're undertaking it. We haven't had a specific formal request.

Senator WATERS: Hence the lack of a specific time frame to finish it off?

Ms Chidgey: Yes, and it would be fair to say, too, we've obviously been focused on the transition and transfer and updates—
Senator WATERS: Yes, the technical difficulties.

Mr Moraitis: You will appreciate, with the transition, both the policy response and the technical stuff was transferred to us in May and we're working through the technical stuff as a priority. We're well aware of the policy position put out in that report, and we'll get to that, obviously, once we've fixed the system as is.

Senator WATERS: Did one of the ANAO recommendations go to how to deal with in-house lobbyists? My understanding of the code of conduct is that it only pertains to third-party lobbyist companies that are employed by companies who want the lobbying done but it doesn't apply to in-house lobbyists in companies themselves. That seems to me to be ridiculous, and I don't understand the policy basis for it and I think it really needs to be fixed. Is that being considered?

Ms Atkinson: The ANAO's recommendation only goes to the code in its current form, which is in relation to third-party lobbyists.

Senator WATERS: Is the department considering expanding the code to include those in-house lobbyists?

Ms Chidgey: We're not giving that current active consideration, but that's one thing we're obviously aware of, so we will in due course.

Senator WATERS: What would it take for you give active consideration to that proposal?

Ms Chidgey: We'll work our way through the ANAO report first and the transition and then we'll have a look at any broader issues.

Senator WATERS: How does a person make a complaint under the Lobbying Code of Conduct?

Ms Atkinson: A person who would like to make a complaint can make that to the secretary or, via delegation, to me or my team. All of the contact details are available on our website about how to make a complaint.

Senator WATERS: Do they need to have any special standing or can any person make a complaint?

Ms Atkinson: No, any person can make a complaint.

Senator WATERS: How many complaints have been made since the operation of the code?

Ms Atkinson: I would have to take the question on notice. I can tell you that, since the code was transferred to us, we haven't received any complaints.

Senator WATERS: Lastly, how many penalties for how many breaches have been imposed? And, if there are none under your administration, could you provide on notice the detail for the previous period?

Ms Atkinson: Yes. I think, though, it might be worth pointing out that we have answered a similar question in the House of Reps, so I will make sure that our evidence is consistent with that.

Senator WATERS: I asked PM&C yesterday whether or not there was any consideration being given to requiring ministers' diaries to be disclosed like they are required to be in
Queensland and New South Wales. Is that something that would fit within your policy purview and is that being considered?

Ms Chidgey: Broadly, in the sense that some of those issues arise under freedom of information legislation. And, no, that's not being considered by the department.

Senator Waters: Why not?

Ms Chidgey: Because we're not considering it.

Senator Waters: That's not a reason. Is there any better reason?

Ms Chidgey: I don't have anything to add.

Senator Waters: Maybe you should consider it. That's my suggestion; that's a free one. Thank you.

Chair: I will finish with three very short questions. When did the public interest disclosure scheme move into the Attorney-General's portfolio?

Ms Chidgey: We'll need to take on notice the exact transfer time.

Chair: Can you also take on notice, if you don't know off the top of your head: was it introduced by a Labor government or a coalition government?

Ms Chidgey: The public interest disclosure scheme?

Chair: Yes.

Ms Chidgey: By a Labor government.

Chair: Is it accurate that a Federal Court judge recently described that scheme as 'technical, obtuse and intractable' and in a separate quote, involving 'a number of complex, interlocking substantive provisions and definitions' that gave it those qualities? That's from, as I understand it, Justice Griffiths.

Mr Moraitis: Yes, we recall that quote.

Ms Chidgey: Yes.

Chair: You recall that quote?

Mr Moraitis: Yes. And—

Chair: And the decision of Stefanic?

Mr Moraitis: We recall that, and it resonated for quite a few people who have to administer the act.

Chair: Thank you. That's much appreciated. We will now move to group 1. Senator Carr, do you have any questions in group 1?

Senator Kim Carr: I certainly do. Can I turn to the issue of legal assistance funding?

Mr Anderson: Senator, it's not group 1. If your questions are—

Senator Kim Carr: I haven't asked a question yet. I was waiting for you to get to the table. Can you explain to me how the new mechanism for legal assistance funding differs from the existing system under the national partnership agreements for Indigenous groups?

Mr Anderson: With respect to the funding for Aboriginal and Torres Strait Islander legal services, they're currently under a separate national agreement, and the proposal is that that
funding be rolled into the national legal assistance partnership, together with the funding for legal aid commissions and community legal centres.

Senator KIM CARR: There was a review that was undertaken by the Aboriginal and Torres Strait Islander legal services, calling for a standalone, specific funding program, and this new arrangement clearly stands in contrast to that central recommendation. Explain to me why that has been ignored.

CHAIR: Senator Carr, is this an AGS question?

Mr Moraitis: No, Senator. It's group 2.

Senator KIM CARR: You don't think it's an appropriate time to ask—

CHAIR: It's group 2. We're currently in group 1..

Mr Moraitis: The Australian Government Solicitor usually doesn't get asked many questions, but I don't want to pre-empt the committee.

Senator KIM CARR: Do you want to complain that I've asked the question?

Mr Moraitis: I don't want to complain at all, Senator. We're happy to answer your questions.

Senator KIM CARR: That's good.

CHAIR: It's just that Senator Patrick has AGS questions. Can we ask you to hold the phone for a bit, and we'll go to Senator Patrick.

Senator KIM CARR: I don't mind when you do it.

CHAIR: That's wonderful. Senator Patrick, you have the call.

Senator PATRICK: Mr Kingston, during the election campaign, there was a controversy referred to as 'watergate', which related to the purchase of water buybacks by Eastern Australian Agriculture Pty Ltd which turned out to be a daughter company of a Cayman Islands domiciled company called Eastern Australian Irrigation. During the discussions in relation to that particular controversy, Mr Barnaby Joyce indicated that he wasn't aware, when he approved the purchase, that there were any Cayman Islands entities involved in the transaction. Under order for production of documents in the Senate, all of the papers associated with that particular transaction were provided to the Senate. AGS were responsible for due diligence, but, unfortunately, the due diligence work was redacted. It's now currently subject to FOI and will be referred to the Information Commissioner shortly. When conducting due diligence for contracts for the Commonwealth, do you—as a matter of general policy or as a matter of course, as you are going through due diligence process—check to see whether any company which the Commonwealth is dealing with has related entities domiciled in tax havens?

Mr Kingston: I think it would be accurate to say that we would not do that as a matter of course, if that means on every occasion on which we might be asked to do some level of due diligence. What due diligence might involve for us, in any particular case, will be very dependent on what we're asked to do by the client. A client will not normally just say, 'Will you do due diligence on that?' and leave it for us to decide the scope of our retainer. It will be often the case—and I'm not talking about this particular case—that they'll say, 'Can you look at these particular issues or answer these precise questions?' in relation to what's called due diligence. And, even if what we're asked to do is left more at large, whether we would look at

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that would depend very much on the circumstances of the matter and the thing in relation to which we are conducting the due diligence.

Senator PATRICK: So, to your knowledge and not restricting to that particular transaction, has the AGS ever looked at companies or related entities domiciled in tax havens in the course of any due diligence that you are aware of?

Mr Kingston: I can't say from my personal knowledge, but that's a pretty poor indication, frankly, of whether we have, because there will be lots of due diligence operations that I'm not personally aware of.

Senator PATRICK: I will accept on face value that, in principle, it's not something you generally look at, so I will go to the secretary now. Noting that the government purports to have strong multinational tax avoidance policies, is there any reason why you are not instructing due diligence in examining for companies that might be connected to parents, or related entities, in tax havens?

Mr Moraitis: I wouldn't add anything to what Mr Kingston said about how AGS approaches their due diligence role. The clients instruct AGS on these contracts. As a matter of policy, whether there should be a presumption that AGS does this things in recommending to their clients that they do that, it all depends on the risk matrix. But I take your point, given the larger picture here, that it's something to consider.

Senator PATRICK: So, in some respects, that would be a matter for the Minister for Finance?

Mr Moraitis: Well, to an extent—

Senator PATRICK: From a policy perspective. Obviously you would have some legal view on it.

Mr Moraitis: We should also have a legal view and perhaps suggest to our colleagues in other departments, 'Let's consider this issue.'

Senator PATRICK: Minister, do you have a view on that at all, in terms of the importance of examining companies which the Commonwealth deals with and having an understanding of their connections to related entities in tax haven countries?

Senator Payne: I appreciate the point you're making, but it is a matter which I would want to take up with the finance minister and the Treasurer to provide you with a full response.

Senator PATRICK: So you would—

Senator Payne: If you want me to take something on notice, I'm happy to do that.

Senator PATRICK: That would be appreciated, Minister, thank you very much. I'm done now, Chair.

CHAIR: Thank you very much, if there are no further questions for the Australian Government Solicitor, we will say thank you very much to Mr Kingston. You are dismissed. We will move on to group 2. Senator Carr.

Senator KIM CARR: Yes, thank you. Here we go again.

Mr Anderson: I can recall your question.

Senator KIM CARR: You can recall it? That's very good.

Mr Anderson: Should I answer it?
Senator KIM CARR: Try and help me here.

Mr Anderson: There were actually two reviews done. There was one review done of the national partnership agreement and there was one review done of the agreement concerning funding for the Aboriginal and Torres Strait Islander legal services. So the one concerning the Aboriginal and Torres Strait Islander legal services did make a recommendation that they should continue as a standalone program, but it didn't provide a lot of analysis in support of that. The other review said that having multiple different funding streams for the legal assistance sector was actually not helpful for the sector, and that recommended that all the different funding streams should be brought into the single agreement.

Senator KIM CARR: Mr Anderson, Aboriginal groups themselves surely have some stake in this. I'm advised that Indigenous groups have expressed outrage about the decisions that have been taken. I have an open letter that was signed by 100 organisations back in April. The letter stated that the government decision ignored the recommendation of the review. I can go on and quote them at length. In my experience, it's folly to ignore that level of consultation with direct Indigenous groups. Why was that ignored? Why was that consultation ignored?

Mr Anderson: The government is well aware of the views that have been raised by a number of Indigenous organisations in respect of the proposed change. The government proposed that there be a number of measures that will ensure that the funding that currently goes to the ATSILS is quarantined so that it cannot be taken away from Aboriginal community controlled organisations for the life of the agreement. We have actually said to the ATSILS, are there any areas that they would like the Commonwealth to negotiate on their behalf in this agreement with the states and territories. The intention is not in any way to move away from having Aboriginal community controlled organisations providing culturally safe and culturally appropriate services for Indigenous people.

Senator KIM CARR: I take it you have had extensive conversations with these various Aboriginal groups, these ATSILS?

Mr Anderson: We have met with a collection of the CEOs and principal legal officers of the ATSILS on at least one occasion. We have met with a representative of NATSILS, the peak body. On several occasions we've met with the Attorney—on at least two occasions.

Senator KIM CARR: Directly with the Attorney?

Mr Anderson: Yes.

Senator KIM CARR: Over what period of time?

Mr Anderson: It would've been at least since June.

Senator KIM CARR: I see. Have these discussions led to any change in the government's position?

Mr Anderson: They have led to no change in the government's desire to see all the different streams of funding for the legal assistance sector brought into the one agreement but at the same time with appropriate protections to ensure that Aboriginal community controlled organisations and the ATSILS in particular, continue to provide culturally safe, culturally specific services to Indigenous people.
Senator KIM CARR: Sure. I understand why the government would say they haven't had a change in their desire, but the Indigenous groups would be looking for assurances that self-determination actually means something. What assurance can you give the groups with whom you are dealing that there will be effective self-determination with regard to providing legal assistance, given how important it is. Given the rates of incarceration of Aboriginal people in this country—extraordinary and disgraceful rates—what action can you take to give ATSILS groups assurances that there will be self-determination in terms of the provision of legal assistance?

Mr Anderson: I'll make a comment in particular about incarceration rates. Under the stand-alone arrangement, the Commonwealth is funding the ATSILS to provide services, over 80 per cent of which are in relation to defending parties in criminal matters under state and territory laws. But the states and territories are not within that relationship with the ATSILS. By bringing it within the single national legal assistance partnership, we are bringing it into a situation where the states and territories have to be involved in discussions about the impacts of their policies and practices upon Indigenous people. So we think that is in the interests of the Indigenous people. To answer the question—I'm sorry I'm taking a little long—the assurances that have been given and are being given are to say to the ATSILS and to NATSILS: 'What assurances would you like us to embed into the national legal assistance partnership? The offer has been by one of those to quarantine the funding to the existing bodies, subject to—if a body was to have a significant performance issue, then there would be a need to examine that, but even then it would still be funding quarantined to an Aboriginal community controlled organisation. Those are the sorts of things that we have been saying to the ATSILS and to the peak body, NATSILS, 'What would you like us to do?' We have been really stressing: what would they like us to negotiate in the agreement?

Senator KIM CARR: And that is a change in your position?

Ms Hermann: The other thing the new arrangements have looked to do is embed the principles of self-determination. This is the first time these principles will be embedded in legal assistance arrangements.

Senator KIM CARR: When you say 'embedded', what's the form of the embedding?

Ms Hermann: I can give you the exact words, if that's helpful.

Senator KIM CARR: If you would, please. Thank you.

Ms Hermann: Sorry, it will just take me a moment to find them. The words in the paper that has now been released say: 'We will provide funding to ATSILS to allow for the delivery of culturally appropriate legal assistance services, thereby supporting self-determination of Aboriginal and Torres Strait Islander people, which in the context of the national legal assistance partnership refers to Aboriginal community controlled organisations being the preferred providers of culturally appropriate legal assistance services, while acknowledging that Aboriginal and Torres Strait Islander people have a choice in which legal assistance services they access. ATSILS is determining service priorities and locations based on community need and in partnership with governments and the broader legal assistance sector, and ATSILS is being involved in the development and implementation of legal assistance policies and programs that affect Aboriginal and Torres Strait Islander people.'
Senator KIM CARR: Okay. So I appreciate the point you make, but is that embedding going to occur in the form of guidelines or is it in the form of contracts? How will you secure those commitments?

Ms Hermann: It is proposed to be in the formal text of the national partnership agreement with the states and territories.

Senator KIM CARR: So this won't necessarily guarantee them a separate and distinct relationship to the Commonwealth? They'll still have to work with the states?

Mr Anderson: The Commonwealth isn't stepping away from the relationship. The Commonwealth is actually seeking to take a national leadership role, which both reviews recommended we take.

Senator KIM CARR: Do you think this will actually improve the level of incarceration? The Western Australian situation, for instance, is truly appalling. Do you really think these arrangements will see fewer Aboriginal kids locked up?

Mr Anderson: That is primarily being driven, of course, by policies and practices of, for example, the Western Australian government—

Senator KIM CARR: Including mandatory sentencing. Yes.

Mr Anderson: Including mandatory sentencing and fine enforcement and things like that. But I come back to the point that, currently, each individual ATSILS has to lobby a state government on their own. This way it will be them and the Commonwealth and the state government all together in a room but also with the legal aid commissions and the CLC. We see situations where a state government listing practice in a particular court, for example, can have a disproportionate resourcing impact upon an ATSILS if they have to send people to represent their Indigenous clients more than one day a week in a remote location. There are those very simple things, and then there are the larger things about can government consider changing some of their policies, legislation practices around policing and—

Senator KIM CARR: Thank you. Obviously I'll return to this matter. You'll have to get used to me.

Mr Anderson: Yes, Senator.

Senator KIM CARR: I'm sure you will look forward to that. I'll now turn to family law matters. I raised some matters in regard to the extraordinary position that the government's got into with regard to the reviews that they're undertaking, which are now with the parliamentary review, on top of the matters that the ALRC has been dealing with. Can I turn to the Henderson inquiry. Has the government responded to the Henderson inquiry recommendation?

Senator HENDERSON: A very good inquiry, I might add, Senator.

Senator KIM CARR: I'm pleased to hear that. I just wondered if you could help me here. The Henderson inquiry recommended:

… the Attorney-General, through the Council of Australian Governments where necessary, works to improve the information available to courts exercising family law jurisdiction at the earliest possible point in proceedings …

The government response to this recommendation, recommendation 21 of the report, said, 'The government is working with the states and territories to improve information-sharing
between the states' and so on and so forth. What specifically has the government now done to actually action that recommendation?

Mr Anderson: That specific recommendation?

Senator KIM CARR: Recommendation 21.

Mr Anderson: I mentioned earlier today in respect to information sharing that the government allocated $11 million towards working on improving information sharing with states and territories, the majority of which goes to co-location of state and territory officials in family law registries and a very small portion of which goes to scoping out a technological solution to also improve information sharing.

Senator KIM CARR: There were a series of recommendations in the Henderson inquiry that were either noted or agreed in principle. In the ALRC report recommendation 53 was a mandatory national accreditation of family reporting writers. Recommendation 7 is the replacement of the presumption of equal shared parental responsibility and so on. There were recommendations 18, 19, 14, 57, 23, on child views, and 24—

Senator HENDERSON: Can I just perhaps intervene for one moment? Clearly I was the chair of the Henderson inquiry. I have got a comprehensive overview of all the ways in which the government has responded—it's obviously quite detailed—so I could assist you by going through each of the recommendations and giving you a response as per the government's response, which was made in September 2018.

Senator KIM CARR: What I'm interested to know, Senator, is not your response; it's the government's response.

Senator HENDERSON: I understand that, but I'm just trying to be very helpful.

Senator KIM CARR: I'm interested to know: when will the government complete its consideration of these recommendations?

Mr Anderson: A number of the recommendations are actively being considered as part of the broader process of considering reform to family law, so that picks up the response to the ALRC as well. Two recommendations have been fully implemented and 16 have been partially implemented besides the 13 that have—

Senator KIM CARR: Would it be fair to say that these matters have been paused pending the parliamentary inquiry?

Mr Anderson: No. No matters have been paused pending the parliamentary inquiry. I'll go back to the response to recommendation 21 on information sharing, for example. Working with the states and territories on their family violence and child protection systems to get them to better work with the federal family law system is not a small piece to take forward. It's going to take some time, but we're actively doing that. So that's just one example. No-one's actually pausing on any of these reforms.

Senator KIM CARR: When will we see them implemented? If they're not paused, when will they be implemented?

Ms Orr: As we've indicated, some have already been implemented. A number have been partially implemented. Would you like to give me some examples?

Senator KIM CARR: You can take it on notice. I'd like to know when these matters are all going to be concluded.
Ms Orr: Are you referring to the Henderson recommendations?

Senator KIM CARR: I've listed through eight of them. When will you be able to say that they'll be concluded?

Ms Orr: As we've stated, some are being considered in context of the ALRC report, which had 60 recommendations. There's no obligation for the government to make a formal response to that report, and the timing of any response is a matter for the government, but the department's actively considering them.

Senator KIM CARR: I hear those words; I'm obviously not particularly comforted. If I could turn to the Women's Economic Security Package: funding of $10 million for a two-year pilot was announced in November 2018 for family law property disputes mediation run by legal aid commissions across Australia. Can you give me some information on that? How many mediations have been run under that pilot so far?

Ms Orr: Sorry, can you repeat the question?

Senator KIM CARR: How many mediations have been run under the pilot—that funding of the $10 million for the two-year pilot—that was announced in November 2018 for family law property dispute mediations?

Ms Orr: The $10 million—

Mr Gifford: That trial you're referring to is due to commence in January 2020.

Senator KIM CARR: That's not the question. I was wanting to know how many mediations you've run under the pilot.

Mr Gifford: Sorry, the pilot has not yet commenced.

Senator Payne: It starts in January.

Senator KIM CARR: I see, it hasn't started—so none. None is the answer.

Senator Payne: Its commencement date is January 2020.

Senator KIM CARR: There you go. That's straightforward, then. Do you have a target number? You must have worked out your money on that basis.

Mr Gifford: The trial is due to run from January 2020 through to December 2021. I believe we have an estimate of how many people would likely go through that pilot.

Ms Orr: It is 650.

Senator KIM CARR: It's 650? Thank you. We'll have to measure that at another point. There's $7 million for three years, under the Women's Economic Security Package, to prevent victims of family violence being cross-examined by their ex-partners. When did that commence?

Ms Matthews: That has commenced now. The funding is available, and the scheme has also commenced hearings.

Senator Payne: And it's been legislated.

Senator KIM CARR: Have you got the numbers of people involved with that?

Ms Matthews: The commencement of the scheme has only just begun, in terms of hearings. It's too early to say the numbers that it has applied to.
Senator KIM CARR: You can't tell me about the numbers of people who've sought legal assistance either?

Ms Mathews: I could take it on notice to provide whatever data we have.

Senator KIM CARR: The legal aid commission has indicated that a hundred matters a year would fall into the category of needing the funding. Would you agree with that number?

Ms Mathews: We did work with Legal Aid to establish the funding and also commissioned the Australian Institute of Family Studies to do some modelling, on which the funding was based.

Senator KIM CARR: On how many occasions has the court, on its own initiative, directed that a prohibition should actually apply?

Ms Mathews: I'd have to take that on notice.

Senator KIM CARR: With regard to the Family Advocacy and Support Service, the government indicated that it's urgently committed to adopting the recommendations of the Standing Committee on Social Policy and Legal Affairs and the ALRC, along with domestic violence and child safety bodies. Could you indicate what's actually been done in regard to those matters.

Ms Mathews: In relation to the FASS, in MYEFO last year the government did extend it for a further three years. That was $22.6 million to extend the FASS. Also, in this year's budget, there's a further $7.84 million over three years for dedicated men's support workers in the FASS registries. In relation to the child support services, that is being considered in the context of further family law reform.

Senator KIM CARR: So that's in—

CHAIR: Senator Carr, how much more is there to go?

Senator KIM CARR: One question. Is this a national program?

Ms Mathews: Yes, it is.

Senator KIM CARR: There'll be no regions of the country that are left out of that?

Ms Mathews: It applies in all states and territories, yes.

Senator KIM CARR: Yes, I understand the idea of 'national'. I want to know whether or not families in rural and remote Australia can access the scheme. Is that what you mean?

Ms Mathews: It's currently in all family law court registries throughout the country and in some circuit court locations.

Senator KIM CARR: Can you answer my question, though. Can people in rural and remote Australia access the family law scheme through regional family law registries?

Ms Mathews: Where there is a family law court registry nearby, yes.

Senator KIM CARR: So is it the case that rural and remote Australians can access them?

Ms Mathews: They could.

Senator KIM CARR: We're obviously talking at cross-purposes. Are there regional family law registries right across the country in remote areas?

Ms Mathews: Yes, there are.
Senator KIM CARR: So there are no parts of the country that are not covered by this scheme?

Ms Mathews: It depends on what you mean by 'covered.' Obviously, there's not a family court registry in each town. There are around 16 throughout the country.

Senator KIM CARR: It has been put to me that there are parts of the country where rural and remote families do not have access. Is that correct?

Ms Mathews: I think that may be a separate issue.

Senator KIM CARR: Would you like to take that on notice so you can consider the implications of the question?

Ms Mathews: I can do that. The FASS only operates where there is a family court registry.

Senator KIM CARR: That's what I'm saying. We're going around in circles.

Ms Mathews: I understand the question.

Senator KIM CARR: What parts of the country do not have a regional family law registry?

Ms Mathews: I can provide on notice the list of locations where there is a registry.

Senator KIM CARR: Thank you very much. Chair, I've got further questions on other aspects of group 2 program 1.6.

CHAIR: You've had 20 minutes, so we might have to share the call around a bit before we come back to you.

Senator KIM CARR: Sure.

CHAIR: Senator Siewert.

Senator SIEWERT: I want to go back to funding for Aboriginal legal services. I think Mr Anderson made the point that this is bringing a whole lot of legal programs together. Does that include a rethink on the Family Violence Prevention Legal Services funding? Is there an intention to bring that into the A-G funding pool?

Mr Anderson: Not currently. For the meantime that's going to remain with the National Indigenous Australians Agency.

Senator SIEWERT: You commented before about bringing ATSILSs into the broader fund. What's the thinking then on the Family Violence Prevention Legal Services then?

Mr Anderson: It's partly about the nature of the services that they provide. They're not necessarily providing legal services in all circumstances. They're providing a slightly different type of service. There's the question: are they actually a good fit with the national legal assistance partnership? I think the intention of the National Indigenous Australians Agency is to observe what happens with incorporating the ATSILSs and see if that would be a good model for future incorporation of the Family Violence Prevention Legal Services as well.

Senator SIEWERT: For what length of time is the national partnership agreement?

Mr Anderson: The existing arrangement expires on 30 June 2020. It will be a new arrangement. The national legal assistance partnership will be for a further five years.
Senator SIEWERT: That's what I figured, given other ones are generally for five years. That means it will be five years down the track before it's determined whether the Family Violence Prevention Legal Services will go into the agreement?

Mr Anderson: It would be theoretically possible to negotiate a variation midterm, but that is some speculation.

Senator SIEWERT: I want to go now to the legal services and follow-up on a couple of the issues that came up during your previous evidence. If I understand you correctly, you said that funding for ATSILSs will be quarantined.

Mr Anderson: That's correct.

Senator SIEWERT: For the same amount of funding plus indexation? This is where I'm going to.

Mr Anderson: Plus indexation. There's the potential for it to be slightly increased as well.

Senator SIEWERT: I suppose where I'm coming from—

Mr Anderson: There will be no decrease in funding.

Senator SIEWERT: Will it be written into the agreement that there will be no decrease in funding?

Mr Anderson: That will be entered into the agreement, yes.

Senator SIEWERT: How long will that go for?

Mr Anderson: For the life of the agreement.

Senator SIEWERT: So for five years?

Mr Anderson: Five years.

Senator SIEWERT: With the indexation but perhaps further increases?

Mr Anderson: Yes.

Senator SIEWERT: Is the indexation guaranteed?

Ms Hermann: Yes, indexation has been applied.

Senator SIEWERT: I ask that because some departments around here aren't indexing and it's causing a significant problem.

Mr Anderson: We are indexing for the life of the agreement.

Senator SIEWERT: Sorry I'm speeding through these. I have a limited amount of time. You said it will go to either ATSILSs or Aboriginal controlled organisations. Will it be a closed tender process or an open tender process? What do you envisage the process will be for refunding organisations under the new process?

Mr Anderson: For the sake of clarity, I don't necessarily envisage that there will be any process. That's only in an extreme case. But it is the case that the Central Australian Aboriginal legal service, for example, was defunded and that service is now being provided by the Northern Australia Aboriginal legal service. So it is still being provided by an ATSILS but just not by the Central Australian ATSILS. So there is that sort of scenario. These are specialised providers of services. It's not that there are many competing bodies, even Aboriginal community controlled bodies, that would be able to step in and provide these services.
Senator SIEWERT: Yes. I've had a lot to do with them, and the concern is that their specialist expertise could be lost if there were a decision to go to an open tender process. I agree with you that there are Aboriginal controlled organisations that don't have the necessary legal expertise. That's why I'm asking to make sure that that legal expertise is guaranteed. I take on board what you've said about NAAJA taking over the Central Australian Aboriginal legal service, but it is not envisaged that you would be going to other Aboriginal controlled organisations that don't have legal expertise?

Mr Anderson: It would be an extreme circumstance to be looking to another organisation beyond an existing ATSILS. There would need to be a process of looking to another organisation that had the ability to provide those services in addition to being an Aboriginal community controlled organisation. We've certainly had issues with a number of the organisations from time to time, where we've needed to take steps, including having funding controllers put in. But what we want to ensure is that states and territories have to similarly go through a process of working with an organisation to ensure that, if they have concerns, those concerns are properly remedied and the organisation is given the opportunity to get itself back on a good footing. It's not about immediately saying, 'We don't like that organisation—we'll pull the funding.' They have to go through the similar sorts of processes that the Commonwealth would go through.

Senator SIEWERT: Will that be written into the agreements that are established in the run-up to June 2020?

Mr Anderson: That's our intention. It's a negotiation with the states and territories, but it's our intention to negotiate that fairly firmly.

Senator SIEWERT: I want to come to the negotiation of the partnership agreement. You said that this will enable the states, the territories, the Commonwealth and the ATSILS to be at the table. Is it intended that this agreement is negotiated with the ATSILS as well in a similar way to the way that the health agreements are now being negotiated through COAG, with them being co-designing and at the table, and co-chairing?

Mr Anderson: When I was talking about having everyone around the table, that is more about the collaborative service planning within each jurisdiction, as opposed to the actual negotiation exercise. There are two sets of negotiation exercises: the Commonwealth with the states and territories, and then there's each state and territory with the bodies within its jurisdiction.

Senator SIEWERT: So each state and territory will now be negotiating with the ATSILS, not the Commonwealth?

Mr Anderson: That's right. We'll negotiate, as it were, the head agreement with each state and territory, which will have quarantining of funding and other conditions around the ATSILS' funding, for example. Then the states and territories will negotiate how to actually implement that themselves.

Senator SIEWERT: How to implement it, or how to do the funding?

Mr Anderson: How to deliver the funding.

Senator SIEWERT: So each state could be different about the way that this is implemented now?
Mr Anderson: They can't depart from the amounts of funding, which will be set out in the head agreement.

Senator SIEWERT: But they could exercise control over what the ATSILS do?

Mr Anderson: We're putting some quite prescriptive things in the head agreement, for example, about the extent to which ATSILS can continue to lobby state and territory governments with respect to changes in policy and practices. That was a concern that ATSILS had raised with us, so we're saying, 'You are absolutely free to continue doing that sort of lobbying. That's not in any way prohibited.' We will put in there things that will carry through—

Senator SIEWERT: It's also the type of legal services that they can offer and the type of support they can offer people. I appreciate the advocacy and I'm glad you've got that on record.

Ms Hermann: Some of the information that I provided previously in the question around self-determination goes to how those ATSILS service providers will be able to determine the types of services that they provide and where they provide them. They'll do that in consultation with governments and other parts of the legal assistance sector.

Senator SIEWERT: There's still a power imbalance there that's different to the approach that's now being taken with health and through the new Closing the Gap refresh process, where there's a negotiation that's going on with the state, rather than the states being around the table with the Commonwealth and being able to make sure that there is genuine co-design.

Ms Hermann: As part of the consultation process, as part of the negotiations, we do intend to meet with all the state and territory governments, but we also intend to separately meet with representatives from the legal assistance sector, including having individual meetings with each ATSILS in each state and territory. So there will be an opportunity for them to provide comments on the proposed negotiation position of the Australian government.

Senator SIEWERT: I appreciate what you've just said, but that's different to sitting as equal partners around a table, as is occurring in other places for First Nations peoples in relation to self-determination and determining where they want to put their priorities. That is just a comment. I want to go on to the Northern Territory royal commission. Are you monitoring the implementation of the recommendations?

Ms Harvey: We are not monitoring the recommendations coming out of the Northern Territory royal commission. That work is being led by the Department of Social Services.

Senator SIEWERT: I'm going to ask them a series of questions when I'm there on Thursday. But the ones that then pertain to areas that you may have responsibility for, or that aren't social services—are you saying they're coordinating a response from all government agencies?

Ms Harvey: I'm saying they're leading the work on that. I would have to take on notice exactly what that's involving, but we're not leading that work responding to the Northern Territory royal commission.
Senator SIEWERT: In terms of the leadership and that coordination, are you monitoring the implementation, or can you report on implementation of things that fall within your jurisdiction?

Ms Harvey: I might take that on notice. I think there are a couple of recommendations that go to things within this portfolio, but I don't have the information in front of me at the moment.

Senator SIEWERT: Could you take on notice to provide an update on the implementation of the recommendations that relate to your portfolio and justice? Can you provide an update on the implementation of each of those recommendations, please?

Ms Harvey: We can do that.

Senator SIEWERT: So, for example, would you be responsible for recommendation 25.5:

1. The Northern Territory collect and report data on Aboriginal deaths in custody to the Australian Institute of Criminology.

2. The Australian Institute of Criminology to publish all data made available on Aboriginal deaths in custody on an annual basis.

Mr Anderson: The Australian Institute of Criminology is in the Home Affairs portfolio.

Senator SIEWERT: I beg your pardon. I figured it might be with you. I if you could take those on notice, that would be appreciated. I want to go back to the issues around family violence. Is the government considering establishing a national task force into the deaths of First Nations women who are coming into contact with the justice system, as the sector has been advocating for?

Mr Moraitis: That is not something that is under active consideration, as far as I'm aware, although I must say that I have discussed this with the former Canadian Attorney-General, Jody Wilson, a couple of times. They did some work over there.

Senator SIEWERT: They've done similar work?

Mr Moraitis: In Canada, yes. The former Canadian Attorney-General.

Senator SIEWERT: They're quite progressive in terms of a lot of work there.

Mr Moraitis: As for us undertaking something similar, I'm not aware of anything.

Senator SIEWERT: You haven't had any discussions with any organisations?

Mr Moraitis: I'm not aware of any.

Mr Anderson: I'm not aware of anything.

Senator SIEWERT: I understand you've said you're not aware of any, but could you take on notice to confirm that?

Mr Moraitis: Certainly.

Senator HENDERSON: I want to ask Mr Anderson or the appropriate official about the change in the law whereby it is now against the law for a perpetrator of family violence to cross-examine the victim in a particular case. That's just been introduced. It was one of the recommendations of the inquiry I chaired when I was chairing the social policy and legal affairs committee. Could you explain what difference that is making to men and women in
this country? I understand it's only just been implemented, but I'm keen to get a bit of an assessment.

Ms Matthews: As I mentioned earlier, while the act passed some time ago, the scheme has only just commenced. There was approximately six months lead time to allow the appropriate arrangements to be made. It is still early days. I've undertaken to take on notice the number of times when orders are being made. But certainly there does seem to be take-up of the scheme. Referring back to the purposes of the scheme, in which it is intended to avoid people being retraumatised in the process of court hearings from alleged perpetrators, we would envisage that that is the purpose that it is serving.

Senator WATERS: I've got some questions for the Family Law Branch. How much did the ALRC inquiry into the family law system cost?

Mr Anderson: That question might have been better directed to the ALRC this morning, but we could take it on notice.

Senator WATERS: I don't know whether they pay themselves.

Mr Anderson: No, but they have an appropriation.

Senator WATERS: Can you tell me what that is?

Mr Anderson: From memory, it's about $2½ million a year. I'd rather take it on notice in order to be sure.

Senator WATERS: Okay. Thank you. Have any resources been allocated to support the implementation of those recommendations?

Mr Anderson: The department's doing it primarily on our own steam—again, using our existing appropriation to develop the response to engage in stakeholder consultation and things like that. But as we've touched on a number of points today, there's funding for a range of different pilot programs coming from the economic security package and through MYEFO and recent budgets. The evaluation of those different programs, like the domestic violence unit's health and justice partnerships and things like that, will all feed in as well. So, there's all that activity that's already been funded, and we'll take the evaluations and that will feed into recommendations for a full body of reform.

Senator WATERS: Are you able to take on notice the list of those 60-odd recommendations from the ALRC report and match them up with the measures that have been taken under those other programs—or whatever you want to call them—that you've just mentioned, such as the safety package and so forth? I'm just interested in which recommendations aren't getting acted on and how many of those there are, as a comparator for those that are being operationalised through those other programs—if you follow what I'm saying.

Mr Anderson: Yes. I'm just loath to agree to that, because a number of these things were in place before the ALRC made recommendations. I think they will be very helpful in taking forward the government's response, because they are about the family law system, but in only some cases were they expressly referred to by the ALRC in their recommendations. It might imply that there are areas of work that are not being advanced if we say, 'Here's something that wasn't expressly mentioned in the ALRC but that we think is important.' So, I don't want to give that impression, if we were to undertake such an exercise.
Senator WATERS: Are you able to undertake the exercise but noting that I'll take your note of caution that that's not the interpretation that I should give to it?

Mr Anderson: We're happy to come back on notice with a list of different activities and pilots that are underway—

Senator WATERS: Yes.

Mr Anderson: because we do find that people sometimes don't have visibility of those.

Senator WATERS: It is useful when you compile them; that's true. But what I'm particularly interested in is: which of the 60 ALRC recommendations are not being operationalised? I'm interested in the ones that are, but I'm also interested in what is not being implemented. Hopefully that's a fair question that you can understand why I'm asking.

Mr Anderson: We'll certainly turn our mind to a list of different reforms that are currently being progressed, operationalised et cetera, and we'll see the extent to which we can marry that up with ALRC recommendations.

Senator WATERS: Yes. Thank you.

Mr Anderson: But all the ALRC recommendations are being considered at the moment, even if some of them aren't being specifically operationalised yet. We had the example before of funding for legal assistance to do lawyer-assisted mediation of small property disputes in family law. That funding came through in 2018, but the program won't start until January 2020, because sometimes it does take a little while to implement these things.

Senator WATERS: Yes. All of that's very useful information, and I appreciate that there's sometimes time delay. So, thank you for anything you can gather together for me, even noting where those recommendations are still under consideration for potential future action. It will still be a very helpful exercise. I want to ask now about the new Joint Select Committee on Australia's Family Law System. Was the AG's department involved in any of the drafting of the proposed terms of reference of that inquiry?

Mr Anderson: We were given the opportunity to provide some comments on the draft terms of reference.

Senator WATERS: Did you have any oversight of running the process of consulting any other relevant departments, such as the Office for Women or DSS?

Mr Anderson: No. We were just given the opportunity ourselves to provide some comments on the draft terms.

Senator WATERS: Do you know if anybody played that role of checking in, for example, with the Office for Women and who that would have been?

Mr Anderson: I'm not aware of how that was being coordinated. All I know is that we were given the opportunity through the Attorney-General's office.

Senator WATERS: Was the Attorney-General's office running the show, or was somebody else running the show?

Mr Anderson: I'm not aware of that.

Senator WATERS: Does anybody know the answer to that?

Mr Moraitis: No.
Senator WATERS: Minister, are you able to shed any light on who had carriage of ensuring that the appropriate organs of government were consulted.

Senator Payne: I'll take that on notice.

Senator WATERS: Thank you. I'm interested in whether or not those relevant bodies were consulted—in particular, the Office for Women—and also whether any women's organisations were consulted on the draft terms of reference before they were put to the parliament. Lastly, has the Attorney or the department received any correspondence from individual women or women's organisations concerned about the potential adverse impact of that inquiry on women and children?

Ms Orr: Yes, the department has.

Senator WATERS: How many?

Ms Orr: We've received 144 items of general correspondence relating to the family law inquiry since it was announced. We've received another 11 items of correspondence related to what we are terming the Do Gooder campaign emails, and another 1,327 items which are yet to be referred to the department that are also the Do Gooder campaign—

Senator WATERS: I'm sorry: I don't know which one that is. Can you tell me more about what you've dubbed the Do Gooder campaign?

Senator KIM CARR: That would be a government initiative, wouldn't it!

Ms Orr: It's a way that campaign emails are promoted.

Senator WATERS: Sure, but what's the content of their ask?

Ms Orr: The content is—

Senator WATERS: Supporting the inquiry, or opposing it?

Ms Orr: asking the government to reconsider the inquiry.

Senator WATERS: So, opposing the inquiry.

Ms Orr: Yes.

Senator WATERS: That was 1,327 of those, plus an extra 155.

Ms Orr: Yes.

Senator WATERS: Is that an unusually large volume of correspondence on an issue that the department has input into?

Ms Orr: It is a high amount of correspondence, yes.

Senator WATERS: Would you say that's historic highs?

Mr Anderson: It's not historic. On some matters outside the family law jurisdiction we receive thousands of pieces of correspondence.

Senator WATERS: How would you characterise this volume of correspondence?

Mr Anderson: I think it's been characterised as being high, but it's not unusually high or a record.

Senator HENDERSON: In relation to the Do Gooder campaign, I want clarify that it's derived from the dogooder.co website, so it's a platform called Do Gooder. You, yourselves, are not referring to the campaign as 'do gooder'—is that correct?
Ms Orr: That's correct.

CHAIR: Thank you. That's an important clarification. I'm glad you said that.

Senator HENDERSON: Yes, so it's not your name that you've designated for the campaign. It comes from the Do Gooder platform, which is an online advocacy lobbying and supporter platform to assist people to create these campaigns.

CHAIR: Quite right. The assumed knowledge for this room may not be the same for everyone listening at home.

Senator WATERS: What will be done with those items of correspondence?

Ms Orr: They will receive a response.

Senator WATERS: Will the minister be briefed on the content and the volume of those pieces of correspondence?

Ms Orr: Certainly the Attorney-General's office is aware of the nature and the amount of the correspondence.

Senator WATERS: How so? Have you told them?

Ms Orr: Yes, the department's been in contact with the office.

Senator WATERS: Are you briefing as to the content and the volume?

Ms Orr: We've had discussions around the content and the volume.

Senator WATERS: Will the department be coordinating the response rather than the minister?

Ms Orr: Yes, the department will respond to the majority of the correspondence.

Senator WATERS: Has the minister also been receiving similar—or dissimilar—emails about this issue?

Senator Payne: Do you mean the Attorney?

Senator WATERS: Yes, that's indeed what I mean.

Ms Orr: The correspondence is addressed to the Attorney and then referred to the department.

Senator WATERS: I see. It's coming in through the Attorney's office and it's being forwarded to you; you'll coordinate the response and briefing about what they're saying.

Ms Orr: That's correct.

Senator WATERS: Thank you. I'll reflect on that. I might have some more questions on notice.

Senator STEELE-JOHN: Who would be best to direct my questions to, in relation to the Attorney-General Department's role in supporting the royal commission?

Mr Moraitis: The royal commission's branch. For information of the committee, can I just confirm that the PID Act was transferred to our department on 10 May last year.

CHAIR: Thank you, that's very helpful.

Mr Moraitis: As we undertook to provide Senator Carr details regarding the AAT, if there's time in the next 20 minutes to do so we're happy to provide it orally; if not, we'll do it in writing.
CHAIR: Well, that's an incentive for everybody to be efficient!

Senator STEELE-JOHN: Last night, Dr Baxter at the Department of Prime Minister and Cabinet confirmed, in relation to a line of questioning by Senator Waters, that the department together with the Attorney-General's Department had provided a shortlist to the PM for selecting commissioners. Particularly, the Attorney-General had been supportive in relation to issues around assessing perceived conflicts of interest. Who can tell me who in the department of the Attorney-General was given the responsibility for playing this role?

Mr Moraitis: Can I clarify something?

Senator STEELE-JOHN: Yes.

Mr Moraitis: Primary responsibility for those matters is with Prime Minister & Cabinet. They consult with us and we provide advice to Prime Minister and Cabinet on these matters.

Senator STEELE-JOHN: Yes, indeed. I understand and—

Mr Moraitis: We don't control the process.

Senator STEELE-JOHN: Dr Baxter made that clear. My question, to clarify, is: When PM&C engaged you for that support, who gave that support to PM&C?

Mr Moraitis: It would've been Iain Anderson's group. Ms Harvey has been—

Mr Anderson: It's group 2.

Senator STEELE-JOHN: So it would've been somebody here—

Mr Anderson: Officials at the table.

Senator STEELE-JOHN: Specifically, as in which member of personnel or which members of personnel, supported PM&C in that effort?

Mr Anderson: It's the royal commission's Commonwealth representation branch. But, to the extent that we provide support, that's not necessarily providing support on all proposals. We don't necessarily know all proposals.

Senator STEELE-JOHN: No, Dr Baxter was very clear. You gave support in relation to considering the questions of the manageability of perceived or real conflicts of interest. I'm just trying to get to the bottom of when PM&C said, 'This is who we're thinking of; can you take a look and see if there are any issues we need to look at in relation to individuals?' Who undertook that work?

Mr Anderson: It's our royal commission's Commonwealth representations branch, which Ms Byng heads up.

Senator STEELE-JOHN: Ms Byng, did you yourself head it up or did someone within your branch do that work?

Ms Byng: I was responsible for securing the conflict-of-interest form from the candidates and providing that to the Department of Prime Minister & Cabinet.

Senator STEELE-JOHN: Excellent, thank you. Can you provide to me, on notice, I think would be the most efficient way to do this, the definition the department uses in relation to a 'manageable conflict of interest'? I'm presuming, of course, you have a definition of 'manageable'.
Mr Anderson: As Ms Byng mentioned, our role was collecting the forms from nominees and providing those completed forms to PM&C. The form itself refers to, at one point, 'steps that could be taken to manage the interest of the parties'. We collect the forms after they've been completed and provide them on.

Senator STEELE-JOHN: So your job was just to make sure that they filled in a form and that that form was provided to PM&C.

Mr Anderson: That's broadly correct. On occasion we might have provided some comments about what they—

Senator STEELE-JOHN: About what they filled in on the form?

Mr Anderson: filled in, yes. We're not necessarily policing or regulating how people—

Senator STEELE-JOHN: No, I know. Did you, in this case, provide any additional comment on what was filled in on the form?

Mr Anderson: I recall that on a number of occasions a number of people involved made some comments to draw attention to things that had been included on the forms.

Senator STEELE-JOHN: Can you provide a bit more detail on that to me on notice? I'd like to know what you drew people's attention to?

Mr Anderson: We will take that on notice. It may well be that there are public interest issues here in terms of the forms that then feed into a process of eventually going as advice to executive council. We'll take that on notice as to what we could provide.

Senator STEELE-JOHN: So the forms feed into an executive advice process, do they?

Mr Anderson: An executive council process.

Senator STEELE-JOHN: And so the form is not able to be provided to me on notice?

Mr Anderson: They're not our forms. They're PM&C's forms. We're happy to take on notice what we would be able to provide, but it might be that the answer is that you'd need to ask the PM&C if you wanted to see the forms.

Senator STEELE-JOHN: If I wanted to see the completed forms, I would go to PM&C, potentially?

Mr Anderson: Yes.

Senator STEELE-JOHN: That clears that up, thank you very much. Who would be the best person to query something in relation to the drafting of the letters patent?

Mr Anderson: PM&C again is responsible for overseeing the drafting of the letters patent. They instruct the Office of Parliamentary Counsel with respect to the drafting of the—

Senator STEELE-JOHN: Do you give advice to PM&C in relation to the letters patent?

Ms Byng: We participated in a small number of meetings where we provided information to them.

Senator STEELE-JOHN: Sorry, I used the incorrect terminology. I meant the terms of reference of the royal commission?

Ms Byng: The terms of reference process was led by the Department of Social Services and questions would be better directed to them.
Senator STEELE-JOHN: Did you provide advice or assistance to the department in the drafting of the terms of reference?

Ms Byng: No, we did not. We provided assistance to the Department of the Prime Minister and Cabinet in the preparation of the letters patent.

Senator STEELE-JOHN: Okay. That kind of clears that up for me. Thanks for that. My final question to you is in relation to funding allocations. Can I just clarify that the Attorney-General's Department has been allocated $379 million for the purposes of the royal commission.

Ms Byng: That's $379.1 million.

Senator STEELE-JOHN: Point one—we've got to be careful there. Would you on notice be able to provide me with a breakdown of the funding allocation within the department as to what bit is going where?

Ms Byng: Just one moment. I may have some information available, so I could address it now.

Senator STEELE-JOHN: Yes, please do.

Ms Byng: Of the $379.1 million, $310.9 million has been provided to the royal commission for the establishment and running of that royal commission; $17.194 million has been provided for the legal advisory service; $20.089 million has been provided for the Legal Financial Assistance scheme—that's the one designed to provide assistance to individuals who are providing evidence to the royal commission or being interviewed by the royal commission—$2.441 million has been provided for staff and supplier costs relating to the legal advisory service and Legal Financial Assistance scheme; $27.5 million has been provided for the Commonwealth representation component; and $0.9 million has been allocated to in the year 2023-24 for the management of royal commission records.

Senator STEELE-JOHN: Just so that I know I'm not leaving a stone unturned: you provided advice to PM&C in relation to the letters patent that were then published by PM&C?

Ms Byng: Yes. We participated in meetings with the department.

Senator STEELE-JOHN: On that issue?

Ms Byng: On that issue.

Senator STEELE-JOHN: One of the concerns that has been raised with me is the absence of mention of a redress, or explanation of redress, as was found in the Royal Commission into Institutional Responses to Child Sexual Abuse. Was the topic of redress something that was discussed in those meetings between AG and PM&C?

Mr Anderson: Ultimately, that's a decision for the government as to what should be contained in the letters patent.

Senator STEELE-JOHN: I know, but was that something that you flagged? I know ultimately it is, but was it at the time that you had that conversation something that was on the agenda?

Mr Anderson: The discussions that we had between agencies were matters that then went into the shaping of deliberative advice to government for them to consider in the context of
finalising the letters patent. At the very least we'd need to take on notice whether we can provide any detail of what we discussed with them.

**Senator STEELE-JOHN:** Can you take on notice: if you can provide me any detail whatsoever as to whether the question of redress was part of those discussions that then fed into that advice. That would be most helpful.

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

**Senator STEELE-JOHN:** Does the AG's department have a line of sight as to the legal structure of the royal commission: who has which legal role, and where, within the commission?

**Mr Anderson:** It's primarily a matter for the chair and the commissioners as to the structure that they adopt. Each royal commission—there are some similarities and, typically, some differences, so it's been a decision for the chair and the commissioners as to, for example, how they would structure the solicitor assisting function, but then the appointment of counsel assisting is a matter for the Attorney done on the recommendation of the chair.

**Senator STEELE-JOHN:** I know. I just want to know: is the AG's department aware of the current structure of the commission?

**Mr Anderson:** Yes, we are aware.

**Senator STEELE-JOHN:** Can you provide me on notice the structure, as you understand it.

**Mr Anderson:** We could provide you with a structure, as we understand it, but if you wanted to know the structure as it definitively is, you'd be better—

**Senator STEELE-JOHN:** No, I know; I'm very aware. Are you aware: is the department, as of now, aware of the resignations of Michael Fordham and Chris Ronalds from the positions of assisting counsel?

**Mr Anderson:** Mr Fordham didn't communicate a reason to the Attorney-General, and Ms Ronalds gave no reason in her letter to the Attorney-General.
Senator STEELE-JOHN: As far as the department is aware, they've given no reason as to their resignations?

Mr Anderson: No reasons were provided to the Attorney-General by either Mr Fordham or Ms Ronalds.

Senator STEELE-JOHN: And has the department sought reasons?

Mr Anderson: No, we haven't.

Senator STEELE-JOHN: Have they asked why?

Mr Anderson: No, we haven't gone to Mr Fordham or Ms Ronalds to ask for reasons. The point is—and it was made clear by Ms Pirani earlier—there are seven existing counsel: three senior counsel and four junior counsel. If the chair and commissioner feel that they need more, then they only need approach the Attorney. But currently they're well provided for with counsel.

Senator STEELE-JOHN: Thank you very much.

Senator KIM CARR: Mr Secretary, you indicated the date on which one of the appointments to the Administrative Appeals Tribunal was made—

Mr Moraitis: No, the PID Act was transferred to our department on 10 May. Mr Anderson can provide you with all the other information you sought this morning.

Senator KIM CARR: There were some undertakings given by the department as to some returns tonight. Have you got those for me?

Mr Anderson: Firstly, there have been 436 substantive appointments made since 1 July 2015. I choose that date because that's when the various merits review tribunals were amalgamated. Of those 436 appointments, 19 constitute the president and 18 judicial members, so they are qualified by holding judicial office; a further 234 appointments proceeded by way of a legal qualification, so being enrolled as a legal practitioner for at least five years; and 183 were made by reason of special knowledge or skills. I should just say that those 436 substantive appointments don't include extensions or short-term extensions of 12 months or less that have been made in that period, but 436 substantive appointments.

Second, the thing that we took on notice: you asked about whether Tony Barry's CV disclosed employment for then Minister Pyne and also for the Opposition Leader, Mr Turnbull. It did. You asked about Terry Carney, who was first appointed to the Social Security Appeals Tribunal in 1976. He did have an extension from January to September 2017, but his appointment then expired after 41 years as a member. You asked about Mr Will Frost. Mr Frost did not submit his name to the Attorney-General's Department to be nominated for appointment to the AAT. He had resigned from the Attorney-General's office, and his name was submitted to the department by the Attorney-General's office after he had resigned from that office.

Senator KIM CARR: Sorry, there was a date. I was seeking a date.

Mr Anderson: The date that we received his nominated appointment—

Senator KIM CARR: The date of his resignation.

Mr Anderson: His resignation was effective on the 31 December 2018.

Senator KIM CARR: And his appointment date?
Mr Anderson: He was appointed to the executive council on 7 February 2019. And then, Senator Henderson asked about the appointments to the AAT by the government—people who the department were aware had affiliations with the ALP. In the time available, we've identified that Linda Kirk, John Black, David Cox, Anna Burke and Shane Lucas have all been appointed to the AAT and had all disclosed affiliations with the ALP on CVs. I think you mentioned that we didn't have a record of an affiliation with the ALP of Moira Brophy being disclosed through the appointments process.

CHAIR: Before anybody has a moment to ask for anything else, we're going to move on to Group 3. We have four minutes, team. Let's see what we can do.

Senator KIM CARR: I've got a simple matter regarding raising the age of criminal responsibility. I understand the Council of Attorneys-General has committed to establishing a working group on raising the age of criminal responsibility, and it was supposed to report back in 12 months. This was established in November last year and is due to report back. Has there been a report produced?

Mr Moraitis: The next Attorney-General's meeting is at the end of November.

Senator KIM CARR: So it is in a month's time?

Mr Moraitis: It's in a month's time. But I'm not sure of the state of play yet.

Senator KIM CARR: So have you got a working group report?

Ms Chidgey: No, there hasn't been a report produced yet.

CHAIR: Is it the position of the Attorney-General to support raising the age of criminal responsibility?

Ms Chidgey: We'll await the outcomes of the working group.

Senator KIM CARR: Will the working group's report or paper be made public?

Ms Chidgey: I don't know if any decision has been made on that as yet.

Mr Moraitis: There will be a public communique from the CAG on that item. There is usually a paragraph outlining the outcomes or considerations that were taken.

Senator KIM CARR: Is it the intention of the Attorney-General to refer the working group paper or the issue or age of criminal responsibility to the Australian Law Reform Commission or any other agency?

Ms Chidgey: There's no current proposal to do that.

Senator KIM CARR: It's just that that the AMA, the Law Council—I understand that there is a petition of 30,000 signatures—and from Amnesty International, the UN Committee on the Rights of the Child has called on Australia, the UN High Commissioner has called on Australia to raise the age. I'm just wondering whether there's a view within the department that—the evidence is very strong that the public and expert opinion accepts the need to raise the age of criminal responsibility?

Ms Chidgey: This would ultimately be a matter for government. There are probably a couple of things on that that I would mention, which are: at the moment the age of criminal responsibility is consistent across all jurisdictions; and probably the majority of child offenders are actually at state and territory level, so we are particularly interested in state and territory views; and at the moment there are intersections with intervention programs and the...
age of criminal responsibility. So an important part of the work of the working group will be how to consider those issues if the age is changed.

**Senator KIM CARR:** Let me make this clear: the Attorney-General in New South Wales is supporting the position of raising the age. You've suggested taking into account states' views. Have any of the other Attorney-Generals indicated a public position of supporting raising the age of criminal responsibility?

**Ms Chidgey:** I think Northern Territory may have indicated in-principle support. But jurisdictions are obviously participating in the working group and council process.

**Senator KIM CARR:** Thank you for that. I'm just surprised that the Attorney-General wouldn't have made some comment on the matter or had some position on that. I asked some questions before regarding Mr Frost's nomination to the AAT. Were you able to establish the date on which he was nominated? I did ask that question earlier. Are you able to provide that information? You've indicated the date on which he resigned—the 31st—and the date he was appointed, but I also thought I asked: what was the date on which he was nominated?

**Mr Anderson:** The department was advised of his name for nomination on 4 January 2019.

**Senator KIM CARR:** And you regard that as the date of nomination?

**Mr Anderson:** That's the date that the Attorney-General's Department was advised by the Attorney-General's office that we should prepare a pack for his nomination to go forward for consideration.

**Senator KIM CARR:** Thank you very much.

**Senator WATERS:** I have some questions on the National Integrity Commission. Consultation on the discussion paper closed in February 2019. What work has been done to respond to the issues raised in the submissions and what were the key issues raised in the submissions, in a very brief form?

**Ms Chidgey:** We've continued to work with the Attorney to consider a range of issues. There are obviously some complex issues to work through, like potential coverage of the judiciary and parliamentarians and how that might work. We have been providing advice and refining some legislation.

**Senator WATERS:** When we last spoke in February, my understanding of the evidence was that there were some drafting options before the Attorney at that time, which was eight months ago. When will that drafting process be complete and a bill be introduced to the parliament—not my bill; the government's bill?

**Ms Chidgey:** Yes. It will be complete when the Attorney has agreed to the draft—

**Senator WATERS:** You don't say! Is there an estimated time for when that will occur?

**Ms Chidgey:** I think the Attorney has indicated that he hopes to release the exposure draft before the end of the year.

**Senator WATERS:** The Australia Institute submission was highly critical of the proposed model and said it was under-resourced, lacking in transparency and largely toothless. Has the department prepared advice regarding strengthening the proposed model to address those and other criticisms?
Ms Chidgey: Obviously the Attorney is aware of the issues raised as part of the consultation.

Senator WATERS: I understand that you can't tell me what advice you've given to the minister. Would a Commonwealth integrity commission that's consistent with the model proposed in the discussion paper be able to investigate and respond to allegations relating to the involvement of federal ministers and immigration officials in facilitating immigration access for Crown Casino high rollers? Would such an investigation be in public, if it were able to be held?

Ms Chidgey: I think that involves speculation on facts that I am not aware of. The commission will be able to investigate any criminally corrupt conduct.

Senator WATERS: In public?

Ms Chidgey: It would ultimately expect that matters would go on to be prosecuted in court if a brief of evidence were able to be produced.

Senator WATERS: Okay, but the Integrity Commission itself would not be conducting those inquiries in public?

Ms Chidgey: It would be a final decision for the government, but the proposal in the discussion paper, as you are aware, is that the public sector part of the commission wouldn't hold public hearings and that ultimately the public part of any process would be a court resolving a criminal matter.

Senator WATERS: And that hasn't changed since February?

Ms Chidgey: It will ultimately be a final decision for government before introduction.

Senator WATERS: Thank you. I tried. You did your job very well not to tell me anything. I will wait and see.

CHAIR: I have two quick clarifying questions. Senator Waters is obviously very enthusiastic about the integrity model that has been put forward by the Greens political party. Have you looked at that model in the course of your work?

Ms Chidgey: We had considered it. I think there had been a committee inquiry that we had appeared before.

CHAIR: Would that model require journalists—for instance, from the ABC, SBS or any other organisation—to appear before it?

Ms Chidgey: Yes. My understanding is it could.

CHAIR: Would it require those journalists to provide, for instance, their privileged legal advice to the commission, given the breadth of the powers provided to that organisation?

Ms Chidgey: We would have to take that on notice.

CHAIR: You can. That's fine. Similarly, would it require them to reveal sources?

Ms Chidgey: We'll take that on notice as well.

CHAIR: Thank you very much. Thank you, one and all, for your patience, enthusiasm and endurance. We very much appreciate your assistance. I wrap up by saying a big thanks to the minister, who has been with us all day, to Hansard, to broadcasting and to our ever-helpful secretariat staff. Senators are reminded that written questions on notice should be provided to
the secretariat by 5 pm on Friday 1 November 2019. Is it the wish of the committee to accept the documents tabled in the course of the day? There being no objection, it is so ordered.

Committee adjourned at 23:05