Inquiry into the actions of Australian government agencies in relation to the arrest and detention overseas of Mr Mamdouh Habib from 2001 to 2005

Public Report

Dr Vivienne Thom
Inspector-General of Intelligence and Security
under the *Inspector-General of Intelligence and Security Act 1986*

December 2011

Note on report

This report is an abridgement of a more comprehensive and detailed report that has been provided to the Prime Minister. This version of the report is unclassified and intended for public release. This report was prepared on the basis that it would contain as much information as possible while satisfying the requirement that such information would not prejudice security, the defence of Australia, Australia's relations with other countries, law enforcement operations or the privacy of individuals.

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Executive summary and recommendations

Mr Mamdouh Ahmed Habib is a dual Australian-Egyptian national who was detained in Pakistan in October 2001. Australian government agencies believe that, after a period of detention in Pakistan, he was transferred to Egypt in November 2001. In April 2002 Mr Habib was transferred to the Afghan city of Bagram en route to the US Naval Base in Guantanamo Bay, Cuba. Mr Habib was held at Guantanamo Bay until his release into the community in Australia in January 2005.

Following his release, Mr Habib initiated Federal Court proceedings against the Commonwealth in relation to the actions of Australian government officials during his period of detention. This action was settled in December 2010.

In December 2010 the Prime Minister requested the Inspector-General of Intelligence and Security to conduct an inquiry into the actions of Australian intelligence agencies in relation to the arrest and detention overseas of Mr Habib from 2001 to 2005. The Prime Minister also requested that the inquiry cover the actions of the Department of Foreign Affairs and Trade (DFAT) and the Australian Federal Police (AFP) relevant to this intelligence and security matter. The Prime Minister requested the inquiry also explore the implications for the involvement of Australian intelligence and law enforcement agencies, as well as for DFAT, in matters relating to Australians detained in foreign countries.

In February 2011, the Prime Minister expanded the scope of the inquiry at the request of the Inspector-General to include the actions of the Attorney-General's Department (AGD) and the Department of the Prime Minister and Cabinet (PM&C).

The inquiry considered many thousands of pages of documents and twenty-four current or former Commonwealth officers were formally interviewed. Mr Habib was also interviewed and given the opportunity to provide information.

The inquiry also considered the adequacy of agencies' policies and practices at the time of Mr Habib's arrest and detention, as well as any changes since that time. The Prime Minister requested that due weight be given to the potential impact of any recommendations on the future effectiveness of the intelligence community in supporting Australia's national security, notably in operations overseas and in relations with foreign agencies.

The Inspector-General makes a number of recommendations in respect of consular responsibilities, the passage of information to foreign authorities, and on the prohibition on the use of, or involvement in, torture or other cruel, inhuman or degrading treatment or punishment.

The report acknowledges that there have been considerable changes in the way that Australian government agencies manage national security matters over the last ten years, including the creation of the role of National Security Adviser. It also notes that an Interdepartmental Committee would be established in future to manage any situation where an Australian citizen is detained overseas on suspicion of terrorism. The Inspector-General considers these arrangements to be satisfactory and therefore makes no recommendations in respect of clarifying whole-of-government responsibilities.

The Inspector-General found that communication to the Habib family in respect of Mr Habib's welfare was not adequate and recommends that an apology be made.

Key findings

The intelligence case against Mr Habib

1. On 13 September 2001 credible information was obtained that Mr Mamdouh Habib may have had prior knowledge of the September 11 terrorist attacks.
2. From that time until approximately April 2002, Australian government agencies and foreign governments considered that there was an urgent need to clarify the extent of Mr Habib's prior knowledge and whether he was involved in planning for future attacks.
3. From April 2002, the Australian Security Intelligence Organisation (ASIO) was of the view that Mr Habib had not been involved in planning for future terrorist attacks. However, this assessment was not sufficient to secure his release from detention in either Afghanistan or Guantanamo Bay.
4. On 5 January 2005, Australia was advised that the US would not lay charges against Mr Habib. The Australian Attorney-General and the Minister for Foreign Affairs noted in a joint media release on 11 January 2005 that 'it remained the strong view of the United States that, based on information available to it, Mr Habib had prior knowledge of the terrorist attacks on or before 11 September 2001. Mr Habib has acknowledged he spent time in Afghanistan, and others there at the time claim he trained with al-Qa'ida'. They noted further that 'Mr Habib remains of interest in a security context because of his former associations and activities'.

Action of Australian officials in relation to Mr Habib's detention in Egypt and Pakistan

5. In Pakistan (October to November 2001), the only Australian officials to see Mr Habib were one ASIO officer and one AFP officer. Neither of these officers:
   - engaged in acts of mistreatment of Mr Habib or had knowledge of any actual or intended mistreatment by others
   - made threats that Mr Habib's Australian citizenship would be rescinded
   - made threats that Mr Habib's family would be harmed
   - made threats that Mr Habib would be sent to Egypt.
6. Australian officials were not involved in making arrangements for Mr Habib's transfer to Egypt and were not present at any time during his forced removal from Pakistan.
7. No Australian official accompanied Mr Habib on an aircraft from Pakistan to Egypt.
8. In Egypt (November 2001 to April 2002):
   - Mr Habib's place of detention was not known by Australian officials for the period of his detention
   - no Australian official attended Mr Habib's place of detention
   - no Australian official was present during interrogations of Mr Habib
   - in particular, Mr Habib was not seen by any officers from the Australian Embassy in Cairo, or persons identified by Mr Habib as ASIO officers named 'Stewart', 'Stuart' or 'David'.

9. ASIO should have made active enquiries about how Mr Habib would be treated in Egypt before providing information which may have been used in his questioning in Egypt.
10. Mr Habib's claim that he was questioned in Egypt about documents obtained during an ASIO search of his home is credible.
11. On arrival in Guantanamo Bay in May 2002, Mr Habib made various allegations about his treatment while in Pakistan and Egypt. It is not apparent that the Australian government agencies made immediate inquiries of the US, Pakistan or Egyptian Governments at that time with respect to Mr Habib's allegations of mistreatment.

Consular responsibilities in Pakistan and Egypt

12. DFAT's administrative obligation to seek consular access to Mr Habib 'at the earliest possible moment' (in accordance with its consular guidelines) commenced as soon as the possibility of an Australian being detained was first raised. DFAT officials from the Australian High Commission in Islamabad should have demonstrated a greater sense of urgency in formally pursuing proper consular access to Mr Habib in Pakistan.
13. The arrangements for providing consular assistance to Mr Habib in Islamabad, including the use of an ASIO officer, were not adequate in Mr Habib's particular circumstances. It was unrealistic to expect that Mr Habib could contact the Australian Consul in Islamabad directly by telephone if he wished to receive consular assistance or that he would be able to independently contact a legal representative.
14. DFAT officials from the Australian Embassy in Cairo were diligent in pursuing confirmation that Mr Habib was in Egypt and in seeking urgent consular access to him, although access was never granted.

Interview of Mr Habib in Guantanamo Bay

15. When Mr Habib arrived in Guantanamo Bay, his first contact with Australian officials was during an interview conducted by DFAT, ASIO and AFP officers in May 2002. The conduct of the interviewing AFP officers is considered to have been not unreasonable in the circumstances. However, the AFP should have more carefully considered how it might have tasked its officers to conduct an appropriate interview, in circumstances where it was known that Australian domestic laws could have been engaged, but the obligations imposed by these laws could not have been met.
16. It would have been preferable for the AFP officers to have advised Mr Habib, specifically, that he was under no obligation to say or do anything; that he was not required to answer any particular question that he may not have wished to answer; and that he was free to terminate the interview at any time.

Liaison with foreign governments

17. Individual Australian officials gave strong and consistent messages to foreign governments that Australia would not agree to Mr Habib being sent from Pakistan to Egypt.
18. Although ASIO took a lead role in giving these messages, there was no whole-of-government consideration of whether Australia should separately object to the move through other channels, including through diplomatic channels.

19. From 31 October 2001 to 10 November 2001, ASIO received increasingly senior representations from foreign governments about a proposal to move Mr Habib from Pakistan to Egypt. The Director-General of Security did not take sufficient action to advise DFAT or responsible ministers that there was an urgent need for the Australian Government to escalate its objections to that proposal.

20. In April 2002 (when Mr Habib was being detained by the US in Afghanistan, but had not yet been sent to Guantanamo Bay) DFAT requested advice from the US about its future intentions regarding Mr Habib. DFAT did not, however, indicate that the Australian Government had a preferred course of action; nor did it indicate that any Australian government agency expected to be consulted prior to the US making a decision about Mr Habib's ongoing detention; nor that the Australian Government had any intention to communicate a preferred course of action to the US at a later stage.

21. A whole-of-government policy position was never developed on the best way to approach the US Government about Mr Habib's detention in Afghanistan and subsequent transfer to Guantanamo Bay, or what Australia's preferred course of action should be.

22. Australian officials were diligent and committed in attempting to secure the best and fairest possible arrangements for military commission trials for Australian detainees, given the stated and clear position of the Australian Government that if Mr Habib could not be prosecuted in Australia, then the US should prosecute him.

23. It was the responsibility of Pakistani, Egyptian and US authorities to decide whether Mr Habib had committed an offence against the laws of their respective countries, which warranted his detention. However, Australian agencies had insufficient regard to the fact that Mr Habib – an Australian citizen – was held without charge and without access to any legal process for a significant period of time. Mr Habib's best interests should have been the subject of more attention and action by Australian government agencies.

Coordination between Australian government agencies

24. At a number of points during Mr Habib's detention overseas there was a lack of effective coordination between Australian government agencies and it was not clear at times which agency was taking the lead role. This led to poor interagency communication and resulted in some agencies acting on incomplete information.

25. From April 2002, ASIO was of the view that Mr Habib had not been involved in planning for future terrorist attacks. This does not seem to have been understood by DFAT or conveyed to the Australian Ambassador to the US or to the Attorney-General prior to their meeting with senior US officials on 6 May 2002.

Mr Habib's welfare

26. There was no evidence that in the period between June 2002 and June 2003 DFAT made further enquiries about Mr Habib's health or sought access to Mr Habib. During this period DFAT appeared to rely on what ASIO shared about the observations of its officers. DFAT should have taken a more proactive approach to pursuing welfare visits to Mr Habib in this period.

27. In light of the constraints placed upon Australian agencies by having to rely upon foreign authorities to conduct and report on any investigations, Australian officials dealt with the allegations of mistreatment of Mr Habib in Guantanamo Bay appropriately in the circumstances. No report of any abuse investigation conducted by US authorities was provided for public release.

Communication with Mrs Habib

28. A letter sent to Mrs Habib from a DFAT official while Mr Habib was detained in Pakistan was inadequate and was not likely to have given Mrs Habib a full understanding of her husband's circumstances while in detention in Pakistan. Further, the letter may have denied Mr Habib's family an opportunity to obtain legal representation in Pakistan.

29. There was no apparent basis for the advice that DFAT gave to Mrs Habib (and to the Minister for Foreign Affairs) that Mr Habib was 'well and being treated well' in February 2002 when he was detained in Egypt.

30. There were inadequate mechanisms in place to ensure that Mrs Habib was kept informed with information Australian government agencies had about her husband's health and welfare while he was in US custody at Guantanamo Bay. The failure to provide Mrs Habib with any information in the period May 2002 to November 2003 is of particular concern.

Recommendations

Recommendation 1

Australian government agencies should prepare an apology to Mrs Maha Habib for failing to keep her properly informed about Mr Mamdouh Habib's welfare and circumstances.

Recommendation 2

DFAT should amend its current 'Arrest and Detention checklist' in the *Consular Handbook* to make explicit that:

- The checklist must be completed by any government official asked to undertake consular duties.
- The checklist must be completed each time a detainee is visited (not only on the first visit as currently required).
- After each visit, the official must provide details of the information they obtain, against the full range of consular functions.
- The official must advise what ability the detainee has to independently communicate with Australian officials or a legal representative – if the detainee has no such ability, this should be immediately drawn to the attention of senior consular officers in Canberra, for a determination of what action might be appropriate.

Recommendation 3

ASIO should amend its policies and procedures, for the avoidance of doubt, to make it clear:

- that before sending questions or other information to another state, in support of a custodial interview overseas, ASIO will first satisfy itself (including by reasonable enquiry where necessary) that the interviewee is not being and is not likely to be subjected to torture or other cruel, inhuman or degrading treatment or punishment
- any officer approving ASIO involvement in custodial questioning overseas must record what factors he or she had regard to in each particular case
- which Commonwealth agencies might be considered 'appropriate' or 'relevant' to advise or consult, in instances when ASIO becomes aware that torture or cruel, inhuman or degrading treatment or punishment has been used.

Recommendation 4

The AFP should develop a formal policy on what AFP officers should do in the event that they become aware torture or cruel, inhuman or degrading treatment or punishment has been, or is likely to be, experienced by an interviewee who is being held in detention overseas. The policy should encompass the sending of questions or information to support the conduct of a custodial interview, as well as circumstances where an AFP officer is physically present at an interview.

Recommendation 5

ASIO should amend its guidelines on the communication of information to foreign authorities to place a positive obligation on approving officers to document the reasons for a decision when any factor of which they had account is not articulated in the request documentation.

Recommendation 6

The AFP should review its *National guidelines on the disclosure of information* to include procedures for the communication of information about Australians to foreign authorities.

Part 1 ♦ The inquiry

Framework

Legislation

The *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act) establishes the independent office of the Inspector-General of Intelligence and Security (IGIS). The IGIS reviews the activities of the agencies which collectively comprise the Australian Intelligence Community (AIC). These agencies are:

- the Australian Security Intelligence Organisation (ASIO)
- the Australian Secret Intelligence Service (ASIS)
- the Defence Intelligence Organisation (DIO)
- the Defence Signals Directorate (DSD)
- the Defence Imagery and Geospatial Organisation (DIGO)
- the Office of National Assessments (ONA).

The role and functions of the IGIS are set out in ss. 8, 9 and 9A of the IGIS Act and, broadly, are to conduct inspections of agencies of the AIC and to conduct inquiries, the aim of which is to ensure that each AIC agency acts legally, with propriety, and in a manner which is consistent with human rights.

Prior to 2010, the IGIS was only able to examine matters directly relating to the AIC agencies. As part of its response to the inquiry by the Hon. John Clarke, QC in relation to the arrest of Dr Mohamed Haneef, the Government proposed widening the IGIS mandate to enable the IGIS to inquire into other Commonwealth agencies, at the request of the Prime Minister.

Subsequently, the *National Security Legislation Amendment Act 2010* amended the IGIS Act to enable the IGIS, on request of the Prime Minister, to inquire into an intelligence or security matter relating to any Commonwealth agency. The expanded jurisdiction of the IGIS reflects the increasing intersection between other Commonwealth agencies and the AIC on intelligence and security matters.

Referral from the Prime Minister

On 22 December 2010, the Prime Minister, the Hon. Julia Gillard, MP, wrote to me requesting that, in accordance with s. 9(1) of the IGIS Act, I conduct an inquiry into the actions of Australian intelligence agencies in relation to the arrest and detention overseas of Mr Mamdouh Habib from 2001 to 2005. The Prime Minister also requested in accordance with s. 9(3) of the Act that the inquiry cover the actions of the Department of Foreign Affairs and Trade (DFAT) and the Australian Federal Police (AFP) relevant to this intelligence and security matter.

In accordance with s. 9AA(a)(i) of the Act, the Prime Minister gave approval to inquire into those matters that occurred outside of Australia.

The Prime Minister also advised that the inquiry should explore the implications for the involvement of Australian intelligence and law enforcement agencies, as well as for DFAT in matters relating to Australians detained in foreign countries.

The Prime Minister expressed the view that it would be desirable if, in making findings and recommendations, I gave due weight to the potential impact of any proposed adjustments to the agencies' policies and practices on the future effectiveness of the intelligence community in supporting Australia's national security, notably in operations overseas and in relations with foreign agencies. She noted that I would also need to consider the adequacy of agencies' policies and practices at the time of Mr Habib's arrest and detention in 2001, as well as taking into account any changes to relevant policies and practices since that time.

I accepted the Prime Minister's reference on 4 January 2011 and notified relevant ministers and agency heads of the inquiry on that date, as required by the IGIS Act.

On 31 January 2011, after considering some initial documentary material provided to the inquiry, I wrote to the Prime Minister asking her to authorise under s. 9(3) of the IGIS Act an expansion of the scope of the inquiry to include the actions of the Attorney-General's Department (AGD) and the Department of the Prime Minister and Cabinet (PM&C).

The Prime Minister agreed to my request on 26 February 2011.

Powers of the IGIS

The IGIS Act provides the Inspector-General with some significant powers with which to conduct inquiries.

Section 18 provides that the Inspector-General may:

- compel the giving of information or the production of a document that the IGIS has reason to believe is relevant to an inquiry
- compel a person to appear and answer questions where the IGIS has reason to believe that they are able to give information relevant to the inquiry
- administer an oath or affirmation to a person appearing and examine the person on oath or affirmation.

Section 18 also provides that it is an offence to fail to give information or produce a document or answer a question from the Inspector-General when required to do so. A person is not excused from giving information, producing a document or answering a question from the IGIS on the grounds that doing so would contravene the provisions of another Act; would be contrary to the public interest or might tend to incriminate the person or make the person liable to a penalty; or would disclose legal advice given to a minister or Commonwealth agency.

However s. 18 also provides protections for those persons giving information, producing a document to, or answering questions from, the Inspector-General. Any information which is obtained under s. 18 is not admissible in any court or proceedings except in a prosecution for a limited number of offences. Further, a person is not liable to any penalty under the provisions of any law of the Commonwealth or of the states or a territory by reason only of giving information, producing a document to or answering a question from the IGIS. This

immunity ensures that, to the extent possible, the IGIS is able to pursue the truth of a matter rather than engaging persons in an unnecessarily adversarial process.

Scope

The Prime Minister's request essentially established the scope of the inquiry – that is, the actions of the relevant Australian government agencies and their officials in relation to Mr Habib's arrest and detention overseas from 2001 to 2005. Therefore the actions, or failures to act, of Australian government agencies and officials in light of their actual state of knowledge or what they might reasonably have been expected to have known fell within the scope of the inquiry.

The scope of the inquiry did not extend to the action taken by any minister or ministerial staff. The actions of foreign agencies or officials were also outside the scope of this inquiry.

The inquiry was not directed to answering the wide range of allegations made by Mr Habib in court proceedings or otherwise, such as in the media. However, some of the findings of the inquiry do respond to some of those allegations. Similarly, the inquiry was not concerned with making findings about Mr Habib's actions or the actions of relevant Government agencies before his arrest in 2001 or after his return to Australia in 2005, except to the extent that they directly relate to his arrest and detention overseas.

Inquiry administration

To conduct the inquiry, I established a team from within the existing office resources comprising Ms Sharon Dean, Ms Hannah Walsh and Ms Alison McKenzie.

I also arranged for the temporary secondment of an SES Band 1 officer, Ms Diane Merryfull, from the Office of the Commonwealth Ombudsman.

I engaged the services of two legal counsel, Dr Melissa Perry QC and Mr Chris Horan, to assist in the conduct of the inquiry, particularly with interviewing witnesses.

As my office is not generally funded to conduct major inquiries for agencies outside of the AIC, additional funding to conduct the inquiry was provided by PM&C.

Information gathering

Documents

After informing ministers and relevant agency heads about the inquiry, I met with those agency heads to brief them further. Requests were made to agencies, initially, for documents that had been discovered for Mr Habib's Federal Court proceedings against the Commonwealth.[1] This was because the breadth of the order for discovery appeared to be within the range of documents that the inquiry needed (although the scope of the inquiry

[1] On 16 December 2005, Mr Habib commenced proceedings against the Commonwealth in the High Court, which were subsequently transferred to the Federal Court in April 2006. In July 2010, the Court made orders for discovery of documents by the Commonwealth and listed the case for hearing in June 2011. In September 2010, the matter was referred by the court for mediation at a date to be fixed (subsequently listed for 21 January 2011). The case was settled and a confidential deed of settlement signed on 17 December 2010.

was not limited to that range) and agencies had made significant progress in gathering these documents.

Among the categories of documents to be discovered in the Federal Court proceedings which were of particular interest to the inquiry, were documents held by agencies that related to, arose out of, or were connected with:

- contemporaneous documents created between 1 October 2001 and 30 November 2001 concerning Mr Habib's arrest and detention in any place in Pakistan in the period from on or around 1 October 2001 to on or around 30 November 2001
- contemporaneous documents created between 1 October 2001 and 3 May 2002 concerning Mr Habib's transportation from Pakistan to Egypt in or around November 2001
- contemporaneous documents created between 1 October 2001 and 3 May 2002 concerning Mr Habib's detention in Egypt in the period from on or about 1 November 2001 to on or about 1 May 2002
- contemporaneous documents created between 1 October 2001 and 3 May 2002 concerning Mr Habib's transportation from Egypt to Bagram Airbase in Afghanistan in or around April 2002
- contemporaneous documents created between 1 October 2001 and 31 May 2002 concerning Mr Habib's detention in Bagram Airbase in Afghanistan and/or Kandahar Afghanistan in the period from around April 2002 to on or about 1 May 2002
- contemporaneous documents created between 1 April 2001 and 30 May 2002 concerning Mr Habib's transportation to a US 'military prison' at Guantanamo Bay, Republic of Cuba
- contemporaneous documents created between 1 January 2002 and 28 January 2005 concerning Mr Habib's detention at a US 'military prison' at Guantanamo Bay, Cuba from on or about 1 May 2002 to on or about 28 January 2005
- agency documents that related to, arose out of, or were connected with any of the above categories of documents; related information that pre-dated or post dated the periods set out above; and documents containing new analysis of the contemporaneous documents or information
- the movements of any ASIO or AFP officials to and from Egypt (other than in the course of private travel or business that was not connected to their employment in any way) in the period from on or about 1 November 2001 to on or about 30 April 2002
- any communication between any representative, agent, official or employee of any agency of Australia, the USA, Pakistan, Egypt and the UK between 1 July 2001 and 1 July 2005 concerning or relating to Mr Habib.

My view was that these categories of discovered documents would generally cover the areas and times of interest to the inquiry.

All of the agencies within the scope of the inquiry produced the documents already discovered prior to the commencement of the inquiry. ASIO had the largest quantity of

documents that fell within the terms of the discovery order and it initially supplied a range of documents. Over time ASIO supplied further lists as they completed the discovery process. Officers of the inquiry also inspected files directly at ASIO to look for further relevant documents including further emails, original diaries and legal advice. Information and additional documents were requested from agencies as the inquiry proceeded.

As documents were produced it became apparent that the most relevant documents were those of ASIO and DFAT, then the AFP, AGD and PM&C. DSD had a small number of relevant documents and DIO had one document but there were no relevant documents concerning Mr Habib that originated in ASIS, DIGO or ONA.

For two agencies, DFAT and PM&C, I requested that email records for some officers, for particular periods, be reconstituted (where they had not initially been produced for discovery) because I considered they could contain relevant information.

Policies

Noting the Prime Minister's request that the adequacy of agency policies, both past and present, should be considered, I requested that each agency within the scope of the inquiry provide me with any policies, practices, procedures and guidance material in force during the period 2001-2005 and those in force currently, relating to:

- information sharing with foreign organisations about Australian persons who are likely to be or have been taken into custody or detention overseas
- information sharing with foreign organisations about Australian persons who are likely to be or have been questioned overseas (including the provision of questions)
- the participation by staff members or representatives of agencies in the questioning of Australian persons overseas
- information sharing with foreign organisations about the custody or detention arrangements made for Australian persons overseas, particularly in respect of Pakistan, Egypt and the US
- consular access to Australian persons taken into custody or detention overseas, particularly in respect of Pakistan, Egypt and the US
- information sharing, cooperation and/or consultation with foreign organisations concerning the rendition of Australian persons between overseas jurisdictions, particularly in respect of Pakistan, Egypt and the US.

I also asked to be provided with any policies, practices, procedures and guidance material relating to cooperation with other Australian government agencies, regarding information sharing about Australian persons who are likely to be questioned or have been questioned, taken into custody or detained overseas.

Interviews

Having reviewed the documentary and electronic material listed above, I decided to serve notice, under s. 18 of the IGIS Act, on twenty-four currently or previously serving Commonwealth officers, to attend before me to answer questions under oath or affirmation. The purpose of these interviews was to enable me to seek further information relevant to

my inquiry and, in doing so, to also give those individuals an opportunity to provide any information that they considered was relevant. Not everyone who undertook official functions in relation to Mr Habib in the relevant period was interviewed. Rather, I interviewed persons where I needed additional or clarifying information, for example where the documentary record was incomplete or where it was clear that the person had played a central role in critical events concerning Mr Habib.

The individuals concerned were required to swear an oath or affirmation before me and their interviews were recorded and professionally transcribed. All interviewees were advised that they could have a person present to advise and assist them during the interview and that that person could be a legal practitioner. Most interviewees chose to have an adviser present.

Interviewees were provided with the option of receiving a copy of the transcript of their interview directly, for comment, or having it provided to the agency in which they were employed during the period of relevance to the inquiry. If an interviewee raised questions about the accuracy of the transcription, then the audio recording was reviewed. The transcript was only amended to more accurately reflect the audio recording. If an interviewee wished to add additional information or clarify a statement that was made, then that was noted; however the transcript of the interview was not amended.

Mr Habib's input into the inquiry

In January 2011 I wrote to Mr Habib to explain the scope of the inquiry and request any information that he might consider relevant. Mr Habib referred me to the book that he had written *My Story – The Tale of a Terrorist Who Wasn't*, published in 2008 and recounting his experiences in the period covered by the inquiry. In the course of a number of telephone conversations and by way of letters and emails Mr Habib also said he had various documents that he wanted to provide to me. I offered to assist him in meeting the costs to copy and courier the documents to my office, or arrange for the documents to be collected, copied and the originals returned. Mr Habib ultimately did not provide any documents relevant to the inquiry.

In particular, I note that Mr Habib did not provide me with a purported statement (which had been mentioned in the media) from an Egyptian intelligence officer who had allegedly witnessed the involvement of Australian officials in Mr Habib's mistreatment while in Egyptian detention. Mr Habib asked me to provide funding for witnesses to be brought to Australia from Egypt. At no stage did Mr Habib provide me with the actual names of any witnesses or details of what information they could give to the inquiry, as he asserted that to do so would put them in danger. I did not agree to his request.

I also interviewed Mr Habib under oath in the course of the inquiry to obtain particular information about his direct observations of, and direct experiences with, Australian officials during the period 2001–2005. Mr Habib was assisted by a legal practitioner during the interview. I provided funding for the legal practitioner's preparation for, and attendance at, the interview. Mr Habib provided a small number of documents at the interview but I ultimately judged they were not relevant to the inquiry. I provided Mr Habib with a transcript of his interview.

Media reporting subsequent to my meeting with Mr Habib indicated that an Egyptian lawyer acting for Mr Habib visited Australia in June 2011, and Mr Habib indicated that this person

had information to assist the inquiry. I requested, through Mr Habib, that the lawyer contact me directly to discuss what information he could provide. The lawyer did not contact me directly and I was not given his contact details. Mr Habib stated that I could only speak to the lawyer if he personally acted as interpreter and he would not accept the use of an independent accredited interpreter. Mr Habib also requested that I fund the Egyptian lawyer including his international flights. I did not agree to these conditions.

I was not given any indication of what information the lawyer had that was relevant to my inquiry but have no reason to believe that he had first-hand information about the actions of any Australian official.

Has the inquiry obtained all relevant information?

An inquiry by the IGIS can compel the production of documents in respect of which legal professional privilege might be claimed in other proceedings, as well as documents where public interest immunity might also be claimed. As noted earlier, the IGIS can also compel the giving of evidence that might incriminate a person. These coercive powers, together with the security with which information is treated by this office and the private nature of the inquiry, mean that the range of evidence available to the IGIS is greater than that which might ordinarily be available to other forms of inquiry.

Agencies were cooperative in identifying and providing all relevant documents to my staff. Inquiry staff frequently found multiple copies of the same document, or drafts of documents, which decreased the risk of missing key documents. Overall, the inquiry team examined many thousands of pages of documents. While it is never possible to state with certainty that all relevant records have been located, I do not think that extending the timeframe of the inquiry would have located any more particularly relevant documents. I have formed the view that some instances of poor contemporaneous recordkeeping (discussed below) rather than a failure to locate or produce documents is the reason why gaps in the record may exist.

The records created by individual ASIO officials and relevant DFAT cables provided a comprehensive record of most relevant events. Contemporaneous documentation from relevant Australian government agencies in relation to Mr Habib's detention at Guantanamo Bay, Cuba, is comparatively more comprehensive than the documentation available for the earlier period covering Mr Habib's arrest and detention in Pakistan or Egypt. However, there are still some gaps in documentation of the actions taken by Australian officials – including in relation to critical decision-making – during the period April 2002 to January 2005, particularly in relation to the actions of senior officials in Canberra.

Often witnesses were being asked about events that had taken place nearly ten years previously. Unsurprisingly there were frequent occasions when the interviewee was unable to recall the events about which they were being questioned. Significant lapses of time can, of course, affect the quality of the evidence available to an inquiry such as this. The adverse effects of delay in terms of the increased likelihood of the loss of evidence and forgotten conversations have been noted judicially.[2] For inquiries such as this one, these lapses in memory should be ameliorated to a significant extent by the requirement placed on

[2] *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25

government officials to keep records of significant meetings and events. Unfortunately this requirement was not always complied with (discussed below).

Nevertheless, I am satisfied that agencies have done as much as could reasonably be expected to identify and supply the inquiry with relevant documents and that current and former officers have given truthful information when being interviewed. I am also of the view that, while there remain some gaps in the documentary evidence and the evidence supplied by witnesses, the inquiry has reconstructed as much as is able to be put together of the story of the actions of relevant Australian government agencies in relation to Mr Habib's arrest and detention overseas.

The report

Where I propose to set out in an inquiry report opinions that are, either expressly or impliedly, critical of a person, s. 17(5) of the IGIS Act requires me to 'give the person a reasonable opportunity to appear before [me] and to make, either orally or in writing, submission in relation to the matters that are the subject of the inquiry'. On 12 August 2011 I informed a number of individuals of my preliminary views and invited them to make submissions. These further submissions were all received by 11 September 2011.

The legislation also requires me to allow each head of an agency a similar opportunity to comment. I informed six agency heads of my preliminary views on 26 September 2011 inviting submissions within fourteen days. Submissions were all received by 17 October 2011. The current Secretary of DFAT, Mr Dennis Richardson, was Director-General of Security (that is, the head of ASIO) in the period 2001 to 2005. Mr Richardson made some comments on my preliminary views in his personal capacity, and requested that a Deputy Secretary, Ms Gillian Bird, provide me with comments on behalf of DFAT. I agreed that this was an appropriate way for Mr Richardson to handle this matter.

The IGIS Act also requires me to give the responsible ministers a reasonable opportunity to discuss the proposed report if the report sets out opinions that are, either expressly or impliedly, critical of the agencies for which they have ministerial responsibility. I wrote to responsible ministers on 18 October 2011 offering them an opportunity to discuss the proposed report. On 8 November 2011 I provided a draft report to agency heads for comment. These comments were considered in the final report.

The legislative provisions for procedural fairness in the IGIS Act are particularly prescriptive and have added some months to the inquiry process. Nevertheless, given the complexity and significance of this inquiry, I found that these stages were invaluable to test my findings and ensure that all comments and views were considered thoroughly. I am grateful to the individual officers and agencies for their comments in this process.

The final report provided to the Prime Minister contained classified material. This public report is an abridgement prepared on the basis that it would contain as much information as possible while satisfying the requirement that such information would not prejudice security, the defence of Australia, Australia's relations with other countries, law enforcement operations or the privacy of individuals.

Recordkeeping

I have noted above that the passage of time and the high level of activity at the relevant time have meant that witnesses could not always remember key events including meetings, conversations and briefings. Memories of events are sometimes unreliable or conflicting. While this is understandable, it has placed an additional emphasis on the importance of documentary evidence. Generally, official records of operational matters were comprehensive and complete but, despite the many thousands of pages of documents that were examined as part of this inquiry, some instances of poor recordkeeping practices have meant that the official record of these events is incomplete in some key aspects.

I was concerned at a number of times throughout the inquiry by comments that indicated that a number of Australian government officials, including senior officers, appear to consider that the making of adequate records is an unreasonable administrative burden. It is disappointing that good recordkeeping is not always accepted as a foundation of accountability.

It is often difficult to assess the consequences of poor recordkeeping. While there is no evidence that the absence of a complete documentary record had any direct adverse consequences for Mr Habib, the lack of some records has made it difficult to verify the recollections of individual officers, particularly in respect of decision-making.

Requirements for recordkeeping

The 2006 Australian Public Service Commission (APSC) guide *Supporting Ministers, Upholding the Values* as well as the Management Advisory Committee Report *Note for File: A report on recordkeeping in the Australian Public Service* of the following year, both endorse earlier comments made by the Auditor-General on recordkeeping:

> In his report on Magnetic Resonance Imaging Services, the Auditor-General acknowledges the need for good judgement, both in deciding when to create a record and what to include:
>
> > The level and standard of documentation considered necessary to support an administrative process is always a matter for judgement for management as part of an organisation's control environment. Nevertheless documentation is important for an agency to:
> >
> > - demonstrate it has taken all reasonable steps to identify and manage risks
> > - provide assurance to management that the administrative processes are adequate and have integrity
> > - record significant events and decisions
> > - be able to review its decisions and processes thereby identifying strengths and weaknesses in the process, drawing out lessons for the future
> > - in some circumstances provide support for the Commonwealth's position in the event of a legal challenge
> > - meet accountability obligations to the Government, Parliament and other stakeholders.
> >
> > The level and standard of documentation needs to match the circumstances. However it would be expected that both the level and standard of documentation would increase as the consequences of decision and actions increases. While it is not necessary to record

every meeting, prepare file notes of every conversation or retain all emails, it is important to record and maintain in an accessible form:

- significant decisions by Ministers, and the basis for them including advice on options and risks
- program decisions, including decisions affecting individuals or individual businesses that may be subject to administrative review, together with the basis for decisions and the authority for making the decision
- significant events, including meetings and discussions with Ministers or stakeholders or members of the public which may be significant in terms of policy or program decision-making.[3]

In respect of interaction with ministers and their offices, the APSC publication continues that:

> Good practice can be having a written agency policy that significant agency contact by employees with Ministers' office staff, whether face-to-face or by phone, is recorded in a file note.[4]

The version of this document on the APSC website is annotated: 'Please note: This document is for reference purposes only and is no longer considered by the APS Commission to be current', but I have no reason to believe that this particular advice does not still represent good practice.

Observations about recordkeeping

As noted, the standard of operational recordkeeping was generally good – ASIO and DFAT correspondence, cables, minutes, emails and records of conversations were generally comprehensive and readily available. That is, where records had been made, they had generally been retained, were discoverable and made available to the inquiry.

The problem arose where records had not been made, or where informal records had been made, including diary notes, but had not been retained. This arose in three key areas.

Records of interagency meetings in Canberra

This includes informal meetings as well as Interdepartmental Committee (IDC) meetings. It was often not clear who convened the meeting, which agencies were represented, what decisions were made, and what follow-up actions were required. This often resulted from a lack of coordination of such meetings, and a lack of clear identification of a lead agency.

Records of meetings with ministers and their offices

While I agree that a record does not need to be made of all meetings or discussions, it was not possible for the inquiry to ascertain who had responsibility for briefing ministers and who was actually briefed at significant decision points in the course of Mr Habib's arrest and detention overseas. Many of the events were unprecedented and amounted to far more than routine operational matters.

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[3] Australian Public Service Commission Management Advisory Committee, *Note for File: A report on recordkeeping in the Australian Public Service,* 2007

[4] Australian Public Service Commission, *Supporting Ministers, Upholding the Values,* 2006

I do not believe that such recordkeeping need be onerous, but at the very least I would have expected that where a significant discussion occurred there should be a record to identify who was present, (briefly) what was discussed and what follow-up action was required. For example, I would have expected to have found at least a brief record that particular ministers were briefed about the US plans to transfer Mr Habib to Guantanamo Bay.

Records of decision-making

For proper accountability, it is essential that officials record the reasons for the decisions they make. Many of the policies that apply to Australian government agencies require reasons to be documented. This is because such activities, for example the passing of information to a foreign agency, have a level of risk attached. A requirement to document reasons ensures that the decision-maker has considered the relevant factors and arrived at a defensible decision. Even though the decisions are often not reviewable, they can still be scrutinised in the course of an inquiry or by an oversight body. Apart from these accountability considerations, the documentation of reasons for a decision can help a decision-maker consciously identify relevant factors and be more careful in their decision-making, particularly where serious consequences may arise.

This inquiry found that the recordkeeping requirements in some relevant policies were not always satisfied. The explanation often given for this non-compliance related to time constraints. In my view, if a policy states that the reasons or the consideration given to various factors needs to be recorded then this is not an optional requirement – it is an essential part of good decision-making and should be regarded as such.

Of particular concern is that my office and other similar bodies are often consulted during the formulation of agency policies. I am sometimes asked to provide assurance to ministers that revised policies are lawful and reasonable. Where a policy states that reasons *must* be documented, I assume that this is mandatory and provide comments on that basis. I assume that the person approving the policy has the same expectation. If an agency believes that the recording of reasons for a particular type of decision is a constraint upon effective operations and can be discretionary in times of heightened activity, the agency should justify its position and seek to reflect that in its policies. Failing this, any requirement to document reasons must be satisfied.

Australian Intelligence Community agencies

Australian Security Intelligence Organisation

The role of the Australian Security Intelligence Organisation (ASIO) is to collect and evaluate intelligence on threats to security, both in Australia and overseas, and to provide advice to protect Australia, its people and its interests. Its functions are set out in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). It is also subject to guidelines issued by the Attorney-General under the ASIO Act.

Security is defined in the ASIO Act as the protection of the Commonwealth and the States and Territories and the people in them from:

- espionage
- sabotage
- politically motivated violence
- the promotion of communal violence
- attacks on Australia's defence system
- acts of foreign interference
- the protection of Australia's territorial and border integrity from serious threats.

ASIO collects information using intelligence methods including human sources and special powers authorised by warrant, as well as through its liaison relationships and published sources.

The Attorney-General is responsible for ASIO.

Defence Intelligence Agencies

Three of the six intelligence agencies which comprise the Australian Intelligence Community are administered by the Department of Defence (Defence), namely, the Defence Intelligence Organisation (DIO), the Defence Imagery and Geospatial Organisation (DIGO) and the Defence Signals Directorate (DSD). DSD's and DIGO's functions are set out in the *Intelligence Services Act 2001* (ISA).

The Minister for Defence is responsible for these Defence agencies.

Defence Intelligence Organisation

The functions of DIO are to provide intelligence assessment and advice on the strategic posture, policy and intent and the military capabilities of countries relevant to Australia's security. It provides advice to the Government, the Australian Defence Force and senior Defence officials, policy makers and planners on weapons of mass destruction, military capabilities, defence economics and global military trends.

Defence Signals Directorate

DSD is Australia's national authority for signals intelligence and for information security. DSD collects foreign signals intelligence and produces and disseminates reports based on the intelligence information it collects. These reports are provided to key policy makers and select government agencies with a clear and established need to know the information.

Defence Imagery and Geospatial Organisation

DIGO provides imagery and geospatial intelligence to support Australia's defence and national interests. It also provides a range of geospatial services (including mapping).

Australian Secret Intelligence Service

The primary function of the Australian Secret Intelligence Service (ASIS) is to collect and distribute secret intelligence about the capabilities, intentions and activities of people or organisations outside Australia that may impact on Australia's interests. Its functions are formally set out in the ISA and include communicating secret intelligence, conducting counterintelligence, liaising with foreign intelligence or security services and cooperating with and assisting other Australian agencies.

The Minister for Foreign Affairs is responsible for ASIS.

Office of National Assessments

The Office of National Assessments (ONA) is established by the *Office of National Assessments Act 1977* (ONA Act) and provides 'all source' assessments on international political, strategic and economic developments to the Prime Minister and the Government. Its sources for reporting are other intelligence and government agencies, diplomatic reporting, and open sources such as the media.

The ONA Act charges the ONA with responsibility for coordinating and reviewing Australia's foreign intelligence activities and issues of common interest among Australia's foreign intelligence agencies. The ONA is also responsible for evaluating the effectiveness of Australia's foreign intelligence effort and the adequacy of its resourcing.

The Prime Minister is responsible for the ONA.

Other relevant Australian government agencies

Department of Foreign Affairs and Trade

The Department of Foreign Affairs and Trade (DFAT) is the agency responsible for advancing Australia's and Australians' interests internationally. It does this through its diplomacy activities and its consular functions.

Consular functions and responsibilities for Australians overseas do not arise from a legislative responsibility. Australia is party to the Vienna Convention on Consular Relations which gives Australia, at international law, a right to perform consular functions in another country. This includes helping and assisting Australian citizens and a right of communication and contact with Australian citizens where the person so requests. The convention also

provides an obligation on the country where the citizen is located to allow Australia to perform its consular functions.

Consular services provided by DFAT are generally provided through Australian missions and consulates overseas (including those headed up by honorary consuls). Consular services are provided in accordance with the *Australian Consular Handbook*.

Australian Federal Police

The *Australian Federal Police Act 1979* sets out the functions of the Australian Federal Police (AFP). Those functions include providing police services in relation to the laws and property of the Commonwealth, safeguarding the Commonwealth's interests, assisting or cooperating with an Australian or foreign law enforcement, intelligence or security agency, and providing police services to establish, develop and monitor peace, stability and security in foreign countries.

The Minister for Home Affairs and Justice is responsible for the AFP.

Attorney-General's Department

The Attorney-General's Department (AGD) is the central policy and coordinating agency for the Attorney-General's portfolio and provides support to the Government in maintaining and improving Australia's system of law and justice, its national security and emergency management systems.

Department of the Prime Minister and Cabinet

The Department of the Prime Minister and Cabinet (PM&C) is a central co-ordinating agency providing advice, support and policy development to the Prime Minister and to the Cabinet. The National Security Adviser within PM&C has a whole-of-government leadership and coordination role for national security matters.

Legislative and policy framework

As noted, most of the agencies in the AIC have their functions prescribed by legislation (ASIO by the ASIO Act; DSD, ASIS and DIGO by the ISA). While agencies such as DFAT, AGD and PM&C are not covered by specific legislation, there are a range of instruments – legislation, guidelines, general legal principles – which govern their functions, operations and the conduct of their officers. These instruments include the Australian Constitution, the *Public Service Act 1999*, the *Financial Management and Accountability Act 1997*, the *Privacy Act 1988*, the *Archives Act 1983*, the administrative law framework and legislation around human rights and anti-discrimination.

As well, each agency has in place guidelines, policies and procedures governing its operations and the discharge of its functions.

Part 3 ♦ Period prior to Mr Habib's detention

11 September 2001

On 11 September 2001, a coordinated terrorist attack was launched in the US on New York and the Pentagon by nineteen hijackers using four commercial aircraft causing the deaths of nearly 3,000 victims, including the nineteen hijackers, all passengers and crew aboard the planes, firefighters, police officers and paramedics who responded to the crisis.

The US immediately sought information from other countries on the possible perpetrators of the attacks, including: who might be responsible, the backing of any organisation such as al-Qa'ida, knowledge of other targets or future attacks, extremists trained as pilots, and the travel plans of known extremists.

On 13 September 2001, credible information was obtained that an Egyptian person in Afghanistan may have had prior knowledge of the attacks. This person was subsequently identified as Mr Mamdouh Habib, a dual Australian-Egyptian citizen.

Mr Habib had departed Australia on 29 July 2001, apparently intending to spend three months in Pakistan visiting friends and relatives.

The operational environment: September 11 aftermath

In reviewing the actions of Australian officers in relation to Mr Habib throughout 2001 to 2005, it was necessary for me to obtain a clear understanding of the security environment at that time. In particular, I was concerned to fully understand any contemporaneous issues caused by the 11 September 2001 terrorist attacks, which would have been at the forefront of officers' minds and which influenced their decisions and actions.

The events of 11 September 2001 had a huge and unprecedented impact on the global national security environment.

The ANZUS security treaty between Australia, New Zealand and the United States of America was invoked for the first time in its nearly 50 years of operation on 14 September 2001, emphasising the degree to which Australia was committed to assisting the US and the seriousness with which Australia also regarded the terrorist threat to its own interests.

The Australian intelligence community augmented its around-the-clock operations and refocused its work to counter-terrorist investigations. Officers interviewed for the inquiry consistently gave evidence about the unprecedented pace and intensity of their working environment post–September 11, and their expectation that more attacks would occur.

A number of witnesses gave evidence to the inquiry on the extraordinary working conditions at the time. A senior ASIO officer summed it up:

> … the operating environment at the time where 11 September was a defining moment in the security and intelligence business. It was an extraordinary circumstance that called for an extraordinary response. And the response had to be quick and it had to be seamless. We were expecting further attacks, we didn't know where, when, whom, we asked for a lot from our people in the Organisation and they gave it willingly and professionally but it was relentless. And this went on for months and months and months at a time.

> As I indicated before we were pursuing a larger number of investigations, something like eight hundred at any one time, and each had to be dealt with expeditiously and thoroughly, the pace was fast, there was a lot going on. And, you know, therefore, you know, subsequently resourcing has been given to the Organisation to enable it to be able to take a more sustained effort in these sorts of areas but it was certainly not the case at this point and people were working very long and very hard and it meant that sometimes some of the procedures that we had weren't followed as perhaps they should have been to the letter of the law, as they should have been, although conceptually they certainly were.
>
> There was just not the time to actually be sitting down to record a whole raft of things that might necessarily have been done … it is difficult to explain just what an extraordinary time that was.

Search of Mr Habib's house and car – 20 September 2001

One of the highest priority investigations immediately pursued by ASIO after September 11 was arranging for a number of search warrants to be executed on Mr Habib's residence and vehicles, and his possessions and baggage in the event of his return to Australia.

The Attorney-General authorised the search warrants on 15 September 2001 on the basis, inter alia, that Mr Habib's apparent knowledge of the September 11 attacks indicated that he was likely to be closely involved with those who planned the attacks, and he was therefore likely to be engaged in activities prejudicial to Australia's security. Each warrant remained in force for twenty eight days from authorisation.

On 20 September 2001, ASIO executed search warrants on the Sydney home of Mr Habib and on a vehicle registered to him. The following day, ASIO commenced sorting the items that had been seized under the supervision of the AFP (who were ensuring evidentiary standards for the handling of the material were met).

On 25 September 2001, material from the search was sent to a foreign government. In an accompanying letter, ASIO noted that the material had not been fully assessed and it was therefore subject to strict caveats and conditions on its use. These caveats and conditions included that the material was not to be shared with second or third parties without the express prior permission of ASIO (except in the event that failure to pass on information could contribute to a life-threatening situation).

Part 4 ♦ Pakistan

Mr Habib's arrest and detention in Pakistan

The exact date on which Mr Habib arrived in Pakistan from Afghanistan is not known. He is believed to have entered at the Chaman border crossing on or around 4 October 2001 and was initially allowed to proceed in his travels, with his immediate destination being the city of Karachi.

It appears that all foreigners entering Pakistan from Afghanistan were subject to particular scrutiny at that time, because of the impending launch of military operations by US, UK and Afghan United Front (Northern Alliance) forces in Afghanistan on 7 October 2001.

Having been identified as a foreign national on entry into Pakistan, Mr Habib was subsequently detained by a Pakistani intelligence agency on 5 October 2001 at Khuzdar village in Baluchistan Province, while en route from Quetta to Karachi by bus. He was then held in detention facilities in Quetta.

Australian authorities in Islamabad informed about arrest

ASIO was informed of Mr Habib's arrest on 6 October 2001. At that time, the person being detained was identified as an Australian national using the names 'Mimboh Habib' and 'Abu Ahmed', who was born in Egypt in 1979. Although the detainee's year of birth was cited as 1979, rather than Mr Mamdouh Habib's year of birth of 1955, the similarity in names and the fact that the person was also born in Egypt gave ASIO cause to make further inquiries.

ASIO immediately sent a request for information to the Australian High Commission in Islamabad. The cable was titled 'Consular Enquiry' with the subject heading 'Possible detention of Australian citizen Mimboh Habib'. The cable read:

> … a male person claiming to be an Australian citizen has been detained by Pakistani authorities, while attempting to cross the Pakistani/Afghanistan border.
>
> … the male provided the name of Mimboh Habib (son of Ahmed) year of birth 1979, place of birth Egypt.
>
> Could you please make enquiries to ascertain if a person of that name has been detained by Pakistani authorities and if so could you please provide the following information:
>
> Full name
>
> Date of birth
>
> City and country of birth
>
> Passport number (if available)
>
> Residential address in Australia
>
> Name of relatives in Australia
>
> When was he detained
>
> Exact location where he was detained
>
> (If he was detained crossing the Pakistani/Afghanistan border)

> Where in Afghanistan had he come from?
>
> How long had he been in Afghanistan?
>
> What was he doing in Afghanistan?
>
> …

On Sunday 7 October 2001 the AFP Liaison Officer in Islamabad, Federal Agent B, was separately informed of the arrest of a 'Mimboh Habib'. Federal Agent B reported back to AFP Headquarters in Canberra that there was a 'high interest in Habib due to a belief that he was involved/colluded with entities connected to September 11 attacks'.

In evidence given to the inquiry, the then Australian High Commissioner to Pakistan, Mr Howard Brown, recalls both receiving ASIO's cable requesting information and being briefed by Federal Agent B. He then advised the DFAT Canberra of the pertinent facts by cable.

Formal identification and Mr Habib's transfer to Islamabad

From Monday 8 October to 19 October 2001, efforts by Australian officials in respect of Mr Habib were variously focused on:

- confirming Mr Habib's identity
- asking that he be transferred from Quetta to Islamabad to facilitate consular access and interviews
- clarifying his possible connection to the September 11 terrorist attacks
- resolving the circumstances in which he might be interviewed.

Federal Agent B had the lead role in gathering information about Mr Habib through his law enforcement contacts in Islamabad, and forwarding that information to ASIO and AFP Headquarters in Canberra. Separately, the Consular Officer at the Australian High Commission had responsibility for pursuing information about Mr Habib through his contacts in the Pakistan Ministry of Foreign Affairs and reporting through DFAT channels. Both officers were responsible for reporting their findings to the High Commissioner.

In evidence given to the inquiry, Federal Agent B explained that his activities were completely separate from the Australian consular activities

> … because a consular person would get in trouble if they both tried to perform a consular [role] and also investigate someone when they're trying to protect the interests of the Australian individual… It would be the same situation if I was investigating someone and possibly be seen as an inducement if I was also trying to look after their consular activities, their consular welfare.

While Federal Agent B was active in pursuing the matter, six days elapsed after the arrest before Australian authorities were able to formally identify the person being detained as Mr Mamdouh Habib. This occurred on 15 October 2001.

Four days later, on 19 October 2001, Mr Habib was transferred from Quetta to Islamabad.

Deployment of an ASIO officer to Islamabad

By 18 October 2001, ASIO had taken a decision to deploy a representative, Mr L, to Islamabad. The purpose of this was threefold: to seek further information about Mr Habib from foreign government representatives; to seek an undertaking from Pakistan 'to advise the Australian Government in advance, of any movement or action in relation to Mr Habib'; and to conduct an interview with Mr Habib.

Australia's initial efforts to gain consular access

The Australian public has a strong and legitimate expectation that the Australian Government will provide assistance to Australians in trouble overseas.

While there is not, and there never has been, any defined or explicit legal or constitutional obligation on the Government in relation to the delivery of consular services, successive governments have sought to provide both information to the public and guidance to consular and diplomatic staff as to how consular services should be delivered. This guidance can principally be found in the DFAT's *Consular Handbook* (see below). In addition, a number of related state rights and responsibilities are set out in the Vienna Convention on Consular Relations.

In the immediate aftermath of September 11, Pakistan was in considerable turmoil and the Australian Government was concerned that the situation was going to deteriorate further. The High Commission was being downsized to remove what were called 'non-essential staff'. The High Commissioner, Mr Brown, was involved in this process and also in helping to encourage Australians to leave the country.

Another officer held the dual role of being the DFAT Senior Administrative Officer, responsible for corporate services at the High Commission, and providing consular services to Australians in the region. This officer reported directly to Mr Brown. In addition to his pressing responsibilities during the move of non-essential staff out of Pakistan, which coincided with Mr Habib's detention, the Consul was also involved in extensive negotiations with the Taliban following the detention of Australian aid workers in Afghanistan in August 2001. These Australians were released in mid-November 2001.

On Saturday 20 October 2001, articles appeared in the Pakistani press indicating that Pakistani authorities had arrested an Australian with alleged links to al-Qa'ida. In Australia, reporters from *The Age* and the *ABC* approached the office of the then Minister for Foreign Affairs seeking further details. DFAT Canberra then sent a cable to the High Commission in Pakistan noting the media interest in Mr Habib.

Until that point, the Consul had taken no action to pursue access to Mr Habib. In evidence given to the inquiry, he explained that it would have been:

> [A] fruitless exercise on my part to approach those formal channels, which is really the Ministry of Foreign Affairs. I left it to [the AFP and ASIO] because I knew they were addressing the issue, they were going to be far more successful in locating this person than I ever could possibly be by going through formal channels.
>
> ... Having seen the story go public, being afraid of the press is one thing, and I'm telling you that was a real personal concern to me, but also it was, if you like, a public expression that an Australian was in difficulty and that's when I sprang into action.

The Consul contacted his desk officer counterpart in the Pakistan Ministry of Foreign Affairs by telephone that day asking for assistance to visit Mr Habib and to offer consular services. From evidence given to the inquiry, it appears that he was somewhat assertive in his manner during this telephone call. Whilst I make no criticism of his behaviour, it appears to have caused offence to the Pakistani official and resulted in a reprimand being given to Mr Brown by the Protocol Officer in the Pakistani Foreign Ministry later that week. It is not clear from the contemporaneous records whether this incident was the cause of further delay in pursuing consular access to Mr Habib. However, it is clear that a Third Person Note from the High Commission to the Pakistan Foreign Ministry – formalising the request for consular access – was not sent until 1 November 2001. By that date, Mr Habib had been in detention for some twenty-six days.

Early and formal contact by the Australian High Commission with the Pakistani Ministry of Foreign Affairs, to pursue full consular access, should have been important having regard to:

- DFAT's responsibility under its consular guidelines to visit detained Australians 'at the earliest possible moment'
- Mr Habib being the first Australian known to have been detained by a Pakistani intelligence agency (rather than the Pakistani police forces)
- the serious allegations of terrorism that had been made against him in the post-September 11 environment
- the fact that he was apparently being held without charge
- the lack of knowledge by Australian authorities about the location of his place of detention and the conditions in which he was being kept.

Notwithstanding the pressure on staff from the downsizing of the High Commission and increased activity in the region, I have come to the view that the High Commission in Islamabad should have demonstrated a greater sense of urgency in formally pursuing proper consular contact with Mr Habib through the Pakistani Ministry of Foreign Affairs. I do not accept that action could reasonably have been delayed until Mr Habib’s identity was fully confirmed on 15 October 2001, nor until the fact of his detention was revealed in the media on 20 October 2001. It is my view that DFAT’s administrative responsibility to seek access to Mr Habib ‘at the earliest possible moment’ commenced as soon as the possibility of an Australian being detained was first raised.

I put these views to both Mr Brown and the Consul in the course of the inquiry.

At interview, the Consul agreed with the chronology of events upon which my views rely, but was firm in his position that the actions he had taken were appropriate.

CONSULAR GUIDELINES

DFAT is responsible for providing consular services to Australians overseas. Its policy is underpinned by the Vienna Convention on Consular Relations (which sets out the rights and responsibilities of countries) and is detailed in the department's consular guidelines, also known as the Consular Handbook. As DFAT did not have in place comprehensive version control of this document for the period of interest to the inquiry, ascertaining the exact version in force at any particular time is not possible. For the purposes of Mr Habib's arrest and detention in Egypt and Pakistan, a version dated March 2002 was provided by DFAT. This version was 'comprehensively' reviewed in 2002.

The 2002 guidelines address the 'Arrest and Detention' of Australian nationals overseas. The diplomatic post concerned is to notify DFAT Canberra (Consular Operations) when information comes to hand of an Australian being arrested and provide information about the person including details about their identity and the circumstances of their detention including:

- details of their arrest and where detained
- whether they can receive phone calls
- the nature of the charges they face
- legal defence facilities available to the accused
- possibility of release on bail
- whether the accused is able to finance arrangements for their defence
- any medical problems involved
- details of their next of kin.

The guidelines also set out the assistance which an Australian diplomatic mission can provide to a detained Australian. Officers should attempt to visit the client at 'the earliest possible moment', and provide a list of legal practitioners willing to represent foreigners and their specialties. However, that list should state that the Australian Government does not accept any responsibility for the ability or probity of the practitioners or for any fees they may charge. The person should be asked whether they wish DFAT to inform their next of kin about their arrest and confirm that in writing. DFAT will in turn telephone the next of kin and follow up with a letter (the guidelines contain a draft of such a letter). A detention check list is to be kept of the assistance provided by the post. Consular officers should show a continued interest in the welfare of the person and 'show a compassionate understanding of the psychological impact of imprisonment' and report any psychological problems.

If consular access to the prisoner is denied, either at the time of the arrest or during imprisonment, the post is to inform Consular Operations promptly.

The Australian Government does not have a legal obligation to provide consular services overseas.

Mr Brown does not agree with the chronology of events upon which my views rely. His recollection is that a significant period of time elapsed between Mr Habib being detained and the Australian Government being advised of that fact (whereas the documentary record shows that only two days elapsed); and that the actions taken by the High Commission on 7 October 2001 were *immediately* followed by the actions taken by the Consul on 20 October 2001. He summarised this as follows:

> The IGIS claim that I did not take 'any action' to provide consular assistance to Habib between 6 to 20 October of that year is totally incorrect. As I advised during my appearance before the IGIS, as soon as the AFP officer in the Australian High Commission, Islamabad was advised – informally and belatedly – of Habib's arrest … I, with the support of the Consul, took immediate action to … lodge a formal request with the Pakistani Foreign Ministry for confirmation of the arrest and for consular access to Habib …

Notwithstanding Mr Brown's evidence on this matter, I have placed greater weight on the bulk of other evidence before me (both documentary and that given under oath or affirmation) which consistently reflects the sequence of events that I have described above.

Proposal to send Mr Habib to Egypt

The ASIO representative, Mr L, arrived in Pakistan on 22 October 2001. He immediately made contact with the High Commission and relevant foreign officials, and on 23 October 2001 Mr Brown facilitated his access to a high-ranking Pakistani intelligence official. Mr L proceeded to make arrangements for an initial visit to Mr Habib and to interview him.

Mr L was informed that Pakistani authorities and other foreign government representatives planned to interview Mr Habib later that week and Mr L was invited to attend.

Irrespective of these arrangements, however, it appears that an alternative proposal had already been formulated for Mr Habib to be moved from Pakistan to Egypt to 'facilitate further investigations'. This idea was raised with Australian authorities on a number of occasions in that week, both in Australia and overseas.

ASIO's initial response was that Mr Habib remained an Australian citizen and that the Australian Government would not support the deportation of Mr Habib to Egypt under any circumstances.

On the morning of 24 October 2001, Mr Richardson used the opportunity of a meeting being held (in relation to another matter) in the Attorney-General's Department (AGD) to consult informally with a number of his colleagues throughout government about the proposal. Although no official, contemporaneous records were kept of the attendees at this informal meeting or the consultations that occurred, evidence given to the inquiry confirmed that the following persons were present: Mr Bill Paterson (First Assistant Secretary International Security Division, DFAT), Deputy Commissioner John Davies (AFP), Mr Geoffrey Dabb (Executive Adviser, AGD) and Mr Michael Potts (First Assistant Secretary International Division, Department of the Prime Minister and Cabinet (PM&C)).

Recollections vary amongst those interviewed about the purpose of the meeting and what was discussed. Mr Paterson and Mr Davies considered that the meeting was called simply to pass on information:

> IGIS: The sort of tone of this informal meeting, was it one of consultation, of seeking agreement to this position, or was it one of informing you of the position or something else?
>
> …
>
> MR PATERSON: … my recollection was, it was more by way of Dennis [Richardson] advising us that although we would probably have reservations about this course of action, we may not have much option, that it may well take place, whether we made representations, you know, arguing against this or not.
>
> IGIS: Did you understand that it was within your area of responsibility to formulate or agree to an Australian Government position in this matter?
>
> MR PATERSON: No, no, no, I didn't see it as part of my responsibility at the time.
>
> IGIS: So would it be fair to say you did agree to a position on behalf of your agency?
>
> MR PATERSON: No.

and

> MR DAVIES: … it wasn't a case of him [Mr Richardson] raising with me or even my agency, it was a case of him calling out a number of agencies and then passing that information.

Mr Potts recalled that attendees participated more actively:

> MR POTTS: My sense would be that it could have been somewhere in between that, that ASIO had a preferred option, if they wanted to test the water before proceeding with it further.

However, Mr Dabb recalled that the meeting essentially canvassed legal issues:

> And Dennis [Richardson] said, '[There's] an Australian terrorism suspect in Afghanistan– he's in Pakistan now, they want to take him out of Pakistan to Egypt for questioning.' That was basically the message. Now the curious thing was, I can't remember the exact words, but it was something like, 'They want our authorisation or they want – ', there was something about the way he put it, that made me think that it was a legal question and [a foreign government] needed some sort of legal foundation for this that they could get by us agreeing to it. And that was why the conversation, the part that I remember, went down the lines of, we can't give any legal authorisation for this. It's up to [them] to satisfy themselves that what they're doing is legal under their law and under the law of the place where they happen to be. But Australian jurisdiction doesn't extend there and we don't have any power to authorise what's going on. And Dennis was to say, 'Okay, we can't authorise, we can't give a clearance but it's up to [them].'

Nevertheless, later that afternoon ASIO published an intelligence report which stated that:

- … we have advised [a foreign government] that, after consultation with DFAT, AGD, PM&C and the AFP, we could not knowingly agree to Habib being sent to Egypt given that there is no warrant for his arrest and given Egypt's poor human rights record …

Was ASIO's consultation and advice on the proposal appropriate?

Based on the totality of the documentary records I have reviewed and on evidence given to me at interview, I accept that Australian officials gave a strong and consistent message that Australia would not agree to Mr Habib being sent from Pakistan to Egypt.

Notwithstanding that, I also regard the formulation of words that Australia 'could not knowingly agree', as expressed in the ASIO intelligence report, as an unfortunate choice. Even within Australian government circles, the message may not have been clearly conveyed. This formulation risks being misinterpreted as Australia possibly being willing to turn a blind eye to the transfer. 'Not agreeing' is also not as decisive a statement as, for example, 'objecting' or 'strongly objecting' to the transfer would have been.

I asked attendees at the 24 October 2001 consultation meeting whether the precise formulation of words in the ASIO report reflected an agreed outcome of the meeting, but none could recall to that level of detail. In respect of whether the Australian Government had considered 'formally objecting', Mr Potts said:

> Looking back, I presume it would have been because we felt that … despite whatever our position would be, [Habib might be taken to Egypt] regardless of our wishes.
>
> And extrapolating from that, it may have been part of the discussion …[about whether to] 'knowingly object' and I've got a vague recollection that there may have been some discussion of that, and the difficult problem that presented itself, was if we formally objected and [it was disregarded], there was a potential political problem there. That may well have been why that … course of action was preferred.

And Mr Paterson said:

> … the gist of it as I recall was that [it had already been] decided, in effect, that Habib would be moved from Pakistan to Egyptian custody and that while we could – while we would – could robustly express a difference of view about this, it may not deflect [others from] proceeding with this course.

Mr Richardson did not agree with these recollections.

Mr Richardson put to me that the intelligence report, which documented the outcome of the meeting, was sent to the heads of PM&C, DFAT, AGD and AFP, all relevant ministerial offices and other senior people, was highly classified, and was distributed by safe-hand procedures to named recipients.

He noted that in light of the content of the report and the time it was provided (that is, shortly after September 11) it would be surprising if any of the addressees had not read the report and that none of the attendees had contacted him with a concern that the report had misrepresented their position. ASIO has stated that it is entitled to assume that its intelligence reports are read by officials who need to know the information they contain.

I note, however, that a copy of the report was not sent directly to all of the attendees, with Mr Dabb and Deputy Commissioner Davies being absent from the distribution list. Further, notwithstanding ASIO's expectations, the sending of an intelligence report does not guarantee that addressees will read and note its contents immediately, or that they will expect it to contain information about whole-of-government decision-making.

Although, in my view, it was not satisfactory for Mr Richardson to have relied on an intelligence report to ensure there was consensus, I nonetheless have no reason to conclude

that any official would have disagreed at the time with the formulation of Australia's position.

In reviewing agency files on the Habib case, I was struck by the absence of written records relating to this consultation meeting, including an absence of ministerial briefings, notes to or by agency heads, or notes for file from any of the attendees. Given the seriousness of the proposal to move Mr Habib from one country to another without lawful charges being laid against him, I would have expected records to have been made.

The reason for an absence of ministerial briefings at this particular time may be able to be explained, to some extent, as there is a coincidence of timing between Mr Habib's detention in Pakistan on Friday 5 October 2001 and the dissolution of the Australian Parliament for a federal election on the same day. The election was held on 10 November 2001 and a new Ministry was sworn in on 26 November 2001. Progress in the Habib case may have been briefed to ministers' offices in the caretaker period between 5 October to 26 November 2001, rather than directly to ministers themselves. At interview Mr Richardson clarified that:

> … it does mean that the Prime Minister and ministers were not here in Canberra. It does mean that they were moving around the country and it does mean that in that period, you were dealing more with staffers than what you might have done normally.

And Mr Paterson recalled that:

> … the view conveyed … [that 'we could not knowingly agree'] accurately reflected the views of the Foreign Minister, who was kept fully informed of this issue.

In the circumstance of a caretaker period, it would appear to have been even more important than usual to make accurate written records of briefings to ministerial advisers so as to ensure a non-political approach was taken.

Mr Richardson briefed the Attorney-General and the Leader of the Opposition about the matter soon after the election on their return to Canberra although no record was made of this briefing. Mr Richardson clarified, on this point that he has

> … never kept records of meetings with ministers, the Prime Minister or Leader of the Opposition and continues that practice to this day.

Mr Richardson made this point to 'avoid any inference being unfairly drawn that the absence of records of such briefings might suggest certain matters were discussed at such meetings'. I agree that no such inference could reasonably be drawn from the absence of these records.

While it is not within the scope of this inquiry to comment on Mr Richardson's general or current recordkeeping practices, his failure to make an official record in this particular instance was not satisfactory in my view. My expectations in respect of recording the substance of meetings with ministers are set out in Part 1 of this report.

Interviewees have also stressed the very rapid changes made to the government's focus, direction and practices after September 11 as an explanation for their attention being on issues other than recordkeeping. I acknowledge that government agencies were stretched in this environment and that officials were under significant pressure to respond to the September 11 attacks, investigate the possibility of further attacks (including on Australian soil) and prevent future attacks. However, the situation of an Australian citizen being detained in a foreign country, on suspicion of being connected to the events of September 11, was both extraordinary and directly related to the counterterrorism effort. The proposal

that this citizen would be transferred to a third country was, to the best of my knowledge, without precedent. Operational imperatives cannot excuse a failure to keep adequate records in these circumstances.

No satisfactory reason for the more general absence of written records on other agency files was identified, although I am inclined to believe that it relates in part to the informal manner in which Mr Richardson approached his colleagues and sought their opinions. I consider that attendees were not given sufficient notice or information to allow them to adequately prepare their agency's position and they did not come away from the meeting believing that they had any reason to take further action.

It is possible that attendees may have made informal annotations about relevant events in personal notebooks or diaries at the time but, if so, they were not retained. For example, Mr Paterson said that:

> My personal notebooks covering the period had been in my custody until June 2008 when … I decided that they had no further utility and, as they contained sensitive information, I had them destroyed … It is likely that they would have included personal and informal notes relating to this meeting to assist my own recall.

and Mr Potts said that:

> … I am sure that I would have recorded the salient details of the meeting in my workbook at the time. I retained these books for five years or so afterwards but [then] destroyed them …

Should ASIO have been the lead agency?

Although I do not question the appropriateness of Mr Richardson's actual response, a broader question is whether ASIO (as an agency with a vested interest in obtaining intelligence from Mr Habib) should have been the agency to take the lead on developing a policy position on this matter, and whether it should have been the only agency with responsibility for responding to the proposal. ASIO's broad functions under the ASIO Act at the time were to obtain, correlate and evaluate intelligence, to communicate such intelligence and to advise ministers as appropriate. In my view it would have been preferable for the relevant policy departments to have consulted and developed a policy position on the matter of the proposal to transfer Mr Habib.

Although the proposal to transfer Mr Habib from Pakistan to Egypt was raised with Australia through ASIO, any response by Mr Richardson did not preclude the possibility of Australia separately objecting to the move through other channels, including through diplomatic channels. On this point, Mr Dabb was of the view that:

> The 'does not agree' response through the agency channel left quite open the possibility of a nationals protection objection through the diplomatic channel (perhaps specifying conditions) if that was what the Minister for Foreign Affairs or DFAT decided was appropriate, either immediately or later in the course of the matter. That might have been confusing for [the foreign government] but it would have followed from their raising the matter through the intelligence agency channel rather than the diplomatic channel. In most countries, police and investigative agencies do not usually speak for their governments on diplomatic matters.
>
> The truth is that at the time channels and functions were confused, but it was not a function of the Attorney-General's Department to sort that out … The weight to be given

> to the consular protection aspect remained a separate, and in the circumstances quite difficult, matter, but not one for the Attorney-General's Department to raise.

However, as the DFAT representative at the meeting, Mr Paterson was not of the view that a separate approach was necessary nor that it was inappropriate for ASIO to take the lead role. He advised that:

> The ASIO [intelligence report] of 24 October makes it clear that [a response had been provided about] Australia's position after consultation with the three policy departments DFAT, AGs and PM&C. ASIO's approach thus reflected its statutory responsibilities and established liaison channels of communication and liaison, but also involved consultation and coordination with relevant policy departments. This was an entirely satisfactory if ad hoc process in the short time available in which to convey an Australian position. At all times I was involved (which were limited), ASIO acknowledged the importance for the government of consular access and seeking to ensure Mr Habib's human rights were fully respected in accord with international norms.

Mr Potts disagreed that ASIO was clearly taking a lead role at all:

> The 24 October meeting was … more in the nature of a caucus in the margins of the Cornall Committee. It was that committee, appropriately chaired by AGD, that had the role of coordinating whole-of-government responses on a range of counterterrorism issues, including the [matter of] Mr Habib … As I recall it … the meeting of 24 October was in the nature of a break-out from the larger committee (and with the knowledge of its chair, Mr Cornall)…

I would have made a recommendation in respect of clarifying whole-of-government processes in situations such as this, but I note that arrangements have changed considerably over the past ten years. I understand that an interdepartmental committee, chaired by the most appropriate agency in close consultation with PM&C, would now undertake a coordinating role if such a situation were to arise again. This is discussed further in Part 7 of this report. I am of the view that this is a more appropriate allocation of responsibilities, as it is more likely to ensure that all possible avenues of response are raised for consideration by the government.

First meeting with Mr Habib in Pakistan

Following the 20 October 2001 media interest in Mr Habib's arrest and detention, DFAT Canberra instructed the High Commission in Pakistan to ensure that basic consular matters were dealt with by the first Australian official to make contact with Mr Habib. On either 22 or 23 October 2001, the High Commissioner decided that the ASIO officer, Mr L, should be the person to make that contact and that the Consul, who would normally deal with this matter would avoid contact.

Mr L subsequently requested that Pakistan approve a visit to Mr Habib by Australian officials only, prior to the joint security interview that was planned for later in that week. His purpose in requesting this visit was twofold: to provide an opportunity for limited consular assistance to Mr Habib and to assess his condition and possible attitude to a security interview.

Arrangements having been agreed, Mr L went to a location arranged by the Pakistani government in suburban Islamabad on the morning of 24 October 2001 where he met with Mr Habib. He introduced himself as an Australian government official; explained that he was not a consular official, but that he was interested in the 'security aspects of the matter';

obtained written consent from Mr Habib to inform Mrs Habib of his detention and circumstances in Islamabad; provided a number of documents on behalf of the Consul including a letter, a pamphlet on consular assistance and the Consul's business card; and advised Mr Habib to read the letter carefully and to contact the Consul directly by telephone if he wished to receive consular assistance.

The letter stated that:

> Your arrest in Pakistan has been brought to the attention of this High Commission and I am writing to offer the Australian Government's assistance.
>
> As a first step, I can, if you wish, inform a person nominated by you of your circumstances. This person may be your next of kin, other relative or another person of your choosing. If you decide that you do not want me to inform anyone, I must ask that you confirm this to me in writing. However, I should point out that if your arrest is made public by the local authorities, the High Commission would be expected to confirm this local knowledge.
>
> I also wish to stress that once an initial advice has been provided, it remains your responsibility to keep your contact informed of progress in your case, your funds and clothing needs and of your well-being generally.
>
> In an attachment to this letter, I have set out details of the Australian Government's consular function and the assistance its consular officers can give you in your present circumstances.
>
> The attachment also gives some other information, as well as a local list of lawyers. I must make it clear, however, that the Australian Government cannot accept liability for the consequences of the advice nor can it accept any responsibility for the probity, ability, or charges of the listed lawyers.
>
> I shall be in touch with you as the occasion requires and will do whatever is possible to provide you with our full range of consular services. Should you wish to contact me, and the local authorities will allow it, my telephone number is [provided]...

Mr L then asked Mr Habib a number of questions about his recent travels and his plans for the immediate future, should he be released. His report of this interview says:

> I then told Habib there are a number of issues concerning his travel, activities and the reason for his visit to Pakistan which are of interest to various people. I told him that the best way through this was for him to be open and honest and to help all interested parties in resolving these issues. I said to Habib that those matters would not be dealt with today but I expected to see him again in a few days, probably with some other people.

Several times during this conversation Mr Habib made pleas for Australian Government assistance to secure his release and to talk to Mr L in private. Towards the end of the meeting, Mr Habib asked if he could have a lawyer present, but Mr L did not directly answer his question, apart from reminding Mr Habib that amongst the papers given to him was a list of local lawyers.

The meeting between Mr L and Mr Habib concluded after approximately 30 to 45 minutes and afterwards Mr L returned to the Australian High Commission to debrief Mr Brown, the Consul and Federal Agent B on what had occurred. From the documentary records and evidence given to the inquiry at interview, it appears that one matter about which Mr L did not advise Mr Brown or the Consul was that Mr Habib had asked if he could have a lawyer present.

In respect of Mr Habib's appearance and condition, Mr L had noted during the meeting that:

> He was very subdued at first, slow speech but showed no signs of physical injury or mistreatment. When asked how he was physically, he said he [was worried about a pre-existing medical condition] The [Pakistani] minder said that he was being given medication in accordance with doctor's instructions and Habib had been provided with medical care whenever he requested.

Mr Brown relayed this information, and other pertinent facts of which he was aware, to DFAT Canberra by cable. The Consular Operations section in Canberra then followed this up with a telephone call to Mrs Maha Habib on Thursday 25 October 2001 and a letter to her on the following Monday, 29 October 2001. Inter alia, this letter advised:

> As you are already aware, the High Commission reported that your husband is well although he is receiving treatment for a pre-existing [medical condition].
>
> ... our consular officers overseas visit Australians as soon as possible after learning of their detention. Subject to the person's wishes, Consuls will:
>
> a) assist them to arrange legal representation by providing a list of local English-speaking lawyers and advice on the availability or otherwise of legal aid or a public defender
> b) liaise with authorities about any problems which the detained person may have
> c) arrange for notification of the next of kin unless the person does not want anyone informed
> d) attend court hearings and trials if possible
> e) relay requests for financial assistance to families or nominated persons
> f) advise on the transfer of funds from Australia as required
> g) visit the person to monitor their physical and mental wellbeing and general welfare (it is however the person's responsibility to keep family or contacts informed of their needs and situation if they are permitted to correspond or make telephone calls)
> h) report on the person's welfare and legal proceedings
> i) provide moral support to the person
>
> Attachment: List of Local Lawyers in Pakistan

Was satisfactory consular support provided to Mr Habib?

In interviews conducted during the course of the inquiry, I asked Mr Brown, the Consul and Mr L why the decision had been taken for Mr L to provide limited consular services to Mr Habib, rather than making arrangements for the Consul to also visit him. I asked this having regard to the documentary records, which did not indicate that Pakistan had placed a limitation on the number of Australian officials who could visit Mr Habib.

The reasons given for this arrangement varied. There was a general belief that only one Australian officer would be allowed to see Mr Habib, that foreign authorities would have a preference for a security official, and that the visit was primarily an intelligence matter.

I am satisfied that it *could* have been an adequate arrangement for an ASIO officer to be the first Australian government official to have access to Mr Habib in Pakistan and for him to be asked to perform a consular function on behalf of DFAT. However, I do not consider that

either the High Commissioner or the Consul were cognisant that this approach involved managing a level of risk.

The letter sent from the Consul to Mr Habib about the scope of consular support services was as per a template letter recommended in DFAT's *Australian Consular Handbook*. Notwithstanding this, I believe that the verbal direction given to Mr Habib to 'contact the Consul direct by telephone if he wished to receive consular assistance' was not realistic in the circumstances. At interview, DFAT officers agreed that Mr Habib was unlikely to be allowed access to a telephone by Pakistani authorities.

While it is true that Mr L was able to deliver a letter to Mr Habib on behalf of the Consul and that he was also able to report on Mr Habib's physical and mental wellbeing, this only partially discharged Australia's consular responsibilities. It should also have been recognised that Mr L may have had a conflict of interest with respect to Mr Habib obtaining legal counsel (as it was otherwise in ASIO's interests to continue to obtain information from Mr Habib) and, since Mr L would be conducting a security interview of Mr Habib, it would be extremely unlikely that he could fill a 'moral support' role.

I acknowledge that in certain circumstances it is preferable to have a non-DFAT officer provide some level of consular assistance rather than have no assistance provided at all. When I put the views outlined above to Mr Brown prior to the finalisation of this report, Mr Brown still considered that:

> [Mr L had been] given a comprehensive briefing on the consular support he should offer Habib … [and], under these extremely restricted circumstances, the Consul could have offered no more assistance had he been allowed to see Habib in person … And while the outcome may not have conformed with Australian consular text book requirements, consular access to Habib was nonetheless achieved.

However, I would still note that non-DFAT officers are not likely to have been properly trained in consular duties and may not fully understand their responsibilities. This issue was highlighted when I offered Mr L the opportunity to comment, prior to the finalisation of this report, on his apparent failure to advise Mr Brown or the Consul that Mr Habib had asked on 26 October 2001 if he could have a lawyer present. Mr L responded that he had taken Mr Habib's question to be conjectural in nature: that is, he thought Mr Habib was asking *if* he had the option of having a lawyer present at any future interviews, and did not conclude that he would necessarily *want* a lawyer present. He did not consider the question to be a request for legal representation.

Mr L responded to Mr Habib's query by referring him to the papers he had been given which included a list of local lawyers. Mr L informed me that he had expected that Mr Habib would consider this material and, if he wished to request legal representation, would do so at the next interview. Mr Habib did not do so. Mr L said that he did not specifically ask Mr Habib to select one of the lawyers from the list because Mr Habib did not show any interest in doing so.

I found Mr L to be a truthful and credible witness and I have no reason to doubt his recollection of events. However, it remains my view that he appears to have responded to Mr Habib's question from the perspective of an ASIO officer, rather than with a view to his consular tasking, and it is probable that he did so because he was not fully attuned to the scope of Australia's consular responsibilities to Mr Habib. My recommendation to address this issue is set out in Part 7 of this report.

Was Mrs Habib properly informed about Mr Habib's circumstances?

The letter sent from the DFAT Consular Operations section to Mrs Habib about her husband's detention and the scope of consular support services available to him followed a template letter in the *Australian Consular Handbook*. However, given the unusual circumstance of Mr Habib's detention, I do not believe that use of a template letter was likely to provide Mrs Habib with a full understanding of her husband's circumstances.

In reading the letter, I believe that it would have been reasonable for Mrs Habib to assume that a *consular* officer had visited her husband and that the full range of consular support services described in the letter had been made available to him. This was not the case. In evidence given to the inquiry, the Senior Executive Service (SES) officer who led DFAT's Consular Branch at the time, Mr Ian Kemish, agreed that – in hindsight – the language of the letter to Mrs Habib did not adequately reflect the complexities of the case. He also advised me that he had tried to ensure that matters relating to Mr Habib were handled properly by asking a team leader to manage the case and asking that an experienced senior officer clear correspondence relating to that matter. He added 'That said, I was the relevant SES officer and any failings of the branch are my responsibility'.

I put to Mr Kemish that the form of the letter may have also denied Mrs Habib a reasonable opportunity to understand that legal representation had not been arranged for Mr Habib and to consider arranging that independently, either from Australia or through family contacts in Pakistan.

Mr Kemish responded that it would not have been a practical option for the Habib family to engage a Pakistani lawyer to represent Mr Habib's interests in-country because the Pakistani authorities would have been very unlikely to give that lawyer confirmation of his detention or access to him. He stated that:

> … It denies the reality of Mr Habib's circumstances – in short, there was not the slightest prospect of Mrs Habib being able to independently arrange legal representation for Mr Habib in Pakistan in circumstances where the post could not itself obtain access.

I do not accept this argument. The fact that consular or other DFAT officers, however experienced, may hold that view is not conclusive – it is a matter for the family to assess and decide. In a case where a person is being held without charge, without an apparent legal basis, it becomes particularly important for that person to have legal representation. Even without gaining direct access to Mr Habib, a lawyer acting on his behalf would have been able to make independent representations to the Pakistani Government or to senior political figures in Pakistan about his circumstances.

ASIO requests information about Mr Habib

On 24 October 2001, ASIO was provided with a range of documents that had been in Mr Habib's possession when he was detained. On 25 October 2001, ASIO decided to seek information about the contents of those documents from Egyptian authorities and, later that day, the following message was sent:

> An Australian citizen Mamdouh Ahmad HABIB … was detained after crossing the Afghanistan – Pakistan border on 5 October 2001 ...
>
> There is some suggestion that HABIB had limited foreknowledge of the attacks on 11 September 2001 ...

> He is open about his support for [Usama bin Laden] and the Taleban regime.
>
> We have located a number of documents that were in HABIB's possession and amongst them were located the following items …
>
> We would appreciate any information you may have on Mamdouh HABIB ...

Was ASIO's request for information appropriate?

The passing of information about an Australian citizen or a permanent resident to a foreign authority may involve risks to the Australian which need to be balanced against the benefits of passing such information. This passage of information was then, and is now, governed by an internal ASIO policy.

Having regard to a number of factors, in 2001 the policy required, inter alia, that:

- information about Mr Habib could only be communicated to Egypt in exceptional circumstances
- the approving officer for sending this information was the Director-General of Security.

Mr Richardson clarified at interview that the policy's 'exceptional circumstances' test applied both in respect of the broader security environment at the time, and also in respect of Mr Habib's personal circumstances:

> MR RICHARDSON: We were in exceptional circumstances at the time and ten years down the track it still meets the definition of exceptional circumstances … so the base requirement of whether we could share information is clearly met.
>
> IGIS: ... 'Exceptional circumstance' is something that would have to be assessed, as well, by reference to the individual case, would it not?
>
> MR RICHARDSON: Yes. And I would suggest that whether you're looking at … a macro-level or a micro-level, you're talking about exceptional circumstances. There weren't – there are about six billion people in the world, how many, how many might have had prior knowledge [of the September 11 attacks]. So the individual case was exceptional. And the circumstances were exceptional.

The officer who approved the text of the message sent to Egypt on 26 October 2001 was the Deputy Director-General of Security, Mr E (who was Acting Director-General while Mr Richardson was on an official international visit). He recorded his approval, in writing, on 28 October 2001 (two days *after* the message was sent) by replying to an email submission with the single word 'approved'. In evidence given to the inquiry, Mr E said that it was possible that he had given verbal approval at an earlier time but that he could not recall whether that had occurred.

The submission which had been sent to Mr E had detailed a number of 'factors for' approving the communication to Egypt, but it did not list any 'factors against'. In particular, it did not include that ASIO had been approached a number of times about the proposal to send Mr Habib to Egypt for questioning, and it therefore did not contain an assessment of whether the text of the message might increase the likelihood of Mr Habib being sent to Egypt (thereby possibly increasing the risk to Mr Habib's safety).

Notwithstanding that the submission did not address these points; I questioned Mr E about whether he had known about the proposal to move Mr Habib, and what his considerations

had been in respect of Mr Habib's safety. Mr E responded that he was aware of the proposal that Mr Habib be sent to Egypt and that Australia had not agreed. Given that Mr Habib was detained in Pakistan at the time, he had assessed that the passage of the particular information to Egypt 'would be unlikely to affect Mr Habib's safety'.

In respect of whether the message passed to Egypt contained only information about Mr Habib which was necessary to elicit the information ASIO needed, Mr E said that unless some contextual information was provided with the request for information, it is unlikely that a timely and useful reply would have been received.

I do not question Mr E's view that, in hindsight, the operational requirements at the time justified the passage of the information and I accept the evidence he has provided me, stating that he properly considered all of the factors required by the policy at the time, including the safety of Mr Habib. There is, however, no contemporaneous record that the matter was properly considered at the time or that the decision made by Mr E took into account all of the factors that the policy required to be considered, including the risks to Mr Habib's welfare.

In circumstances such as these, I would have expected to see more detailed record of the decision-maker's considerations. In my 2009–2010 Annual report, I commented on this same accountability issue as follows:

> In some instances there is a lack of documentary evidence that the considerations articulated in the policy are being given effect.
>
> ASIO should maintain appropriate records of such decision-making and approvals. In the absence of adequate records, including a decision-maker's views on each of the relevant considerations in the policy, my concern is that it is not possible to be satisfied that the policy is being given proper and full effect.
>
> It is the potential gravity of the consequences, in some circumstances, of passing information to foreign liaisons that means documenting the basis for each decision is of particular importance.
>
> Should a situation arise where it is alleged that ASIO has been complicit in the torture or ill-treatment or rendition of a person, ASIO will be required to provide evidence of any decisions it took to pass information and the compliance or otherwise of those decisions with the policy.

It has been suggested that it would not have been possible for ASIO to function efficiently if the policy was always followed strictly in terms of documenting the reasons for decisions, particularly given the operational imperatives of that time, and having regard to a decision-making environment where 'Australia had become a terrorist target in its own right both in Australia and overseas'.

Mr Richardson described this as '[ASIO] would have gummed itself up and it wouldn't have been doing its job'. He also said:

> I am not aware of any information or evidence to suggest that any ASIO officer did anything that was inconsistent with my expectations at the time … This is especially the case in relation to the lack of detailed record keeping … In light of the extreme intensity of operational and analytical demands referred to above, I had no expectation that ASIO staff would spend valuable time seeking to comply with a work to rule approach in relation to documenting matters. Indeed, I would have been critical of any such approach when there

> were so many operational and analytical demands of a time critical nature, which carried potentially catastrophic consequences if they were not attended to quickly.

I do not accept this view. As Mr Richardson said himself, the circumstances surrounding Mr Habib were exceptional. The passage of information can have severe consequences and, in my view, it is essential for proper accountability that records of the decision-making process are made and retained.

Second meeting with Mr Habib in Pakistan

Mr L agreed on arrangements with Pakistani and foreign government representatives for Mr Habib to be jointly interviewed on Friday 26 October 2001. The interview ran for some four hours between 3.30 pm and 7.40 pm (with a short break at 6.15 pm) and was held at another location arranged by the Pakistani government. Four interviewing officers were present and a number of Pakistani officers observed (Mr L recorded two Pakistani officers being present, but Federal Agent B recorded six Pakistani officers being present). The interviewing officers were Mr L (ASIO), Federal Agent B (AFP), and two foreign government representatives.

In respect of Mr Habib's physical and mental wellbeing, Federal Agent B recorded that he asked after Mr Habib's welfare prior to the interview commencing and was told that he was 'fine but complains a lot'. Mr L noted during the meeting that:

> As far as I could tell, Habib was in a similar condition as our previous meeting on 24 October ... I could see no evidence nor have any reason to believe that he had suffered physical injury or been mistreated. During the course of the interview he walked around the room several times without difficulty; when taking cigarettes, reaching for tea, ashtrays etc ... As far as his emotional state is concerned, he appeared subdued, worried etc. At one point he was given medication [for a pre-existing medical condition].

The interview concerned only security matters. Apart from Mr L advising Mr Habib that his wife had been notified of his whereabouts, Mr L avoided any other discussion relating to consular matters.

On the following day, 27 October 2001, Federal Agent B briefed the High Commissioner, Mr Brown, about the outcomes of the meeting and Mr L pursued the question of what should happen next. Mr L advised ASIO Central Office in Canberra that he was of the view that Mr Habib would wish to return to Australia, at least for the short term, and 'in this regard, he noted that Habib's ticket had expired and there would be a requirement for someone (his family/DFAT) to arrange passage'.

Senior officers in ASIO subsequently decided that Mr Habib should be interviewed again, in an attempt to resolve the key questions about his travel to Afghanistan and his apparent foreknowledge of the September 11 terrorist attacks.

On 29 October 2001, ASIO was of the view that Mr Habib would 'probably be interviewed once or twice more and probably be deported to Australia'.

Final meeting between Mr Habib and Australian officials in Pakistan

On Monday 29 October 2001, Mr Habib was interviewed again. The interview lasted approximately two hours from 3.30 pm to 5.20 pm, with a 15 minute break at 4.45 pm.

It was held at the same location, arranged by the Pakistani government, where the previous interview had taken place, and with the same four interviewing officers who had attended the previous interview. Two Pakistani officials observed.

In respect of Mr Habib's physical and mental wellbeing at the start of the interview, Mr L recorded that:

> Habib was ushered into the room wearing the same blue track suit, T-shirt and runners that he was wearing on the previous two occasions [I saw him]. He was subdued and a little untidy, but again showed no sign of physical mistreatment. He shook hands with each of those present before sitting and immediately asked for a cigarette. Habib is a heavy smoker, although I suspect that he does not have access to cigarettes in custody.

Were Australian officials complicit in any mistreatment of Mr Habib at that interview?

A critical point in the interviewing process was reached when Mr Habib was questioned about his apparent foreknowledge of the September 11 terrorist attacks. After discussing that particular point to no effect for some 20 to 25 minutes, Mr L decided to call a break and Mr Habib was taken out of the interview room by Pakistani officers. The interviewing officers then decided that the best way forward was to call Mr Habib back into the room and ask for his cooperation a final time. If he did not respond, the interview should be concluded.

When Mr Habib was brought back into the room, Mr L observed that he 'required some assistance to walk'. In his book, *My Story – The Tale of a Terrorist Who Wasn't*, which was published in 2008, Mr Habib asserted that at this point he was 'injected with drugs that made me very groggy, so that when I came back into the room I could hardly stand. I can't really remember what happened after that'. In evidence given to the inquiry Mr L was asked to elaborate on what he saw and what he inferred from that, in light of the possibility that Pakistani officials may have mistreated Mr Habib in some way whilst out of sight of the Australian officials. Mr L said that:

> MR L: ... I don't have a photo image of how he walked back into the room and all the rest of it, but he was assisted, he was sort of held, you know, in a sort of like you might hold someone who's a little bit ailing or your mum or something like that, back into the room. He wasn't carried into the room, he was under his own – he was walking by himself, but he was assisted, I don't know how else quite to say it, someone who was, you know, I don't know, a bit frail or something like that. And then he sat down and we basically resumed – I can't remember if he popped up straight away to get a cigarette or an ashtray or something like that, but yes.
>
> IGIS: Did you have any concerns at that stage about continuing with the interview?
>
> MR L: No, my impression was - I mean I know what the implication of all of this is in a sense, no, I didn't think that he'd been mistreated, I don't think he'd gone outside and had a bashing and come back into the room, no, I do not think that. My impression, at the time, and it's still my view, is that … he's looking at a real crossroads at himself, I mean in what he says, we've asked the situation he's in, what he's done and all the rest of it. He displayed every basically every human emotion in the last half hour before that in any case. I think he was simply very emotional and nervous and wobbly, you know, because of that whole thing. I honestly do not think that he'd been, you know, mistreated and that was the reason that he needed to be held or assisted back into the room.

> IGIS: [In addition to] talking about mistreatment, I'm also talking about, you know, being ill or being - - -
>
> MR L: Yes, being ill or – no, I don't think so, I mean, I mean there's a balance here, there's sort of – well, I mean I'm thinking about it this way for the first time, but the interview was very intense, it was a hard interview as we would say, all right, so he's gone all over the place and his emotions … He's got decisions to make about how he will then respond when we resume, because that would have been his clear impression, I think that we probably would have resumed. And there's the issue for me, if you know, I mean, do I carry on with the interview or not. And clearly I decided that we would. I didn't think, I didn't think that there was – before he left and when he came in, particularly after he sat down again and he then moved around and seemed quite – he seemed the same as he was before, … so I didn't see that there was anything different, nothing that I would think, I shouldn't continue with an interview, either for his wellbeing or suggesting that, you know, that there was no point, I mean we'd got to that stage of the interview where we were sort of getting, as you can see from the interview report, basically, another chance, go over it again very quickly, another chance to provide some additional information or be sort of more fulsome in his replies and then if that didn't work, to close shop, which is what we did.
>
> IGIS: ... just to be clear and ask directly but in each of these interviews, the 24th and in particular, the 26th and 29th, did you witness mistreatment, physical or otherwise of Mr Habib?
>
> MR L: No, no, I didn't.

If the Australian officials had been aware of, or suspected, any mistreatment of Mr Habib and had continued to question him, then they could have been complicit in that mistreatment. I found Mr L to be a credible witness and am satisfied with his account of what he saw. I also note that, should it have been the case that Mr Habib was either physically or mentally exhausted from the interview by approximately 5.00 pm, or if he had been medicated, the interview was concluded shortly thereafter at 5.20 pm and Mr Habib was not subject to extensive questioning after the break.

The conclusion of the security interview on 29 October 2001 marked the last time that an Australian official saw Mr Habib until May 2002, after his arrival in Guantanamo Bay.

Australia is pushed for agreement to transfer Mr Habib to Egypt

Mr Richardson undertook official international travel in late October 2001. On 29 October 2001 and 31 October 2001, he met with a number of senior foreign government officials who made further requests for Australian agreement to transfer Mr Habib to Egypt.

I asked Mr Richardson whether he formed the impression that the proposal would go ahead regardless of whether Australia agreed and he responded:

> MR RICHARDSON: [We again said 'no' to the proposal and] … I didn't believe they were going through the motions, if they were going through the motions they didn't need to raise it with me ... I didn't leave thinking, oh, well, Habib's about to go out the window.

I accept that Mr Richardson persistently put forward the strong view that Australia did not agree to Mr Habib being transferred to Egypt. Although I have noted earlier that the words in the ASIO intelligence report ('not knowingly agree') should have been clearer, I am in no doubt that the actual words and tone used by Mr Richardson were unambiguous.

Nonetheless, the persistent and increasing senior representations made to Mr Richardson on this matter, throughout his overseas travel, should have been identified as a clear sign that there was a firm resolve to move Mr Habib to Egypt, and there was a need for the Australian Government to escalate its objections to that proposal urgently. I am of the view that Mr Richardson did not take the action he should have in respect of immediately advising DFAT or responsible ministers to that effect.

When I put this view to Mr Richardson, he noted that from 24 October 2001 DFAT had been aware of the possibility that Mr Habib might be transferred to Egypt but that 'DFAT chose not to do anything to oppose that transfer'. While Mr Richardson accepts that he could have done more to convey that there appeared to be a firm resolve to transfer Mr Habib to Egypt, he does not accept that his omission 'provides any explanation for DFAT's failure to pursue this issue at a high level if at all'.

A period of hiatus in Pakistan – 30 October to 5 November 2001

On Tuesday 30 October 2001, Mr L met with the High Commissioner and the Consul in Islamabad to discuss Mr Habib's circumstances. Mr L reported that the Consul was 'very concerned about mounting press interest and that he had not pursued consular access'.

Mr L asked for guidance on a way ahead from various senior ASIO officers over the following week, but he was advised that any decision would need to await the return of Mr Richardson from his official overseas travel.

For his part, Federal Agent B had apparently decided that the AFP should absent itself from future interviews of Mr Habib in Pakistan, as it would be proper from that point to formally caution him (which would be unlikely to improve Mr Habib's cooperation).

On 31 October 2001, the Consular Operations section of DFAT in Canberra also contacted the Consul to advise that it had 'heard indirectly from ASIO ... that you shouldn't feel constrained pushing hard the issue of consular access to Habib with the Pakistanis' and on 1 November 2001, the High Commission sent its first Third Person Note to the Pakistani Ministry of Foreign Affairs formally seeking permission to visit Mr Habib and offer him consular services.

In Canberra, ASIO and the AFP had brief discussions on 2 and 5 November 2001 about potential physical security issues relating to Mr Habib's possible travel to Australia and whether the AFP could provide some type of security for an escorted return. This idea was not pursued when the AFP indicated that:

> ... there was not a willingness for the AFP to become directly involved in a security role ... [as] AFP officers would have no jurisdiction on the airline of another country except when the aircraft was within Australia's territorial boundaries. [The AFP] could not identify any other agency in Australia which might have that role.

Further indicators that Mr Habib would be sent to Egypt

Between 6 and 9 November 2001, ASIO representatives who were travelling overseas (on unrelated business) received senior representations from a second foreign government about the proposal that Mr Habib be moved from Pakistan to Egypt.

The ASIO representatives responded that Mr Habib should return to Australia from Islamabad, and they immediately reported to ASIO Central Office in Canberra that '[the foreign government was] likely to render Mamdouh Habib to Cairo'.

Did ASIO do enough to prevent Mr Habib's transfer to Egypt?

ASIO did not advise DFAT, or its own representative in Islamabad, that new representations had been received from a second foreign government.

As described above, I am of the view that Mr Richardson did not take the action he should have in respect of alerting DFAT that Mr Habib's transfer from Pakistan to Egypt appeared to be increasingly likely by 31 October 2001. The need to take such action appears to have escalated by 9 November 2001.

I believe that this lack of information sharing denied DFAT the opportunity to make equally senior representations in Pakistan or in Canberra against the proposal (noting that representations to that date from the Australian High Commission to the Pakistan Ministry of Foreign Affairs about Mr Habib had comprised only one telephone call and one Third Person Note, with no knowledge that a greater sense of urgency might be required).

At interview, Mr Brown said that it would have been possible for him to have taken a more direct approach, or to have been more personally involved in making representations, if he had known of a reason to do so. In respect of him not taking independent action on this matter, but instead waiting for direction from DFAT Canberra, he also said:

> Given the highly volatile situation in post-11 September 2001 Pakistan, it would have been totally irresponsible of me to have entered into dealings of a security nature with the Pakistani authorities which did not have the prior knowledge and approval of DFAT Canberra at that department's most senior level.

The SES officer who led DFAT's Consular Branch in Canberra at the time, Mr Ian Kemish, acknowledged that the urgency and formality with which DFAT later sought access to Mr Habib in Egypt (including through high level contacts between the ambassador and the host government) was – in hindsight – preferable to the approach taken earlier in Pakistan.

While I cannot conclude that such attempts would have been successful, or would have resulted in Mr Habib being returned to Australia, I believe that ASIO's failure to act in a more collaborative way did deny DFAT an opportunity to press the matter. It also meant that DFAT was not in a position to brief its minister so that the matter could be pursued at a political level. I put these views to Mr Richardson in the course of the inquiry and he responded that:

> I had a short time before [on 24 October 2001] taken action to ensure that all relevant areas of government had been briefed in relation to [foreign] 'thinking on the matter'… DFAT was clearly in a position to press the matter and/or brief its minister so the matter could be pursued at a political level if the Government had wished to do so. To my knowledge neither of these things were done. I consider the suggestion that I am responsible for denying DFAT such an opportunity an unfair one …

Having considered Mr Richardson's response, my views on this matter are unchanged.

Mr Habib's final days in Pakistan – 6 to 11 November 2001

Based on the documentary records and evidence given to the inquiry during formal interviews, Australian government agencies remained largely indecisive about what to do in respect of Mr Habib during what was to be his last week in Pakistan.

On 8 November 2001, DFAT Canberra expressed concern to the Australian High Commission that consular access had not been granted and requested action be taken to follow up the Third Person Note sent on 1 November 2001 with the appropriate Pakistani authorities. The Consul subsequently prepared a second Third Person Note about Mr Habib which was dispatched on 12 November 2001.

However, the opportunity had passed for the Australian Government to secure access to Mr Habib in Pakistan and to arrange for his return to Australia. I believe that it was likely that Mr Habib was transferred from Pakistan to Egypt sometime over the weekend of 10 to 11 November 2001. This is discussed in Part 5 of this report.

Did Australian officials mistreat Mr Habib in Pakistan or were they complicit in any mistreatment?

In evidence given to this inquiry, statements provided to the courts and in published material, Mr Habib has made many statements about alleged mistreatment in Pakistan. While this inquiry has not addressed Mr Habib's allegations of mistreatment by Pakistani officials, I have found no evidence that any Australian official mistreated Mr Habib directly or was complicit in any mistreatment of Mr Habib while he was interviewed in Pakistan.

I have extensively interviewed a wide range of Australian officials with an involvement or interest in Mr Habib's detention and reviewed the contemporaneous records. I am satisfied that in Pakistan there were no:

- threats by Australian officials that his Australian citizenship would be rescinded
- threats by Australian officials that his family would be harmed
- acts of mistreatment by Australian officials or knowledge by Australian officials that he was being mistreated by others
- contacts with Mr Habib by any Australian official other than the ASIO officer, Mr L, and the AFP officer, Federal Agent B
- threats by Australian officials that he would be sent to Egypt.

In particular, I am satisfied that Australian officials were not involved in making arrangements for Mr Habib's transfer to Egypt and were not present at any time during his forced removal from Pakistan.

Mr Habib's transfer to Egypt – November 2001

An ASIO officer gave evidence to the inquiry which indicated that he was the first Australian person to know that Mr Habib had been moved out of Pakistan. However, he did not know where Mr Habib had been taken.

The officer has no firm recollection of the date on which he came to know this information, and he made no contemporaneous, official record of it. From amongst the broad range of records reviewed as part of this inquiry, I have observed that his record keeping was otherwise sound. It is unfortunate that, in this instance, an official record was not made.

The officer gave evidence that he immediately briefed his superiors including the Director-General of Security, Mr Dennis Richardson, and that it was agreed that a range of agencies including the AFP, DFAT, AGD and PM&C should be told. He did make a record of a conversation he had with the AFP on 14 November 2001, during which he passed on the information.

On 12 November 2001, DFAT Canberra sent a cable to the High Commission in Islamabad asking for urgent confirmation that Mr Habib remained detained in Pakistan. The Consular Operations section sent a follow-up email to the Consul at the High Commission clarifying that:

> The bit about seeking urgent advice on Habib's well-being and confirmation that he is still detained in Pakistan is important. For your information only, there is a view here that he might have been transferred to another country. No need for you to research this notion there in Islamabad, but I'd be interested to know if you've heard anything on Habib having been transferred out of the country.

On 13 November 2001, ASIO requested 'firm advice as to the whereabouts of Habib' through its foreign government contacts.

There is no Australian Government record about how or when ASIO received a response to that request. However on 19 November 2001 ASIO advised the AFP that 'Habib is now in Egypt'. That day, DFAT sent a cable to its embassy in Cairo (copied to the High Commission in Islamabad) informing it as follows:

> Consular: Arrest: Habib, Mamdouh Ahmed
>
> The above named, an Australian citizen born in Egypt who had been detained in Pakistan, has been transferred to Egypt … Grateful you make urgent enquiries to locate [him], confirm detention and seek access. Islamabad was unable to gain access since his detention in early October. [Habib's] wife recently advised that a German national, who had been detained with him and who had been released, informed her that her husband had been 'mistreated' by Pakistani authorities. Please note that the visit reported [on 24 October 2001] was not/not by a consular officer ...

There is no evidence that any Australian official had prior knowledge of the fact or manner of Mr Habib's transfer from Pakistan to Egypt, or that any Australian official was involved in the planning or logistics of that transfer.

First report about Mr Habib's questioning in Egypt

On approximately 22 November 2001, ASIO received information which indicated that Mr Habib was being questioned in Egypt. ASIO provided feedback about that information on 29 November 2001.

In evidence given to the inquiry, Mr Richardson stated that he did not have any concerns about ASIO providing feedback on an interviewing process which was assumed to be occurring in Egypt.

As discussed in Part 4 of this report, the passing of information from ASIO to overseas agencies about Australian citizens and permanent residents was, and is, governed by an ASIO internal policy. In 2001 the policy required, inter alia, that:

- When assessing whether or not to pass information, an approving officer must consider the prejudice that the communication might represent to the person and give paramount concern to the person's safety.
- Written records must be placed on an official file, documenting the circumstances in which a communication was considered, the factors for or against its communication, the approving officer's considerations, and the decision made.

Mr Richardson advised the inquiry that he always considered such matters carefully within the framework of established ASIO guidelines. No records exist on ASIO files which document the considerations which Mr Richardson took into account when agreeing to provide ASIO's feedback on the information that Mr Habib had apparently provided during questioning in Egypt. Nor are there any records which acknowledge or assess what that might mean for Mr Habib's safety. I would have expected to see contemporaneous records in relation to these matters.

In interviews conducted during the course of this inquiry, I questioned ASIO officers closely about the extent of their knowledge, in late 2001 and early 2002, of rendition practices by foreign governments, Egypt's human rights record and Egyptian interviewing techniques. I also questioned ASIO officers closely about whether they could recall ASIO making any particular inquiries about Mr Habib's likely treatment in Egypt, to allow an adequate assessment to be made about what the passing of information might mean in his particular circumstances.

I have formed the view that, given the particular circumstances of Mr Habib's detention, ASIO officers had an obligation to make active enquiries to obtain and document information about how he would be treated in Egypt, before providing any information which might have been used in his questioning. This was required so that they could consider the prejudice that the communication might represent to Mr Habib and give paramount concern to his safety as required by the policy at that time. To merely take into account more general information about human rights practices in Egypt – without making active enquiries – could not adequately address Mr Habib's *individual* circumstances and could not give effect to the policy.

Whilst I acknowledge that Egypt was unlikely to have responded to a direct inquiry from ASIO (given that Egyptian authorities refused to provide official confirmation that Mr Habib was in Egypt – discussed below), assurances about Mr Habib's treatment could have been

sought through the source of the information, or caveats could have been placed on the information prohibiting its further distribution.

I believe that making 'active inquiries' about a person's likely treatment, prior to sending questions or other information in support of a custodial interview overseas, should be pursued (irrespective of the veracity of any information eventually received in response). My recommendations in respect of this are in Part 7.

Attempts to obtain consular access to Mr Habib in Egypt

From the time that Mr Habib arrived in Egypt until he departed that country in approximately mid-April 2002, DFAT officials made at least sixteen representations to the Egyptian Government asking for confirmation that Mr Habib was in Egypt and seeking urgent consular access to him. These representations included:

- a Third Person Note from the Australian Embassy in Cairo to the Egyptian Ministry of Foreign Affairs dated 19 November 2001
- a conversation between the Australian Embassy and the Australian Desk Officer, Egyptian Ministry of Interior on 19 November 2001
- a conversation between the Australian Ambassador and the Director Foreign Activity Group, Egyptian Ministry of Interior on 22 November 2001
- a conversation between the Australian Ambassador and the Director Foreign Activity Group, Egyptian Ministry of Interior on 3 December 2001
- a letter from the Australian Embassy in Cairo to the Egyptian Minister for the Interior dated 4 December 2001
- a number of follow-up contacts to the Ministry of the Interior by Australian Embassy staff between 4 and 6 December 2001
- a meeting between the Australian Ambassador and the Egyptian Prime Minister on 6 December 2001
- a meeting between the Australian Ambassador and senior Egyptian Interior Ministry officials on 7 December 2001
- a Third Person Note from the Australian Embassy Cairo to the Egyptian Ministry of Foreign Affairs dated 10 December 2001 requesting an appointment with the head of the agency believed to be detaining Mr Habib
- a meeting between the Chargé d'Affaires at the Australian Embassy Cairo and the Protocol Office in the Egyptian Ministry of Foreign Affairs on 24 December 2001
- a meeting between the Chargé d'Affaires at the Australian Embassy Cairo and the Egyptian Assistant Foreign Minister for Consular Affairs on 6 January 2002
- a letter from the Chargé d'Affaires at the Australian Embassy Cairo to the Egyptian Assistant Foreign Minister for Consular Affairs dated 20 January 2002
- a meeting between the Australian Ambassador and the Egyptian Foreign Minister on 2 February 2002

- a meeting between the Australian Ambassador and the Egyptian Foreign Minister's Chef de Cabinet on 6 March 2002
- a meeting between the Egyptian Ambassador to Australia and the DFAT Assistant Secretary Consular Branch on 13 March 2002
- a meeting between the Australian Ambassador and the Egyptian Assistant Foreign Minister for Consular Affairs on 18 March 2002.

Throughout all of the above contacts, Egyptian authorities refused to provide official confirmation to Australian Embassy officials that Mr Habib was in Egypt.

The Egyptian authorities were also consistent in their message that their Ministry of Foreign Affairs must be the conduit used by the Australian Embassy to pursue its inquires, rather than allowing separate contacts with other Egyptian agencies.

Was enough done to pursue consular access in Egypt?

It is my view that the Australian Embassy in Cairo was diligent in pursing confirmation that Mr Habib was in Egypt and seeking urgent consular access to him.

By January 2002, DFAT's efforts also included asking ASIO for assistance to gain access to Mr Habib. This was taken up at an interagency meeting on 15 January 2002 attended by Mr Richardson, Mr John Quinn (Acting First Assistant Secretary International Security Division, DFAT), Mr Ian Kemish (Assistant Secretary Consular Operations Branch, DFAT), Mr Michael Potts (First Assistant Secretary International Division, PM&C), Mr Colin Minehan (Principal Legal Officer, AGD) and Federal Agent A (Director of International Operations, AFP). Mr Quinn's record of that meeting notes:

> … Richardson said he had been pressing [foreign government representatives] for further information on the Habib case as nothing had emerged since November, which raised some concerns about Habib's welfare. (In this regard, Richardson referred to an article in the *Washington Post* of 9 December which reported on several cases of detainees being sent to Egypt and subsequently being executed.) [Foreign officials] had however indicated that we would receive very soon further reports on Habib.
>
> Richardson said … we needed to consider our strategy. For example: should we initiate a formal AFP investigation into his activities, recognising the practical difficulties involved, and, if so, how should we proceed? Should we be asking the Egyptians to return Habib to Australia? If the Egyptians decided to release him, how would we respond? Could he be the subject of [other] legal proceedings, including as a possible material witness in prosecutions of other Al Qaeda figures?
>
> [DFAT] said we had proposed the ASIO [involvement] as a way of checking on Habib's welfare. Our Cairo Embassy had been assiduous in pursuing access, but had run into a brick wall... It would be important to pursue access through [ASIO] … to demonstrate that all that could reasonably be done had been done …
>
> Given the potential seriousness of Habib's activities, it was agreed that the AFP should initiate a formal investigation of Habib, although the AFP representative underlined evidentiary and other practical obstacles. Richardson said he was confident that ASIO could [make representations to assist in securing] access to Habib.

The approach agreed at the meeting was briefed to DFAT's portfolio ministers on 17 January 2002 as follows:

> Given the potential seriousness of Habib's activities with Al Qaeda, AFP has agreed to initiate a formal investigation of Habib, while noting the evidentiary and other practical obstacles to such an investigation. ASIO will seek to assist in securing access by law enforcement officials to Habib... This approach is more likely to bear fruit than our direct approaches through diplomatic channels. At the same time, we have asked our Embassy in Cairo to pursue its parallel inquiries on this case.

ASIO subsequently tasked one if its representatives, Mr K, to 'take the opportunity with the right person at the right time' to obtain agreement for ASIO and the AFP to have access to Mr Habib in Egypt. Having done so on 22 January 2002, Mr K reported that face-to-face access with Mr Habib in Cairo would not be allowed, but questions could be put to him by foreign government officials (on Australia's behalf) if required.

The inquiry found no documentary evidence that ASIO took any further action to seek access to Mr Habib in Egypt after Mr K's report was received. Mr Richardson told the inquiry that he could well have followed up and, on the balance of probabilities, he considers he did. Some support for this position is contained in an ASIO internal email dated 13 March 2002 which states '… ASIO is seeking to establish direct ASIO/AFP access to Habib. While there has been no progress on that to date, that process **has been initiated** [emphasis added] …'. No details of the action taken were provided.

Communication between ASIO and DFAT officers should have been better on this issue, with responsibility for that falling to both parties:

- Mr Richardson had given an undertaking on 15 January 2002 to seek access to Mr Habib. However, there is no documentary evidence that any ASIO officer updated DFAT as to the lack of progress.
- On the other hand, as the agency with primary responsibility for an Australian detained overseas, DFAT should have been more proactive in following up on ASIO's progress in the matter.

Was there any basis to report that Mr Habib was 'well and being treated well'?

On 19 February 2002, the Consular Operations section in DFAT sent a facsimile message to Mrs Maha Habib which stated that 'the Government has received credible advice that [your husband] is well and being treated well' and on 11 March 2002 similar information was included in briefing material prepared for the Minister for Foreign Affairs.

I found no evidence during the course of this inquiry, including from witnesses, to indicate that DFAT had any basis whatsoever for making these statements. In particular:

- ASIO had not tasked Mr K to inquire after Mr Habib's wellbeing in January 2002.
- Mr K's report did not indicate that he had been provided with any information about Mr Habib's wellbeing.
- There are no records of ASIO briefing DFAT about Mr Habib's wellbeing after Mr K's report was received.

- There is no record of ASIO clearing the text of the facsimile to Mrs Habib or the briefing to the minister.

The apparent lack of communication between ASIO and DFAT on this matter is particularly difficult to understand given the high level of interest that DFAT had in Mr Habib.

When questioned about the information provided to Mrs Habib and the minister later, the DFAT officers concerned had a firm recollection that all public lines on matters to do with the Habib case were cleared with ASIO and usually with Mr Richardson himself. They suggested that if no clearance had been sought from ASIO, Mr Richardson would have taken this up in strong terms with DFAT and the officers would have recollected that.

I do not believe that this is a satisfactory explanation in the absence of any other supporting documentary records. DFAT has no record that it provided copies of the relevant documents to Mr Richardson for clearance and cannot now rely on a lack of comment from him as tacit authorisation. DFAT officers were responsible for the content of their own documents. In light of the lack of consular access and first-hand knowledge of Mr Habib's health and wellbeing, they should have ensured that they had documentary evidence on file to support the factual accuracy of the statement that Mr Habib was 'well and being treated well'.

The then SES officer in charge of DFAT's Consular Branch, Mr Ian Kemish, provided the following clarifying comments on this matter:

> … All I can offer about the provenance of the advice is that I was first briefed to this effect by [a senior officer from Consular Operations] … following my return to Canberra from leave at the beginning of 2002 ... It was a firm understanding across the department, including those in the Legal Branch and the International Security Division [ISD], and I had no reason to challenge it or to make further enquiries.
>
> In considering my own action in authorising [the Possible Parliamentary Question (PPQ) briefing material for the Minister], I reflect that all PPQs were the product of a careful consultative process each day, allowing other areas – in this case the Legal Branch and ISD – the opportunity to review and make adjustments. I should also note that PPQs were rarely, if ever, the first line of advice to a Minister on a matter such as the Habib case. (Indeed, at that time they were regularly amended by the Minister's office after the relevant SES officer had cleared them).
>
> Nearly ten years down the track it is not surprising that the basis for making the relevant statement in the PPQ cannot now be determined. A misunderstanding or miscommunication on the part of one or more DFAT and/or ASIO officers seems to me to be the most likely explanation. The fact that DFAT's record keeping does not shed light on the reason(s) for it being made is, of course, something for which we should accept responsibility and valid criticism.
>
> I would … [also] concede that the letter to Mrs Habib of 19 February 2002 should not have described the advice as 'credible'. Even in our understanding of the matter at the time, the Australian official … had not been able to verify the advice for himself.

Second and third reports about Mr Habib's questioning in Egypt

On 31 January 2002 and 3 February 2002, ASIO received further information which indicated that Mr Habib was still being questioned in Egypt. On 13 February 2002, ASIO requested clarification and further comment on a number of points.

I asked Mr Richardson if he remained satisfied, at that time, that ASIO should continue providing feedback on the interviewing process in Egypt and whether it was appropriate for ASIO to raise questions that may be put to Mr Habib during questioning sessions in Egypt:

> IGIS: … ASIO identified issues to be clarified with Mr Habib. Did you consider whether doing that might exacerbate the severity of his interrogations or prolong the time he was subject to interrogation, possibly using inhuman methods?
>
> MR RICHARDSON: To be perfectly frank, whether we gave information or not would have been irrelevant to whatever way they treated him …. I see no conflict between that and working as hard as you can to get him out.

I have already stated my view above that ASIO should have made active enquiries to obtain and document information about how Mr Habib would be treated in Egypt, before responding to information which indicated that he was being questioned there. I also consider that inquiries should have been made before agreeing to provide further information, particularly in circumstances where that information might have been used in questioning Mr Habib. However, providing information in the absence of an enquiry does not mean that ASIO had any intent to be complicit in, contribute to, or encourage any mistreatment of Mr Habib by the authorities questioning him.

Was information provided by the Australian Government used during the questioning of Mr Habib in Egypt?

In evidence given to this inquiry, statements provided to the courts and in published material, Mr Habib has made many claims that he was questioned in Egypt about information which could only have come from the Australian Government. I am satisfied that these statements are credible because:

- Information obtained under an ASIO enter and search warrant executed at Mr Habib's home on 20 September 2001 was released to a foreign government and may have been used during his questioning in Egypt, notwithstanding the caveats placed on the material by ASIO prohibiting its further distribution without ASIO's explicit approval. (See Part 3 of this report.)
- Documents held by Mr Habib at the time of his detention in Pakistan had been obtained by ASIO. ASIO had passed some of the details to Egypt on 26 October 2001. (See Part 4 of this report.)
- As noted above, ASIO also provided commentary on reports of Mr Habib's questioning in Egypt and identified areas that needed further clarification.

I understand that striking a balance between the benefits of information exchange and the risk to an Australian individual poses a difficult dilemma for intelligence agencies. I do not make any recommendation on this point but emphasise that this is an area that my office will continue to monitor in the future.

ASIO's assessment of the intelligence case against Mr Habib

In early March 2002, Mr Richardson requested that a brief be prepared for him commenting on ASIO's assessment of the intelligence case against Mr Habib. The assessment

subsequently provided to Mr Richardson concluded by stating that Mr Habib would remain under investigation upon his return to Australia.

Notwithstanding that assessment, Mr Richardson advised the inquiry that ASIO considered the majority of intelligence questions about Mr Habib had been satisfactorily resolved by March 2002, including his level of involvement with senior al-Qa'ida members, the extent of his foreknowledge of the September 11 attacks, and the possibility of whether he was planning for future terrorist attacks.

> MR RICHARDSON: … come February/March, my mind increasingly turned to getting him back to Australia after Egypt. And to this day, I'm disappointed that [wasn't agreed].
>
> [In] September/October [2001], Habib's in a particular category. There are legitimate unanswered questions there, but as time goes on those questions are put in broader context … Certainly come March/April of 2002, I was certainly satisfied in my own mind that there was no legitimate reason for Habib [to be] anywhere but in Australia.

It appears that by around March 2002 Mr Richardson knew that Mr Habib was in Egypt but was not successful in obtaining any assurance that he would be returned to Australia.

Balancing consular and intelligence priorities

From the time that Mr Habib was detained in Pakistan in October 2001 and throughout his detention in Egypt, Australian government officials were balancing the relative priorities of obtaining intelligence about Mr Habib's activities against the need to gain consular access and provide support to him. Although DFAT's efforts in Egypt appear not to have been curtailed by the higher relative priority initially given to intelligence matters, there was no question in the minds of DFAT officials, at the time, that ASIO was the 'lead agency' in the Habib case and that it should be 'conscious of not getting in the way of anything ASIO was doing'.

At interview, Mr Richardson concurred with this recollection of the status quo in relation to the period from October 2001 until March 2002. However, he was also of the view that the government's relative priorities had changed by March or April 2002 and, at that point, DFAT should have stepped in to become the 'lead agency':

> MR RICHARDSON: …by April of 2002, you know, the balance of the interest had moved from, I think, security intelligence first, through to consular first or welfare first. I certainly expressed myself in terms of security interest being first in October, [but] … I did not do so in the period, March/April.
>
> … An ASIO officer visiting Mr Habib for security intelligence purposes, in Pakistan, was able to do most of the things from a welfare point of view that a consular officer could do, but a consular officer visiting him for welfare purposes was unable to do anything of the things from a security intelligence point of view. Given the question mark that hung over … the nature of [Mr Habib's] foreknowledge of 9/11 …. I think the Australian Government had a legitimate interest in pursuing [intelligence matters first].
>
> … but we weren't running around town trying to make that argument in March/April, and while DFAT could rightly … send a submission to their minister in December of 01 and say, 'Look, you know, we're ensuring that we don't cut across, you know, ASIO's security interest', come March/April, they certainly can't say that - somehow or rather - they had to march to our [ASIO's] drum beat…

> IGIS: Were there discussions with DFAT about this sort of change in emphasis?
>
> MR RICHARDSON: No. I don't believe there was a structured discussion … But, if I can say, Inspector-General, any government department wishing to pursue those matters for which it's responsible under the Administrative Arrangements Orders, can flex their muscles if they so wish... It is within their gift to actually pursue it and say, 'We think the time has come for this or that'.

In my view the communication about this change in emphasis was inadequate and could have compromised the effectiveness of approaches to obtain consular access. There was an Australian Government responsibility to ensure that it was absolutely clear which agency took the lead in coordination. The change in priority should have been agreed, clearly communicated and documented by both ASIO and DFAT.

I note that, if such a situation were to arise again, the question of how to meet the Government's relative priorities and which agency should take the lead at any one point in time would now be addressed by an interdepartmental committee chaired by the most appropriate government agency (as determined on a case-by-case basis), working in close consultation with PM&C and with membership also being drawn from other relevant agencies. I am of the view that this is a more appropriate arrangement and should ensure better communication between agencies in the future. (This is discussed further in Part 7 of this report.)

ASIO asks about Mr Habib's wellbeing in Egypt

In early April 2002 the ASIO representative, Mr K, was tasked to make another approach to foreign officials about Mr Habib and to ask for 'confirmation that Habib remains in good health'. Mr K reported that he was able to raise this question, but he was not provided with an answer.

This was the last approach made by the Australian government for information about Mr Habib until after his departure from Egypt (when he was moved to Afghanistan and subsequently to Guantanamo Bay).

Knowledge of Mr Habib's impending transfer to Afghanistan

Documentary records indicate that ASIO was anticipating the possibility that Mr Habib might be moved from Egypt to Guantanamo Bay by March 2002. In evidence given to the inquiry, Mr Richardson clarified that this was supposition on his part, rather than being based on foreign government advice, 'because I could see that as the possible next step'.

On 5 April 2002, PM&C sent a formal briefing note to the Prime Minister's International Adviser which stated:

> ASIO has advised that Mamdouh Habib, an Australian citizen currently detained in Egypt, may shortly be transferred to Guantanamo Bay via Afghanistan …

Neither the author nor the SES officer who cleared the brief could recall how PM&C became aware of this very specific information. Both agreed that it had probably come from ASIO but there is no record of this. The statement 'transferred to Guantanamo Bay via Afghanistan' seems to imply a greater depth of knowledge about Mr Habib's impending move than the relevant officials in ASIO, PM&C or DFAT can currently recall having at that time.

There does not seem to have been any further communication of this information within government over the next ten days, nor does any action seem to have been taken by any Australian government official in that period to try to influence the position of other foreign governments on this matter.

Some eleven days later, on 16 April 2002, Australia was advised that Mr Habib was being held by US forces at Bagram Air Force Base in Afghanistan.

Were Australian officials involved in any mistreatment of Mr Habib in Egypt?

In evidence given to this inquiry, statements provided to the courts and in published material, Mr Habib has made many statements about his alleged mistreatment in Egypt. While this inquiry has not addressed Mr Habib's allegations of mistreatment by Egyptian officials, I have found no evidence that any Australian official mistreated Mr Habib or was complicit in any mistreatment of Mr Habib while he was in Egypt.

I have had regard to the written material referred to me by Mr Habib as well as to numerous contemporaneous records. I have interviewed Mr Habib under oath and have also interviewed relevant Australian officials under oath. Based on this evidence, I am satisfied that no Australian official:

- accompanied Mr Habib on an aircraft from Pakistan to Egypt
- knew where Mr Habib was detained
- was present at his place of detention in Egypt
- was present during his interrogations in Egypt.

In particular, there was no evidence that Mr Habib was ever seen by any officers from the Australian Embassy in Cairo, or persons identified by Mr Habib as ASIO officers named 'Stewart'/'Stuart' or 'David'.

In the terms of my inquiry I do not need to reach any conclusion as to why Mr Habib made these allegations. One explanation, albeit unsupported by any evidence, is that a foreign official may have posed as an Australian in order to distress Mr Habib and make him believe that the Australian Government had abandoned him. It is also possible, given the very difficult circumstances of his detention, that Mr Habib was confused and his recollection of events is unclear.

Part 6 ♦ Bagram and Guantanamo Bay

Mr Habib's detention in Bagram, Afghanistan

On 17 April 2002, an Australian military liaison officer sent a report back to Australia which advised that Mr Habib was being held by US forces at a US airbase in the Afghan city of Bagram.

Australian Defence Headquarters passed this information to the Attorney-General's Department (AGD), which subsequently sent a copy by facsimile to the Department of Foreign Affairs and Trade (DFAT) and the Australian Security Intelligence Organisation's (ASIO's) Director-General of Security, Mr Dennis Richardson.

On the same day, the Department of the Prime Minister and Cabinet (PM&C) briefed Mr John Howard, the then Prime Minister, that Mr Habib was in US custody in Afghanistan. The Prime Minister asked that Mr Simon Crean, the then Leader of the Opposition, also be briefed on the issue.

DFAT passed information on these developments to several other Australian Government ministers and senior officials by cable on 18 April 2002.

As outlined in Part 5 of this report, the Australian Government had become aware, as early as 5 April 2002, that there was a possibility that Mr Habib may be transferred from Egypt to Afghanistan. But how Mr Habib *actually* came to be in US custody at the Bagram airbase is still not known by the Australian Government, despite enquiries by Australian officials both at the time of Mr Habib's arrival at the airbase, and since.

In his 17 April 2002 report, the Australian military officer said that when he asked how long Mr Habib had been in US custody, he had been advised that 'he had been floating around for a while' but there was no indication, at that stage, as to whether he would be transported to Guantanamo Bay.

The faxed copy of the report received by Mr Richardson from AGD noted that:

> Defence is concerned that the correct Australian authorities are not aware of this latest development. They have provided the attached [report] to DFAT and I have undertaken to make sure that you see a copy.

Mr Richardson made several penscript annotations on the fax, listing a number of potential options for the Australian Government in approaching the US Government about Mr Habib's detention. More specifically, Mr Richardson noted that the Australian Government needed to discuss with the US the background to Mr Habib's case and express the Australian Government's views in relation to his detention. Mr Richardson noted that any message conveyed to US authorities should include that:

- US authorities knew as much about Mr Habib as Australian government agencies
- there was little value in Mr Habib being sent to Guantanamo Bay
- the preference would be to send Mr Habib back to Australia
- Mr Habib was being investigated by the Australian Federal Police (AFP), but that it was unlikely he would face charges.

Mr Richardson also noted that Mrs Habib needed to be informed and that once a decision had been made on Australia's preference, a press release should be issued.

Mr Richardson gave evidence to the inquiry that his annotations to the faxed advice represented 'what I believe we ought to be saying and doing'. Mr Richardson was unable to recall to whom he communicated those points, but advised that either he personally, or someone from his office, would have advised AGD and DFAT.

However, there is no contemporaneous documentation which indicates that Mr Richardson's views on what the Australian Government should be doing were, in fact, communicated outside of ASIO to any other Australian government agency.

The Australian Embassy in Washington had contacted US officials on 17 April 2002 to request early access to Mr Habib while he was detained in Afghanistan for law enforcement, intelligence and welfare purposes. The embassy was subsequently advised that:

- No specific information could be provided about US intentions regarding Mr Habib's detention, but it was likely that he would be transferred to Guantanamo Bay.
- Australia's request for early access to Mr Habib would be advanced through the US system.
- A visit by Australian officials might be possible in early May 2002.
- Further information would be provided when it became available.

On 18 April 2002, DFAT and AGD co-authored a cable to the Australian Embassy in Washington advising that Canberra did not know how Mr Habib had come to be back in Afghanistan. The cable requested that the embassy convey the following points to the US Department of State:

- Australian authorities understood that US agencies were fully aware of Mr Habib's background and circumstances.
- Australian authorities understood that Mr Habib was not captured while engaging in armed combat.

DFAT also requested that the embassy approach the US for further information on its future intentions regarding Mr Habib, how he came to be in US custody, the basis for his detention, the status which the US intended to accord him and to request early access to him for law enforcement, intelligence and welfare purposes. DFAT and AGD advised the embassy that:

> From our perspective, there would appear to be three options:
>
> (a) continue to detain Habib at Bagram;
>
> (b) transfer Habib to Camp X-Ray, Guantanamo Bay;
>
> (c) return him to Australia.
>
> We would be interested to know whether the U.S. had in mind any other options, and whether the U.S. had developed any preference for a particular course of action in the near future.

With reference to option (c) above, the embassy was requested to advise the US that in the event that Mr Habib was returned to Australia, 'he could not be detained, nor could he be prosecuted'.

The 18 April cable did not, however, indicate that the Australian Government had a preferred course of action; nor did it indicate that any Australian government agency expected to be consulted prior to the US making a decision about Mr Habib's ongoing detention; nor that the Australian Government had any intention to communicate a preferred course of action to the US at a later stage.

On 19 April 2002, US officials acknowledged Australia's request for access to Mr Habib.

On 23 April 2002, US authorities confirmed Mr Habib would be likely to be transferred to Guantanamo Bay 'shortly' and that Australia would be given notice of the transfer dates. US officials advised that they had no reason to believe that Mr Habib was otherwise than in good health, as they would have been informed if there had been medical problems, but no advice to that effect had been received.

Did Australian government agencies approach the US effectively?

I found no evidence during the course of this inquiry, including from witnesses, to indicate that a whole-of-government policy position was ever developed on the best way to approach the US Government about Mr Habib's detention in Afghanistan, or what Australia's preferred course of action should be.

As noted in Part 5 of this report, ASIO considered that the majority of intelligence questions about Mr Habib were satisfactorily resolved by March 2002 and the conduct of security intelligence interviews no longer needed to be accorded the highest priority; however, it does not appear that ASIO communicated this view to DFAT. Throughout April 2002 (and for some time thereafter) senior officers in DFAT still believed that Mr Habib's status had not changed, and that security considerations should take precedence over consular or welfare concerns.

In evidence given to the inquiry, Mr Richardson was critical of DFAT for not expressly tasking its embassy in Washington to advise the US Government that Australia's preference was for Mr Habib to return to Australia. Mr Richardson said he did not recall ASIO being consulted prior to the co-authored DFAT/AGD cable being sent to the Australian Embassy in Washington on 18 April 2002, but added that he did not necessarily have such an expectation as the matter was not a security issue.

On 23 April 2002, the then Deputy Secretary of DFAT, Dr Alan Thomas, was briefed by his Department on the actions that DFAT was taking to clarify the circumstances surrounding Mr Habib's detention in Afghanistan. The brief proposed:

> Because of the highly unusual nature of Habib's current circumstances, and the history of the Department's handling of this case since October 2001, we propose to convey the following points to the US as soon as possible:
>
> a) Habib is an Australian citizen detained overseas without charge, and the Government therefore has a responsibility to determine the circumstances of his detention and assess his welfare.
>
> b) The Australian Government requests urgent advice regarding the circumstances of Habib's detention, and on his status with US authorities.
>
> c) The Australian Government requests any urgent advice on any charges that are likely to be laid against Habib, or any information on the activities that he is alleged to have been involved in.

d) The Australian Government also requests urgent welfare access to Habib, and advice on whether he will remain in Afghanistan or be transferred to Guantanamo Bay.

e) The Australian Government would like to convey a request for access to Habib by a lawyer claiming to act for Habib and his family (Mr Stephen Hopper, of Sandroussi and Associates).

…

the request for access to Habib for consular purposes should assist DFAT in being seen to have discharged its consular responsibilities with regard to Habib's detention.

However, Dr Thomas responded that:

> Security considerations override everything else in this case. Whatever Habib's original 'consular' status, it has been overtaken by his current situation and detention by the United States on suspicion of al Qa'ida links.

As late as 3 May 2002 (the same day that Mr Habib was transferred from Afghanistan to Guantanamo Bay) the then Attorney-General, Mr Daryl Williams, and the Australian Ambassador to the US, Mr Michael Thawley, had discussions with senior US officials about the threat posed by Mr Habib to the US and its allies. The US confirmed that Mr Habib had been transferred to US military control in April 2002 for debriefing on his alleged terrorist connection and knowledge of future threats. However, neither the Attorney-General nor the Australian Ambassador to the US appear to have been briefed by ASIO on their assessment that Mr Habib had *not* been involved in planning for future terrorist attacks.

While I cannot conclude that any representations made to the US on this point would have been successful, or would have resulted in Mr Habib being returned to Australia, I believe that a lack of detailed briefing on this critical aspect (this is, the fundamental rationale for Mr Habib being detained) would have affected the Attorney-General's considerations about what representations should be made to the US concerning Mr Habib's detention or release.

Information released to the Habib family and to the public

On 18 April 2002, a senior officer from the DFAT Consular Operations Section in Canberra contacted Mrs Maha Habib to advise her that Mr Habib was in US custody in Afghanistan and that he was 'reported to be in good health' (as this information had been included in the report received from Australia's military liaison officer).

Mrs Habib was advised that 'it is alleged that Mamdouh had undertaken terrorist training with al Qa'ida in Afghanistan', and that the Australian Government would issue a press release that day (a copy of which was provided to Mrs Habib). On 18 April 2002, a joint news release by the Attorney-General and the Minister for Foreign Affairs announced Mr Habib's detention by the US in Afghanistan. It noted:

> Mr Habib was arrested in Pakistan in early October. We believe he was subsequently moved to Egypt. Australian officials were not given access to Mr Habib in Egypt. The Australian Government has requested early access to Mr Habib for law enforcement, intelligence and welfare purposes.

On 22 April 2002, the Australian Government received a letter from Mr Stephen Hopper of Sandroussi and Associates, requesting that Mr Hopper be granted access to Mr Habib for the purposes of a legal visit and to pass on correspondence from Mr Habib's family members. It

was agreed at the Interdepartmental Committee (IDC) held on 23 April 2002 that the Secretary of AGD should be the contact point for communication between the Government and Mr Habib's lawyer. The request for access was conveyed by DFAT to the Australian Embassy in Washington later that day.

In a cable dated 23 April 2002, the embassy advised Canberra that US authorities had rejected the request for legal access to Mr Habib at either Bagram or at Guantanamo Bay. The following day, Mr Robert Cornall, the then Secretary of AGD, replied to Mr Hopper's letter, advising:

> I acknowledge your letter dated 22 April 2002 addressed to the Attorney-General. I note you have forwarded a copy of that letter to the Prime Minister, the Minister for Foreign Affairs and the Minister for Defence. The Attorney has asked that I respond on their behalf.
>
> As Mr Habib is currently being detained by United States authorities, some of the issues you have raised are matters for the United States Government.
>
> We acknowledge Mr Habib is an Australian citizen. I understand the Egyptian authorities recognise Mr Habib as an Egyptian citizen.
>
> Mr Habib is the subject of ongoing investigations by Australian authorities. It is, therefore, not appropriate for me to comment on whether he may have breached Australian law.
>
> It is the responsibility of the US and Pakistan authorities to decide whether Mr Habib had committed an offence against the law of the United States or Pakistan.
>
> Australian law enforcement and intelligence authorities visited Mr Habib while he was in detention in Pakistan. We have requested and expect to have further access to Mr Habib while he remains in US custody.
>
> The timing of the access visit and the composition of the visiting team will be determined by the US authorities.

Visit by the Australian Attorney-General to the US

On 1 May 2002, the Australian Attorney-General met with US officials to discuss the detention of Mr Habib. The US formally advised that because Mr Habib had not yet been charged with an offence, he was not entitled to legal representation.

On 2 May 2002, the Australian Embassy in Washington was advised that Mr Habib was likely to be transferred to Guantanamo Bay the next day. US officials would grant access to Mr Habib in the week beginning Monday 13 May 2002 as part of a previously scheduled visit by an Australian team.

On 3 May 2002, DFAT Canberra provided written guidance to Ms R, the DFAT officer based at the Australian Embassy in Washington who was to be part of the Australian delegation to visit Mr Habib, and included a set of questions to address the welfare aspects of the visit. In addition to the inclusion of a list of generic questions DFAT normally covered when assessing a detainee's welfare, Ms R was also asked to make enquiries as to whether Mr Habib had been diagnosed as suffering from depression, and whether he was receiving treatment.

Mr Habib's transfer to Guantanamo Bay

Mr Habib was transferred to Guantanamo Bay on a US military aircraft on 3 May 2002. The Australian Government was advised of Mr Habib's transfer on 6 May 2002. The US confirmed that Mr Habib was assessed to pose a security threat to US interests and to international peace and security, and was being detained on that basis. The US also advised that all detainees at Guantanamo Bay were being treated humanely, and representatives of the International Committee of the Red Cross (ICRC) present would be given the opportunity to visit the detainees.

On the same day, 6 May 2002, the Attorney-General issued a press release about Mr Habib's transfer and DFAT Consular Operations section in Canberra advised Mrs Habib via telephone and a follow-up fax, which read:

> Dear Maha
>
> As you requested when we spoke earlier this evening, I confirm that the Australian Government has been advised by the United States that your husband was transferred over the weekend to the Guantanamo Bay Naval Base in Cuba.
>
> The Government has been assured that Mamdouh is being treated humanely, and the International Committee of the Red Cross (ICRC) representative at Guantanamo Bay will be given the opportunity to see him.
>
> The Government has also been advised that when Australian authorities visit … Guantanamo Bay, later this month, they will also be able to see your husband.
>
> I will be in contact with you before the visit by the Australian authorities.

The basis for Mr Habib's detention

On 13 November 2001, President Bush issued an Executive Order on *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*. The order directed the US Secretary of Defense to detain and try before military commissions appointed by him, non-US citizens whom the President had 'reason to believe' were members of al-Qa'ida or had engaged in or had aided or abetted international terrorism against the US.[5]

In early 2002, the Bush Administration stated that al-Qa'ida and Taliban members who were prisoners at Guantanamo Bay would not be accorded Prisoner of War status. The captives were to be considered to be 'unlawful combatants'.[6]

While the Geneva Convention states that *if* a prisoner's status is in doubt, it must be determined by a Screening Panel, the US position appeared to have been that there was *no* doubt about the status of the individuals it had transferred to Guantanamo Bay.

After Mr Habib was taken into US custody, the US regarded him as an unlawful combatant, even though he had originally been detained in Pakistan and not on the 'battlefield' in Afghanistan.

AGD advised during the course of the inquiry that under international law a prisoner of war may be held for the duration of the conflict and at the relevant time there was an ongoing conflict in Afghanistan. AGD considered that the question was then whether Mr Habib was a

[5] G Bush, White House press release, 13 November 2001
[6] A Fleisher, White House press briefing, 28 January 2002

'combatant', which under international law would justify his ongoing detention under this principle.

At that time the Australian Government was satisfied with the US position in relation to ongoing detention until the cessation of hostilities. The Minister for Foreign Affairs, Mr Downer, commented in an Australian television interview in April 2003 with reference to Mr Habib and Mr David Hicks that 'these people were detained as combatants in Afghanistan, and they will be detained until the fighting in Afghanistan has finished'.[7]

It appears from a range of documents provided to the inquiry that the view of senior officers in AGD was that until the Australian detainees were transferred to Australian custody, their status was a matter for the US to determine.

Visit to Guantanamo Bay by the Australian delegation – May 2002

On 13 May 2002, an Australian team comprising Mr P (ASIO officer), Federal Agent C (AFP Federal Agent), Federal Agent D (AFP Federal Agent) and Ms R (DFAT Political Officer in Washington) arrived at Guantanamo Bay, Cuba. On arrival, the visiting team met with Guantanamo Bay officials and were advised that although a DFAT officer was allowed to be present to address welfare issues, she could not undertake an official consular visit. The Australian team reported that the US rationale for declining a consular visit was because Mr Habib was an 'unlawful combatant' captured in a wartime situation and, therefore, the conventional consular protections did not apply in his situation. The Australian team was also advised that the US could not give any assurance that Ms R (or another Australian non-intelligence or non-law enforcement officer) would be permitted future visits to cover welfare issues.

The Australian team was further advised that they were not permitted to hold discussions with US and other authorities at the facility, including the Muslim Chaplain, or to inspect the detainees' cells or the Camp hospital.

Interviews with Mr Habib by the Australian team

The visiting Australian team conducted three separate interviews with Mr Habib. The first interview was conducted on 15 May 2002 for law enforcement purposes, with the four Australian government visiting officials present. The session lasted approximately four and a half hours. ASIO conducted a second interview for intelligence purposes on the afternoon of 15 May 2002 (with the DFAT official observing) for a duration of approximately five and a half hours. ASIO questioned Mr Habib again on 16 May 2002 for intelligence purposes, with the DFAT official observing. This interview lasted two hours. In total, Mr Habib was interviewed by Australian officials for approximately twelve hours over a two day period.

Joint DFAT, AFP and ASIO interview with Mr Habib – DFAT contribution

The first interview with Mr Habib was conducted on 15 May 2002 by Ms R (DFAT), Federal Agent D and Federal Agent C (AFP), and Mr P (ASIO). The interview was taped by the AFP and

[7] ABC *Lateline,* 2 April 2003

a transcript later produced. Both the audio recording of the joint interview and the transcript of interview were reviewed as part of this inquiry.

US authorities had advised the Australian team that the 15 May 2002 interview was the first interview with Mr Habib by any person since he had arrived in Guantanamo Bay from Afghanistan eight days earlier. The team began the interview by each providing their full names and identifying the Australian government agency they were representing. The team explained that they were all representatives of the Australian Government. Review of the transcript of interview and audio recording indicated that Mr Habib understood this. Ms R then went on to explain the purpose of the visit:

> Just by way of introduction, you know you're in the custody of the US military authorities, that you were captured in a war situation and that they are now in the process of talking with you. We are part of that process of finding out more about your situation. But obviously from the Australian Government. We've come here to talk to you – obviously come a long way to talk to you. We urge you to co-operate with us and help – help us to help you today. I'll just make a couple of introductory comments and then I'll pass to my colleagues from ASIO and the AFP who have some specific questions for you.

In response to Ms R's questions concerning his health and welfare, Mr Habib said he had been feeling 'very ill'. The questions that followed were about his state of health, in particular since his arrival in Guantanamo Bay and generally according to the guidance that the consular section in DFAT Canberra had suggested.

Mr Habib claimed he was suffering from a broken chest bone, he had problems with his head, and fainted every hour. The team reported that they observed signs of faint bruising on the side of his head, which Mr Habib explained was a result of a fainting spell where he had fallen and knocked his head. Mr Habib said bandages on his head had been removed that morning. The team verified this with US officials, who advised that Mr Habib had been put under observation in hospital for some days until his discharge on 13 May 2002.

Mr Habib said he had suffered from depression in Pakistan, and also made a number of allegations about mistreatment while he was in detention in Egypt prior to coming into US custody in Afghanistan and Guantanamo Bay. Mr Habib said he was tortured in Egypt, including by being drugged and beaten:

> They start beating me and they bring me back after few times. I don't know, I was – my brain is – wasn't with me. I was lost all my memory. They make me feel – say – I don't know how. They brought my family, my kids in jail in Egypt. And they – I say, 'You rape my kids and my wife in front of me'. That's what they show me. I don't know I was drugged by them. Or what happened? Or sickness. I have no idea – until today I see these dream – like a true story.

US officials advised the team that after taking into account Mr Habib's medical history, medical staff at Guantanamo Bay had prescribed Mr Habib anti-depressants.

Ms R followed the discussion about Mr Habib's state of health with a short discussion concerning communication between Mr Habib and his family in Australia:

> MS R: Okay, one of the other questions I wanted to ask you is communication with your family. I just wanted to confirm that we can pass a message to your family if you want to tell us what you would like us to say to them. We have been in contact with your wife and I think colleagues here can pass on some of that if you wish.
>
> MR HABIB: What do you think I tell her?

MS R: I'm sorry?

MR HABIB: Tell her I'm alright.

MS R: Okay.

MR HABIB: I'm still surviving.

MR P (ASIO): Tell who?

MR HABIB: My wife. And I didn't do anything wrong to make them worry.

Ms R asked Mr Habib whether he had been in contact with his family since arriving at Guantanamo Bay. Mr Habib confirmed that the ICRC had assisted him to write a letter, which they advised they could pass on to his family in Australia.

Immediately following that exchange and prior to handing over to the AFP officer, the following exchange occurred:

> MS R: … Are there any other – do you have any – do you want to communicate with the Australian Government by way of message? I mean obviously you can do so with us today, that's what we're here for but ---
>
> MR HABIB: Yeah. I want to know why the government – Australia doesn't take care of me or – like Australian? Why they let them do this to me?
>
> MS R: We are here to find out more of your situation. We have been here for a few days and this is our opportunity to speak with you. So it is a chance for you today if you're feeling well enough to – to talk to us and so we would encourage you to take advantage of us being here. We're only here for a couple of days. So please think carefully about that and if you can help us help you, then we would like to do so. I am going to hand over to my colleagues now to continue; unless you have anything else you would like to say to me.
>
> MR HABIB: …I like – my case to be fair.

The totality of the welfare aspects of the team's work were reported in a cable from the Australian Embassy in Washington and in a report covering Mr Habib's welfare. The report noted generally that Mr Habib appeared to have been treated well by US military authorities and that the conditions at Camp Delta were satisfactory. Detainees had access to appropriate food, medical care and some exercise, and hygiene standards were good. Detainees had access to reading material, including the Koran, and were able to send and receive letters through the ICRC personnel located on the Base. The visiting Australian team noted that camp discipline was appropriate. The team also reported that detainees were interrogated 'regularly' by US officials (however Mr Habib had not yet been interviewed at the time the Australian team visited Guantanamo Bay).

In the Australian team's summary assessment of Mr Habib, which was supported in evidence provided to the inquiry, the team reported that:

> Mamdouh Habib arrived at Guantanamo Bay only eight days before the team met him. He is receiving medical treatment for depression – a pre-existing medical condition – and complained of being in poor health. Mr Habib seemed tired and of yellowish pallor. He had faint bruises on his head caused, he said, from a recent fall induced by fainting spells. During the early part of our initial interview, he seemed disorientated (possibly due to his medication) but later became more lucid.

The AFP reported following the interview that their assessment was that memory loss was not apparent from the interview.

What was the purpose of the AFP interview?

In evidence provided to the inquiry, the AFP advised that Mr Habib was being investigated for offences against the *Crimes (Foreign Incursions and Recruitment) Act* 1978. Broadly, the legislation prohibited incursions by a person into foreign states with the intention of engaging in hostile activities, and acts preparatory to the commission of such an offence. Contemporary documentation at the time Mr Habib was detained in Guantanamo Bay indicates that the AFP was aware that existing Australian legislation was inadequate for responding effectively to many of the counterterrorism issues raised following September 11.

Federal Agent D explained in evidence to the inquiry that the AFP was aware at the time of the interview that prosecutorial options for Mr Habib were limited. He expressed the view that it was his understanding that by the time he interviewed Mr Habib in Guantanamo Bay, the primary purpose of the visit was not to conduct a proper evidentiary interview (according to an assessment that Mr Habib might have committed a crime under Australian law). Federal Agent D told the inquiry that the purpose of the visit to Mr Habib at Guantanamo Bay was to take the opportunity to meet with him to determine whether he had committed an offence against Australian law. He explained that the AFP had approached the interview with Mr Habib:

> … with a view that we weren't convinced [he had] actually breached Australian law at that time, because of the problems with foreign incursions [legislation] and[his] activities and what [his] intent was. So it was really more information gathering at that point of time.

Requirements under Part 1C of the Crimes Act

The reason the purpose of the interview is relevant is because Part 1C of the *Crimes Act 1914* provides for certain procedures to be followed when a person suspected of having committed an offence is interviewed by the AFP (see box below).

Mr Habib was clearly in the company of an investigating official (the AFP officers), however, there appeared to be a lack of clarity on the part of the AFP about whether the interview was an attempt to conduct an evidentiary interview. Evidence provided to the inquiry suggests that the AFP had not yet formed a view as to whether there was sufficient evidence to establish that Mr Habib had committed an offence under Commonwealth law.

Notwithstanding the lack of prosecutorial options available to the AFP, the conditions under which Mr Habib was being detained by US authorities made it difficult for the AFP to meet the requirements of Part 1C in any event. Federal Agent D advised in evidence to the inquiry that the AFP was fully aware of this, and sent its officers to Guantanamo Bay knowing full well that it could not conduct an interview that complied with Part 1C.

Federal Agent D was unable to recall whether the AFP made a specific request regarding the circumstances under which any AFP interview should take place prior to his departure for Guantanamo Bay to interview Mr Habib. Federal Agent D said in relation to the requirements of Part 1C, that he would be 'shocked' if US authorities were not aware or informed of what the AFP needed to conduct a proper record of interview. Consistent with documentary evidence, Federal Agent D gave evidence to the inquiry that US authorities had made clear to Australian officials, including the AFP, that Mr Habib was not entitled to personal legal counsel, and was therefore unable to either communicate with a legal

practitioner or have a legal practitioner attend the interview conducted by the AFP on 15 May 2002.

> … the fact is … we went to Cuba knowing full well … we couldn't have a solicitor attend [and] we couldn't satisfy the [Part 1C] conditions.
>
> …
>
> The parameters [were] clear … there will be no additions to the delegation … and there won't be an opportunity for the person to contact a solicitor or have legal advice present at the time or to make phone contact …

PART 1C OF THE Crimes Act 1914

Part 1C of the Crimes Act 1914 provides rules for the way that Commonwealth offences are to be investigated by investigating officials. Such officials include the Australian Federal Police (AFP). The legislation imposes obligations on investigating officials in respect of persons who are under arrest or are a protected suspect.

The definition of protected suspect includes the following criteria:

- a person is in the company of an investigating official for the purposes of being questioned about a Commonwealth offence, *and*
- the person has not been arrested for the offence, *and*
- *one or more of the following applies:*
  - the official believes that there is sufficient evidence to establish that the person has committed the offence, *or*
  - the official would not allow the person to leave if the person wished to do so, *or*
  - the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so.

There are certain exceptions including, for example, where the official is performing functions in relation to the person's entry or exit from Australia or exercising powers to question or detain and search. If the person is remanded in custody then they cease to be a protected suspect; also if they are taking part in a covert operation in certain circumstances.

The effect of being a protected suspect is that the investigating official must, before starting to interview them:

- issue a caution to the person that they do not have to say or do anything but that anything the person does say or do may be used in evidence
- inform the person that they may communicate with a friend or relative about their whereabouts and communicate with a legal practitioner and have a legal practitioner attend the questioning.

The legislation also explicitly states that a person who is under arrest or is a protected suspect must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.

It is not an offence for an investigating official to fail to comply with the requirements of Part 1C, however such failure may affect the admissibility of any evidence obtained.

Federal Agent D explained in evidence to the inquiry that the mere fact of Mr Habib's detention, and manner in which Mr Habib was being restrained by US authorities was likely to be an issue with respect to meeting admissibility requirements for evidence that may be used to prosecute Mr Habib under Australian law:

> … the fact is, the issue of the duress was so in your face anyway and the fact that we were in Guantanamo Bay, [Mr Habib] was shackled to the floor, he was in his orange pyjamas … there was so much more bigger stuff going on there.

The AFP sought legal advice on the admissibility of the interview for evidentiary purposes from the Commonwealth Director of Public Prosecutions (CDPP) on 11 January 2005. Federal Agent D explained that the AFP had sought the CDPP advice with a view to determining whether there was any realistic opportunity of a successful prosecution. The CDPP provided advice to the AFP on 21 January 2005, which included a brief concluding comment in relation to the AFP's compliance with Part 1C of the *Crimes Act 1914*:

> [Federal Agent D] said to Habib that he was under no obligation to participate in the ROI [Record of Interview]. No caution was administered to Habib that anything he did say or do may be used in evidence. Further because of the circumstances of Habib's incarceration at Guantanamo Bay it was not possible to afford Habib with the rights afforded under section 23G of the Crimes Act 1914 – the right to communicate with a friend, relative and legal practitioner.
>
> Failure to comply with these requirements of the Crimes Act will create further difficulties in attempting to adduce into evidence the ROI.

While the AFP was conscious of its inability to conduct an evidentiary interview in accordance with the legislative requirements for the reasons discussed above, it is my view that the AFP officials nonetheless sought to the best of their ability, to conduct an evidentiary interview, without issuing a caution. Federal Agent D began the taped record of interview explaining the allegations about which he wished to question Mr Habib. The following exchange then occurs between Mr Habib and Federal Agent D:

> FA D: The other thing I want you to know is that you're under no obligation to participate in this interview. Do you understand that?
>
> MR HABIB: I been interview [*sic*] but not by ASIO.
>
> FA D: No, listen to the question.
>
> MR HABIB: Yes?
>
> FA D: You are under no obligation to participate in this interview.
>
> MR HABIB: Yeah.
>
> FA D: Do you understand that?
>
> MR HABIB: What does that mean?
>
> FA D: It means you don't have to if you don't want to.
>
> MR HABIB: I need.
>
> FA D: You want to talk about it?
>
> MR HABIB: I have nothing to hide.

While the AFP informed Mr Habib that he was not under any obligation to participate in the interview, taking into account the totality of Mr Habib's situation, this exchange would not have convinced him that he could decline to take part. Mr Habib had been transferred to Guantanamo Bay without being given any information about his situation or status, and was seeing Australian officials for the first time in over six months. He had alleged torture and other mistreatment prior to his detention by the US, and was restrained at the ankles and wrists with the restraints bolted to the floor for the duration of the interview. In my view, the mere fact of the interview taking place in all of these circumstances would have led Mr Habib to believe that he was not free to leave.

Several of the comments made to Mr Habib by the Australian team during the interview also created additional ambiguity over the voluntariness of the interview. Following the above exchange, Federal Agent D continued with the interview explaining to Mr Habib that by participating in the interview, Mr Habib could not be expected to be transferred back to Australia:

> I'm doing an assessment and I've got to ensure that you have committed an offence against Australian law. But by merely you having this interview, cannot be seen by you to being a guarantee of going back to Australia. There's a lot of steps to go along the way before you return to Australia.

However, as referenced above, Ms R commenced the interview by explaining to Mr Habib that the team had 'come a long way' to talk to Mr Habib, and urged him to ' … co-operate with us and help us to help you today'. Prior to handing over to Federal Agent D, Ms R reminded Mr Habib that the team was ' … only here for a couple of days so please think carefully about that and if you can help us help you, then we would like to do so'. Federal Agent D later explained to Mr Habib that the visiting team's role was to ' … make a judgement or an assessment of whether … any offences you've committed [are] against Australian law … [and] to conduct a record of interview with you', but that 'without that information, it's very difficult for the Australian Government to proceed any further.'

It is my view that these comments could have given Mr Habib the impression that the Australian team was there to assist him and that they required his cooperation to do so, rather than being there for the purposes of obtaining information from him (possibly even to use in prosecuting him). I note that in relation to voluntariness, the CDPP drew on comments by DFAT, AFP and ASIO officers made during the interview in considering the admissibility of the interview of 15 May 2002, and concluded that 'certain inducements were held out to Habib … to the effect that if he cooperated and participated in the record of interview it would help the Australian authorities to help him' and would 'enable discussions to take place with US authorities as to Mr Habib's treatment or fate'.

Federal Agent D's own assessment around the issue of the voluntariness – inherent in the fact of Mr Habib's situation – indicates that he was of the same view. In evidence provided to the inquiry, Federal Agent D explained that:

> To me, at that time, [I] would have probably presented enough for [Mr Habib] to say, 'this is voluntary'. However … should I have gone … that step further to clarify it and say … 'Mamdouh … I'm going to ask you some questions, you don't have to answer them, or in fact, if you want to, you can tell me to go away … you can say you don't want to participate in the interview in any way, shape or form.
>
> …

> I wouldn't have placed it within that thing of a formal caution … but I think … the substance would have been probably very similar.

I have no reason to doubt that if Mr Habib had in fact made admissions that led Federal Agent D to believe that there was sufficient evidence to establish that Mr Habib had committed an offence, he would have administered a caution in accordance with Part 1C.

Taking into account the following factors:

- the restrictions which the US placed upon any interview with Mr Habib
- the uncertainty about whether there would be another opportunity to interview him
- the need to interview Mr Habib to come to some conclusion about whether the investigation of him should continue
- Mr Habib's apparent lucidity

I have concluded that it was not unreasonable for the AFP (or the other Australian team members) to conduct the interview in the manner in which it was carried out.

While I do not consider the conduct of the interviewing AFP officers to be unreasonable in the circumstances, in my view the AFP should have more carefully considered how it might have appropriately tasked its officers to conduct an interview where it was known that Australian domestic laws could have been engaged, but the obligations imposed by these laws could not have been met. As a matter of fairness to Mr Habib, it would have been preferable to advise Mr Habib specifically that he was under no obligation to say or do anything, was not required to answer any particular question that he may not have wished to answer, and was free to terminate the interview at any time.

I note that in giving evidence to the inquiry, Federal Agent D advised that in the time since the AFP interview of Mr Habib in May 2002, the AFP had changed its practice and does not now participate in overseas interviews where the requirements of Part 1C cannot be met:

> IGIS: [regarding the] questioning of an Australian in a foreign country… are there protocols and policies [now]?
>
> FA D: There is a clear understanding that court precedents and everything shows that it is not worth our effort to go in and try and conduct interviews when you can't provide the provisions of Part 1 (C).

Was Mr Habib in a fit state to be interviewed by the AFP?

It is apparent from the report noting the team's observations of Mr Habib's welfare immediately prior to the commencement of the AFP interview on 15 May 2002 that Mr Habib was in poor health. Federal Agent D said in his evidence to the inquiry that the Australian team had decided it was appropriate for Ms R to speak with Mr Habib prior to its formal commencement, so the team could assess his welfare on the day. He noted that the Australian team had decided that it was necessary for Ms R to interview Mr Habib first in order:

> … to make observations … and to see what [Mr Habib] was thinking … [whether] there are issues in relation to how he was feeling, his physical condition, you know, it was useful for

> us to be able to understand that so we could make an assessment as well, whether he was fit and in an appropriate condition to undergo the interview.

Federal Agent D said in evidence given to the inquiry:

> … I would certainly assess from my viewpoint, whether … it was reasonable and responsible enough and appropriate enough for this person to undergo an interview.

Federal Agent D noted that he formed the view during the interview that Mr Habib's behaviour was both as a result of Mr Habib being somewhat evasive and genuine confusion:

> He varied, right throughout the whole interview, he varied from … appearing to be quite vague … and difficult and not difficult … confused maybe to times of sheer brilliance of recollection of events …
>
> … it doesn't mean that [Mr Habib] wasn't fit to do the interview, he might have been just not understanding the question. And other times I believed, I had no doubt, that he was deliberately evasive.

The ASIO officer (Mr P) who was present at the 15 May 2002 interview was asked in the course of the inquiry if Mr Habib's behaviour raised questions about his mental state in terms of his fitness to be interviewed. In reference to claims made by Mr Habib that, while in Egypt, he could hear his wife being raped in the next door room and his children screaming, Mr P noted that he did not believe that to be the case. Mr P said he thought very specifically about the state of Mr Habib's health very early on during the welfare part of the interview and that at that point he had the view that Mr Habib was 'slow and dozy' and that as a result, the team needed to consider whether to proceed with the interview. However, Mr P said that within a short time, the medication appeared to have worn off and that Mr Habib was lucid; Mr Habib did not raise the matter of his wife and children again after the first time.

Mr P has stated that he assessed Mr Habib was in a fit and proper state to be interviewed and that he saw no evidence of mistreatment. Mr P said Mr Habib appeared to be emotional, particularly when referring to his family, he appeared angry in relation to what he thought the Australian government had done, or not done, for him and uncertain in relation to what his future was and whether there was a legal process that may extricate him from his predicament. Mr P has stated that in explaining all of these matters to the team, and answering questions, Mr Habib appeared coherent.

Federal Agent C also gave evidence to the AAT in relation to the 15 May 2002 AFP interview of Mr Habib in Guantanamo Bay:

> AGS LAWYER: What can you tell the Tribunal about your awareness at the time you conducted the interview of the need to ensure that someone such as the applicant being interviewed was in a fit and proper state to be interviewed?
>
> FA C: I'm certainly also very, very mindful of the protections also in Part 1C of the Crimes Act 1914 in relation to insuring [*sic*] people are in a fit and proper state to be interview. It is my experience through my involvement in the numerous interviews that there may from time to time be [a] need to suspend an interview if a person, for example, is tired or in need of medical attendance and we …
>
> AGS LAWYER: Have you ever suspended an interview that you've conducted?
>
> FA C: Absolutely. Yes I have.
>
> AGS LAWYER: Could you tell the Tribunal the reason you suspended that interview?

FA C: There's been a number of occasions but one that springs to mind is tiredness where a person being interviewed was clearly tired and we allowed the person to sleep and then we resumed the interview. On another occasion where a person required medical assistance to insure [*sic*] that they were in a fit and proper state to be interviewed and that's occurred on a number of occasions throughout my career.

…

AGS LAWYER: Could you describe to the Tribunal any view you formed at the time about whether the applicant [Mr Habib] was in a fit and proper state to be interviewed?

FA C: Certainly. The applicant actually raised some concerns when he first entered the interview room in relation to his wellbeing. To the best of my recollection he claimed that he had recently been released from hospital on the base, that he had knocked his head and had received treatment to that. He claimed that he had, a bandage had recently been removed just prior to entering the interview room. There was certainly no physical signs of any abrasion or bruising to his body and certainly not around the head region. He was emotional and cried on one occasion, claim, he made claims of maltreatment at the hand of his captors.

AGS LAWYER: Did he make any claims of maltreatment whilst he had been at Guantanamo Bay?

FA C: No, he did not …

AGS LAWYER: Please go on … ?

FA C: … and very, very mindful of this, we, myself and [Federal Agent D] were very mindful of his state and his wellbeing and we're assessing his suitability to continue with the record of interview. However, it became quite apparent that he was quite lucid. He certainly, to me, did not appear to be suffering from tiredness, fatigue or any other issues and appeared to me at the time to be in a proper, fit state to continue the interview. He was told at the commencement that he was not required to participate if he didn't wish to. He indicated a desire to participate and we continued on that basis with an ongoing assessment of his suitability as the interview continued.

AGS LAWYER: Were you on the lookout for any physical sign that the applicant [Mr Habib] might not be in a fit and proper state to be interviewed?

FA C: Certainly, and that is standard practice with any interview.

AGS LAWYER: What might be some of the things you look for?

FA C: You would certainly look to the person's demeanour, how they're sitting, whether they're indicating any signs of tiredness, whether their speech is slurred. The applicant certainly, in my view, appeared in a position to continue the interview without any issues at all. We provided him with cigarettes during the course of the interview. He was quite obliging and it was, I didn't assess there to be any issues at all.

…

AGS LAWYER: as an interview progressed … did anything the applicant said in answer to questions asked cause you to have some doubts about whether he was in a fit and proper state to be interviewed?

FA C: No.

HIS HONOUR: What about when he was crying?

> FA C: Sir, it was, in my assessment, when we commenced the interview the applicant claimed that he had memory loss, he claimed as I said earlier maltreatment, he claimed that he was not able to recall events but as the, very early on in the interview, he in my view had quite a remarkable memory for dates, times, places and was very coherent and had no issues at all with his memory which was totally inconsistent with the picture he attempted to paint when he first entered the room, in my view.
>
> AGS LAWYER: Can you provide some examples of that?
>
> FA C: Certainly. He was able to recall even the date and time of his apprehension in Pakistan. He was, which …
>
> AGS LAWYER: By date and time, do you mean precise date and time?
>
> FA C: Absolutely, and I do recall that [Federal Agent D] even remarked on his ability to recall the exact time that he was apprehended. Similarly he was able to recall details of bank account – whilst not the number, definitely the institution that he held account with here in Australia. He recalled the ages of his children, how long he had been married for. There certainly didn't appear to me to be any issue with his memory.

While I am clearly not in a position to confirm the state of Mr Habib's health at the time of the interview, it is my view that the interviewing team's assessment of Mr Habib's state of health at the beginning of, and during the interview, was not unreasonable in the circumstances.

The ASIO intelligence interviews of Mr Habib

In addition to the ASIO officer being present for the joint interview, ASIO held separate interviews with Mr Habib for intelligence purposes on 15 May 2002 for a duration of approximately five and half hours, and again on 16 May 2002 for a duration of two hours. Ms R observed the interviews. It is unclear whether the AFP observed the ASIO interviews.

As noted above, on the first day Mr Habib was interviewed by Australian officials for a total of approximately ten hours, followed by two hours the next day, with Ms R present for all interviews. In evidence provided to the inquiry, Mr P noted that at no time did Ms R raise any concerns about the circumstances or duration of the interviews. He added that Mr Habib also did not express any concerns at any time regarding the duration of the interviews, and that the duration was not unusual in the circumstances. Specifically regarding Mr Habib's comfort and welfare, Mr P said that the Australian delegation did everything it reasonably could do. Mr P told the inquiry that the team had satisfied itself that Mr Habib understood that he could take a break from the interview at any time. The team offered Mr Habib refreshments during the interview, and he asked for and was provided with toilet breaks. Mr P said that the team had confirmed with US authorities prior to the interview that Mr Habib would not miss out on meals in the event that the interviews continued past formal meal times.

Mr P and Federal Agent D both provided evidence to the inquiry that it was their impression that Mr Habib was eager to talk with the Australian delegation, having not had contact with Australian officials since October 2001. Mr P said his impression was that Mr Habib was eager to recount his experiences and explain his actions. He said that it was his strong impression that Mr Habib wanted as much time with the Australian delegation as possible, with a view to garner the support of the team. Mr P explained that Mr Habib had willingly taken part in all interviews requested by the Australian delegation.

In hindsight, it would have been preferable for the interviews to be spread more evenly across the two days. In practical terms however, it is apparent that access to Mr Habib at Guantanamo Bay was strictly limited. Given that the purpose of the interview was partly for ASIO to assess whether Mr Habib posed a threat to security, it would have been difficult for the ASIO officer to estimate on the first day how much time would be required to complete their interview of Mr Habib.

Follow-up by DFAT after the May 2002 visit

In a press release on 14 May 2002, the Minister for Foreign Affairs and the Attorney-General stated that the purpose of the visit was to 'advance the investigation into the activities of Habib … [and] in addition [to] assess and report on [his] welfare'. The report from the visit identified a number of issues for consideration and follow up by agencies. These included:

- follow-up regarding the letter from Mr Habib to his family
- what information in relation to the visit needed to be passed to the US
- follow-up in relation to allegations made by Mr Habib during interview about his treatment while in detention in Pakistan and Egypt
- approaching the US to request a further visit by Australian authorities.

Communication with Mr Habib's family

In discussions with Mr Habib's family prior to the visit, DFAT Canberra agreed to report back on his welfare. On 23 May 2002, DFAT Canberra telephoned Mr Habib's family and Mr Habib's legal representative in Sydney, Mr Hopper, and advised that:

- the visit was primarily for law enforcement purposes, but the team was also able to assess Mr Habib's welfare
- Mr Habib was receiving treatment for a pre-existing condition
- Mr Habib had asked the team to reassure his family that he was 'alright'
- detainees appeared to be well treated
- a letter from Mr Habib to his family would be passed on
- Mr Habib was able to further send and receive letters through the ICRC.

Mr Hopper asked DFAT to pass on the message to the Australian Government that 'we still believe [Mr Habib] is innocent and much stronger representations should be made to get him out'.

DFAT provided Mrs Habib with a typed copy of the text of a letter composed by Mr Habib and a summary of the talking points that had already been provided over the phone. It was not until November of the following year that Mrs Habib next heard news from an Australian official about her husband's welfare.

Follow-up of Mr Habib's allegations of torture and mistreatment in Pakistan and Egypt

The report on Mr Habib's welfare set out the allegations by Mr Habib about his treatment while detained in Pakistan and Egypt:

- He was captured by Pakistani authorities, and blindfolded and moved to different locations several times while in the custody of Pakistani authorities.
- While in the custody of Pakistani authorities, he was blindfolded and taken to the airport in handcuffs, where he was stripped of his clothes and drugged, and taken to Egypt.
- While in the custody of the Egyptian Government, he was held in a small room for a period of six months, and tortured. The report noted that Mr Habib claimed:

  > He was tortured (water dripped on his head and he was administered electric shocks over his body). Mr Habib said he was trussed upside down and his body beaten. He said he sustained broken ribs, two broken toes and bleeding from his penis.
  >
  > The captors made him listen to noises that resembled his family and the sound of his wife being raped and his children being beaten. He said he was placed neck-high in water for extended periods of time and not allowed to sleep. After about six months, the torture stopped after a doctor told his captors that he would die.

- Shortly after being told by Egyptian captors that they now believed Mr Habib had 'not done anything wrong', he was blindfolded and taken via a taxi and put on a flight for about eight hours, where he was drugged. When he awoke his mouth was taped, and he had vomited and urinated in his clothes.

In the letter from Mr Habib to his family Mr Habib also reported, 'I've been blindfolded for eight months … '

It is not apparent that the Australian Government undertook further liaison with the US, Pakistan or Egyptian Governments at this time with respect to Mr Habib's allegations of mistreatment and torture while detained in Pakistan or Egypt.

The Australian team asked Guantanamo Bay authorities to closely monitor Mr Habib's health. However there is no evidence that DFAT made any further enquiries about his health following the May 2002 visit. There is also no evidence that DFAT sought further or increased access to Mr Habib, that DFAT had any expressed concerns for his welfare, or even that the issue of his welfare was discussed within DFAT between May 2002 and June 2003.

Request for a second visit by Australian officials to Guantanamo Bay

During the May 2002 visit, Australia was advised that if the Australian officials wished to make further visits to Guantanamo Bay, the request should be made as soon as possible. The cable noted, 'If a request were submitted in the near future, on current planning, the next visit would not be possible until August or September 2002. An alternative option might be intelligence visits which can be organised at much shorter notice'. In a meeting with the US administration in Washington on 3 June 2002, officers from the Australian Embassy advised that Australian officials might seek further visits to Guantanamo Bay for intelligence

investigations and wished to continue monitoring the welfare of Australian detainees – including possibly through future visits.

DFAT and AFP did not participate in the next three visits to Mr Habib at Guantanamo Bay. Due to a lack of contemporaneous documentation, how or why DFAT decided not to visit Mr Habib for welfare purposes is unclear.

The AFP decided, following the first interview with Mr Habib, that information on him to date suggested that he was not of law enforcement interest. Federal Agent D indicated in evidence to the inquiry that the AFP 'formally' came to this view on receiving the CDPP advice on 21 January 2005, but on concluding the interview on 15 May 2002, Federal Agent D was 'reasonably satisfied that this wasn't going anywhere real quick', and that the interview had 'corroborated [the AFP's] belief … that there was insufficient evidence to prosecute [Mr Habib] for any offences under existing legislation'. Federal Agent D explained that this conclusion had a direct effect on the AFP's level of involvement from that point on:

> … when we finished the interview with Habib, I pretty well formed the opinion … [that] the chance of getting any prosecution of this person, with the legislation we had in place and the evidence we had available, was zip, you know, there seemed very, very little prospect. So the level of engagement I had with ASIO in relation to Habib would have been reducing quite dramatically from that point, from once the [May 2002] interviews were conducted.

In a meeting on 21 June 2002 between ASIO, AFP and AGD, agencies agreed that the available evidence held by the Australian Government was insufficient to charge Mr Habib under Australian legislation. The AFP did not seek to interview Mr Habib again while he was in detention at Guantanamo Bay. The AFP continued to pass on information relevant to Mr Habib's US prosecution, including granting US intelligence authorities 'free access' to all information and evidence held by the AFP on Mr Habib.

ASIO requests a further visit

On 31 May 2002, ASIO requested a further visit to Guantanamo Bay. US approval for the visit was given on 19 July 2002. In the period between the first ASIO visit in May 2002, and the second visit by ASIO (on 13 August 2002), ASIO and the AFP continued to exchange information with US authorities concerning Mr Habib. On 26 July 2002, ASIO received reports of US interviews with Mr Habib at Guantanamo Bay on six occasions between 23 May and 21 June 2002.

Further ASIO visits to Guantanamo Bay in 2002

ASIO visited Guantanamo Bay from 12 to 16 August 2002 for the purpose of conducting intelligence interviews of Mr Habib. ASIO noted in its report following the visit that Mr Habib's knowledge of September 11 appeared to be of a generalised rather than a specific nature.

DFAT briefed the then Minister for Foreign Affairs, Mr Alexander Downer, on the ASIO visit to Guantanamo Bay on 15 August 2002, (but only in relation to the interview about to take place). ASIO advised the Minister that while the visit was being conducted for intelligence purposes, the ASIO officer would also seek to assess Mr Habib's welfare and report back to the Government accordingly.

It is unclear whether any guidance was provided to ASIO by DFAT about what was required or expected of its welfare assessment of Mr Habib. There is no contemporaneous documentation indicating that ASIO specifically briefed the Australian Embassy in Washington or DFAT Canberra on the welfare aspects of the visit. The only documented reporting concerning Mr Habib's welfare as assessed by ASIO at the August visit was in ASIO's own intelligence reporting, which noted that Mr Habib appeared well and looked as though he was being treated humanely. Mr Habib had access to medical facilities and appropriate food, and was able to practice his religion if he wished.

Media reports of self-harm and attempted suicide at Guantanamo Bay

Media reporting of self-harm by Guantanamo Bay detainees emerged during the August visit by ASIO. On 15 August 2002, DFAT Canberra advised the Australian Embassy in Washington that the offices of the Australian Minister for Foreign Affairs and the Attorney-General had been contacted by representatives of the Australian media regarding reports that approximately thirty of the detainees in Camp Delta at Guantanamo Bay had attempted suicide in preceding months. DFAT noted that the Australian media reports were based on US reporting, and went into detail on the allegedly poor conditions at Camp Delta.

DFAT Canberra requested that the embassy seek further information from US authorities on the attempted suicides, and whether the incident(s) had involved Mr Habib. The embassy reported back the next day that US authorities had rejected the media claims. Australian officials were advised that there had been a number of self-harm incidents, four of which were classified as life threatening, and therefore considered 'suicide attempts'. No information was available to Australian authorities on the nationalities of the four detainees who had attempted suicide or the nature of the incidents. US officials advised that conditions at Camp Delta were satisfactory given security considerations.

ASIO was not aware of the media coverage concerning self-harm and attempted suicide among Guantanamo Bay detainees at the time of the visit, so Mr Habib was not questioned on it at the time. Mr Habib spoke of his personal circumstances, but made no reference to self-harm. ASIO observed that Mr Habib did not have any visible marks indicating such attempts, and that while no inquiries were made, Guantanamo Bay authorities had not raised the issue of attempted self-harm. ASIO was not permitted to view Mr Habib's cell during the visit.

The August ASIO report was distributed to a number of senior Australian government officials including the Minister for Foreign Affairs, the Secretary of DFAT, a Deputy Secretary of DFAT, and the First Assistant Secretary of the International Security Division of DFAT. Apart from this report – which provided two short paragraphs relating to the health and wellbeing of Mr Habib – it does not appear that a briefing was given to the Minister for Foreign Affairs reporting on the outcomes of the visit. An internal DFAT memo from the Australian Embassy in Washington (dated 29 August 2002) indicates that ASIO was required to communicate to DFAT the outcomes of the visit directly (as opposed to through the widely distributed report).

The Australian Embassy in Washington noted in internal records shortly after the visit that as media interest had died down in Australia and the embassy had not been asked to pursue the issue with US authorities, the embassy would let the issue rest with US authorities.

ASIO visit to Mr Habib – November 2002

ASIO officers visited Guantanamo Bay for intelligence purposes for a third time from 20 to 24 November 2002 to conduct further intelligence interviews with Mr Habib. With respect to Mr Habib's welfare, ASIO reported that the visiting team did not have the opportunity to meet with medical personnel or to establish details of Mr Habib's medical treatment since the previous visit. ASIO reported that Mr Habib appeared to be in good health physically, but when asked how he was being treated, Mr Habib had replied that he was being treated 'very bad in every way, there is no humanity'. Mr Habib informed ASIO that he had declined to take anti-depressant medication because he believed US authorities were trying to drug him with 'bad medicine'. ASIO observed in the report that Mr Habib had previously been on anti-depressants for a pre-existing condition, and expressed the view that 'a failure to take the medication could lead to deterioration in his mental state'.

At this time ASIO became aware of suggestions that tactics such as 'sleep deprivation, forcing detainees to sit in uncomfortable positions that cause no harm (except discomfort), unnecessary movements around the facility and various psychological tactics to encourage detainees to speak' were used but overall their observations were that Guantanamo Bay staff appeared to treat detainees with respect and dignity.

ASIO discussed with US authorities the incidents of self-harm and attempted suicide by detainees in Camp Delta reported in the media during the previous visit. There is no contemporaneous documentation indicating how ASIO was tasked to do this, or whether the officers were provided with any guidance on how to make this assessment. ASIO reported that they were able to confirm with US authorities (but not medical personnel) that Mr Habib had not attempted self-harm.

While it is clear the ASIO reporting on the visit was distributed to senior officials in relevant Australian government agencies, there are no records indicating what additional information was passed from ASIO to DFAT relating to welfare or consular matters.

Strategy for future action

On 3 June 2002, US officials advised that legal procedures for the management of Guantanamo Bay detainees had not yet been established, but that three options remained for detainees: prosecution by military commission, prosecution under the criminal justice system or repatriation to home countries for indefinite detention.

Referring to comments made by the Australian Attorney-General in his visit to Washington during May 2002, the Australian Embassy advised US authorities that it would be extremely difficult for Australia to repatriate and detain the Australian detainees without charge. AGD prepared legal advice on 18 June 2002, confirming that there was no legal basis for indefinite detention under Australian legislation, and advised that they were not aware of any circumstances under which Australian citizens had been detained by the Australian Government during times of war.

In August 2002, the AFP communicated to relevant Australian government agencies that successful prosecution of Mr Habib under Australian legislation was unlikely. The AFP noted that it had concluded from its investigations that there was insufficient evidence to prosecute Mr Habib, and that it was now in a position to discuss with other agencies how best this information could be communicated to US authorities. The AFP recommended however that the formal notification to the US wait until the Australian government was in a position to deal with all the issues concerning Australian detainees being held at Guantanamo Bay at the same time.

The question of the Australian Government's preparedness to repatriate and hold detainees until the end of hostilities was raised again formally by the US on 1 August 2002. During August 2002 AGD, in consultation with PM&C, DFAT, Defence, ASIO and the AFP, developed a draft Ministerial Submission to the Attorney-General setting out a Government strategy for future action in relation to Australian detainees at Guantanamo Bay. It is not clear if that draft document was ever submitted to the Attorney-General. Recommendations were highly contingent on the US position in relation to the Australian detainees, but noted in the event that the US did not intend to prosecute Mr Habib, a request should be made to repatriate him while making clear to the US that the Australian government could not detain Mr Habib without charge for the duration of the hostilities and that Mr Habib would walk free, subject to any administrative or other conditions the Australian government could impose under Australian law.

The next documented consideration by Australian government agencies concerning Australian Guantanamo Bay detainees was at the regular IDC with representatives from ASIO, the AFP, AGD, PM&C, DFAT and Defence held on 30 October 2002. Records of the agenda or minutes of this IDC produced to the inquiry were patchy and it is not evident they were produced routinely; however, a meeting record from an attending AGD representative indicated that agencies did not raise or discuss any issues specifically in relation to Mr Habib.

On 18 November 2002, the AFP briefed the Minister for Justice and Customs, advising that the AFP could not charge Mr Habib with any offences under Australian law, and that the investigation had been concluded.

By the end of November 2002, Australian officials reported there had been no significant developments in US policy on the management of detainees, but that the US continued to express a strong preference for the Australian Government to repatriate and hold in custody Australian detainees until the cessation of hostilities. Australian officials were advised that this request had been made of other allies, who the embassy understood had taken a similar position to the Australian Government on the issue to date.

On 26 November 2002, the Attorney-General formally advised US authorities that there was insufficient evidence to enable the prosecution of Mr Habib under Australian law to date. The Attorney-General advised that information available to the Australian government suggested that Mr Habib did not have unique knowledge of the terrorist attacks of 11 September 2001. The Attorney said that it did not appear to be possible to repatriate Mr Habib back to Australia to prosecute him, and that if the Australian government tried to do so, Mr Habib could be expected to be released without charge.

The Attorney-General also advised that the Australian Government could see the reasons for the approach being taken by the US to the management of the detainees. He noted the situation was accepted for the most part by mainstream Australia.

No further representations in relation to Mr Habib's case were made by the Australian Government in respect of Mr Habib's ongoing detention until the Attorney-General met with senior US officials five months later on 30 April 2003 and again on 7 May 2003. The Attorney-General discussed the mounting media pressure in relation to the Australian detainees, and advised that the Australian Government wished to resolve matters expeditiously. The Attorney-General was advised that the case against Mr Habib was still under consideration by US authorities. At this stage, it is not apparent that Australian officials requested further information concerning the resolution of Mr Habib's case, including expected timeframes.

The fourth ASIO visit to Guantanamo Bay – May 2003

ASIO made a fourth visit to Guantanamo Bay from 26 to 30 May 2003. It reported that no further intelligence concerning Mr Habib's knowledge of the September 11 attacks was obtained through the interview.

On 17 June 2003, ASIO published a routine intelligence report for broad distribution to senior government officials that included some reporting on the welfare of Mr Habib. ASIO reported that it sought to view detainee accommodation during the visit, but as with previous visits, US authorities had declined the request. ASIO reported that Mr Habib appeared to be lean and healthy. Mr Habib reported suffering from some physical conditions, but had told ASIO that he had rejected medical attention because he did not trust US officials. ASIO noted internally that it had come to their attention during the visit that Mr Habib had been placed on 'self harm watch', however, this was not reported in ASIO's intelligence report.

No records were produced to the inquiry to indicate that this information was shared with government agencies at the established IDC, or that Mrs Habib was given any information about Mr Habib's circumstances or the observed state of his health or welfare after the ASIO visits of August and November 2002, or May 2003.

In June 2003, the then Director-General of Security had, reportedly, taken exception to evidence given by DFAT to a parliamentary committee that the US did not permit consular access to the Australian detainees at Guantanamo Bay. Mr Richardson told the Committee that if the Australian Government wanted welfare visits, it could have had them.

The then Secretary of DFAT, Dr Ashton Calvert, had become 'exercised' about the issue and had instructed that research be undertaken on the history of welfare visits to Guantanamo Bay. The Australian Embassy in Washington advised DFAT Canberra that based on the embassy's understanding:

- The US had a ban on consular visits.
- Australia had made one formal request for an officer to visit Guantanamo Bay to check on the welfare of the detainees (the May 2002 visit).
- Canberra (DFAT) had not instructed the Australian Embassy in Washington to make any formal requests for access for welfare visits since that time.
- ASIO had visited Mr Habib and had been able to observe the welfare of the detainees, although the embassy was not aware whether ASIO had reported

formally on this on return to Australia. The embassy had sought to be debriefed after those visits.

The embassy had been aware of the most recent ASIO visit and was surprised to find that DFAT Canberra were not similarly aware, noting the established IDC on detainee issues. The embassy strongly recommended to DFAT Canberra that, based on the latest ASIO debrief, DFAT should send someone to Guantanamo Bay to check on the welfare of the Australian detainees. The embassy advised that a broader intelligence or law enforcement visit could include a consular officer from the embassy.

On 25 June 2003, DFAT Canberra told the Australian Embassy in Washington that ministers were concerned by recent reports indicating that Mr Habib may have health problems, and requested that the embassy seek approval from US authorities for a welfare visit.

The Australian Embassy in Washington advised on 11 July 2003 that US authorities had confirmed there was a prohibition on 'purely welfare visits' and that the Australian request for a welfare visit to Mr Habib would not be accepted.

Did DFAT appropriately pursue welfare access to Mr Habib during this period?

The June 2003 request for a welfare visit was the first time DFAT had actively pursued welfare access since May 2002. For over twelve months, DFAT took no formal steps to seek welfare access to Mr Habib and had relied on the reported observations of ASIO. This was, in my view, unsatisfactory.

The catalyst for DFAT deciding to pursue welfare access appears to have been the criticism of the Department by Mr Richardson, in his capacity as Director-General of Security, to the parliamentary committee. Australian officials also became aware that the UK had successfully inserted an officer into its intelligence visits to make welfare observations in this period.

In my view, DFAT should have taken a more proactive approach to pursuing welfare visits to Mr Habib. There is no indication that ASIO was formally 'tasked' by DFAT to perform a welfare role, or that ASIO was given any guidance to carry out this role. It also appears that while DFAT officers in the Australian Embassy in Washington were receiving debriefings directly from ASIO following their visits, this information was not also communicated to DFAT Canberra. If information was being shared by ASIO or DFAT with other Australian government agencies as part of the IDC (and there is little evidence that it was), this should have been documented.

There is no evidence to indicate that any Australian government agency communicated with Mrs Habib advising her that visits to Mr Habib had taken place, or to inform her of the state of Mr Habib's health and welfare for a period of 18 months.

Progressing a welfare visit – September 2003

On 22 July 2003, Mr Chris Ellison, the then Minister for Justice and Customs, visited Washington to discuss detainee issues and the proposed military commission process with US officials. The Minister reinforced the Australian Government's request to visit Mr Habib, with an embassy official as part of the team to check on the welfare of Mr Habib. US authorities confirmed the prohibition on a purely consular visit, but accepted the proposal

that an Australian intelligence team accompanied by an embassy official could visit Mr Habib.

The records do not indicate any further action was taken to pursue the promised access until the beginning of September 2003.

In early September 2003, DFAT Canberra indicated to the embassy that it should again approach US authorities to request a visit by an Australian delegation, including an experienced DFAT officer. The embassy submitted an application to US authorities to visit Mr Habib. DFAT Canberra advised that it was preferable for the Australian Consul General from the Washington embassy to visit Mr Habib, but agreed that if this was not acceptable to the US then a political officer could attend to carry out the welfare role.

The US declined Australia's request on 15 September 2003, stating that until Mr Habib's status changed to being designated as eligible for a military commission trial, a visit would not be appropriate unless it was purely for law enforcement purposes. This response was contrary to that given to Mr Ellison's delegation in July 2003. Ambassador Thawley pressed US officials to consider the matter and was subsequently informed that US authorities were to reconsider the request.

Media reporting of allegations of torture adds urgency

By early October 2003, the Australian media was reporting allegations by an Australian lawyer working on cases of torture of Guantanamo Bay detainees. The embassy was asked to seek US views on the reports, and to again press US authorities for welfare access.

The US advised again that only intelligence or law enforcement officials could visit Mr Habib and only for those purposes. DFAT Canberra immediately advised the embassy to again pursue the issue of a DFAT officer being included in any delegation to visit the Australian Guantanamo Bay detainees. Australian embassy officials made further representations to US officials, including noting that the sensitivity of the issue had caused the Australian Ambassador to the US in Washington to raise the issue with the White House.

The US advised that if the Australian Government nominated a political officer similar to the first visit by Australian officials to Guantanamo Bay in May 2002, the US would reconsider the inclusion of an additional Australian official to undertake an informal welfare role. A visit was subsequently scheduled for 4 November 2003 and DFAT aimed to inform Mr Habib's family of his welfare as soon as possible after the visit.

ASIO and DFAT visit – November 2003

AGD arranged for Mr Habib's family to provide letters to the visiting Australian team to deliver to Mr Habib. As noted later in this report, it is not clear why AGD was tasked with this responsibility rather than DFAT. The embassy was asked to seek a briefing from US authorities on the physical and mental health of Mr Habib in the period since he had been in US custody.

The team that visited both detainees in Guantanamo Bay comprised an ASIO officer and the Washington-based DFAT political officer, Ms Q. The team interviewed Mr Habib on 5 November 2003 from 10.50 am to 11.45 am.

ASIO and DFAT reports of the visit

Following the visit, ASIO reported internally that although the visit was for intelligence purposes, given Mr Habib's state of mind and apparent unwillingness to volunteer information relevant to security, welfare issues dominated the meeting.

Base medical staff advised the Australian team that Mr Habib was healthy, apart from suffering from some treatable medical conditions. Mr Habib had been seen by staff several times for depressive symptoms, but ASIO was advised by US officials that he was not being treated with medication because it was deemed by Guantanamo Bay medical staff to be unnecessary.

The team reviewed written summaries of Mr Habib's medical history which stated that he had a history of depressive illness, and recorded several instances of self-harm while in detention at Guantanamo Bay. He had undergone a twenty-nine-day hunger strike in July of that year and had subsequently been hospitalised for ten days where he had received treatment for malnutrition and dehydration.

The ASIO internal report noted that Mr Habib appeared to be strong in a physical sense, but less so psychologically, judging that Mr Habib was continuing to deteriorate rapidly in a psychological sense. ASIO observed that Mr Habib had displayed paranoid tendencies, including claiming his family was dead and that US authorities wanted to poison him.

The DFAT report made no assessment of his mental health. The report noted that:

> [Mr Habib] claimed to have been tortured and beaten, including in the hospital. When asked to be specific about the kind of torture, he said that he had to wait in rooms that were too cold (from air-conditioning) for non-specific periods of time before being moved around; and in effect, described his current general circumstance as torture. He also said that he was constantly being given injections. When asked the purpose of the injections, he said he was being injected every three months. He said it was unclear why, but said the doctors claimed it was for flu or TB, 'I don't know'. He said he was refusing medication because he did not trust the doctors.
>
> Mr Habib said he had undertaken a hunger-strike (but could not remember when) for 45 days, the last 15 of which were in hospital.
>
> Mr Habib complained that he only had one blanket and no socks. He was suffering from skin conditions because of the dirty showers.
>
> …
>
> Mr Habib also referred to hurting his head in the past, which he said the guards told him was from a fall. When asked where he had been hurt, he could not remember which part of his head had been hurt and had bled.

Mr Habib was advised of the letter from his family. He said that he had been told that his family had been killed. He did not want to talk about his personal welfare and general conditions unless directly questioned.

Following the visit, Mr Robert Cornall, the then Secretary of AGD, informed Mrs Habib via a telephone call and follow-up letter that Mr Habib 'appears to be in good physical condition', that he had in the past been treated for depression but he was not currently on medication, and that her husband had been given her letter.

This was an incomplete report of the information based on the DFAT cable report which had been sent to the secretaries of relevant departments, including AGD. While AGD was provided with the cable, there is no evidence that the view ASIO had formed – that Mr Habib's mental state was deteriorating rapidly – had been communicated outside of ASIO. ASIO expressed the view in the course of the inquiry that it was the role of the DFAT officer present during the visit to ensure that welfare observations were accurately recorded and passed to AGD.

In information provided during the course of the inquiry, Mr Cornall noted that the 5 November 2003 visit was the fifth visit Australian authorities had made to Mr Habib for intelligence or law enforcement purposes. While the visit was not for welfare purposes, the US had provided some information to Australian officials in relation to Mr Habib's welfare. Mr Cornall noted that AGD had obtained clearance from DFAT to provide Mrs Habib with information concerning her husband's welfare. AGD considered that this information was sufficient for the Department's purpose, namely to advise Mrs Habib about her husband's present health and confirm her letter had been delivered to him. AGD also noted that the Department was not in a position to pass on to Mrs Habib information contained in the classified DFAT cable, or to release restricted information provided by the US Government which AGD consider may have affected access to the Australian detainees.

In my view, the Australian Government was obliged to give Mrs Habib as complete a picture as possible about Mr Habib's condition and situation, particularly given the long period during which she had received no news. As much of the relevant information as possible should have been declassified.

US–Australia discussions on the military commission process

Discussions between Australia and the US concerning the procedures which might apply to any trial by military commission continued during this period. As far as this process related specifically to Mr Habib, the formal US position was that Mr Habib was an enemy combatant who was being properly held and could be detained for the duration of the hostilities. In November 2003, Australia and the US reached agreement on the military commission process that would apply in the case of the Australian detainees held at Guantanamo Bay.

In January 2004, the Attorney-General was advised that Mr Habib's name was likely to be on a list of detainees to be sent to the President in the following weeks for trial by military commission. The assurance that Mr Habib's designation was imminent was given to Australian officials on numerous further occasions (for example on 25 February, 15 April, 7, 18 and 19 May 2003; and to the Australian Ambassador on 10, 19 and 20 May 2003) in response to embassy representations that the Australian Government wanted cases involving Australian detainees dealt with expeditiously.

Request by Mr Hopper for mental health examination of Mr Habib

On 23 January 2004, Mr Habib's Australian lawyer, Mr Stephen Hopper, wrote to the Secretary of AGD expressing concern following his receipt of information indicating that Mr Habib's mental health had deteriorated significantly. Mr Hopper sought, as a matter of urgency, for the Australian Government to formally apply to the US Government to commission an appropriately qualified independent medical practitioner to conduct a

thorough examination of Mr Habib's mental health, and provide a report to the Australian Government and to Mr Hopper's office. Mr Ian Carnell, the then Acting Secretary of AGD responded to Mr Hopper with advice that the Australian Government had not received the information referred to by Mr Hopper. He further advised that the Australian Government was not prepared to approach US authorities without further particulars.

The state of knowledge of the Australian Government as articulated by the then Acting Secretary of AGD was incomplete. The ASIO intelligence report of June 2003 (which had been sent to the office of the Secretary of AGD) had stated that Mr Habib had attempted self-harm on two occasions. ASIO had reported, at least internally, following the November 2003 visit that Mr Habib was deteriorating psychologically. As discussed above however, the ASIO intelligence report and DFAT cable covering the November 2003 visit did not refer to mental health concerns. It is unfortunate that the information known within ASIO and DFAT was not reflected in AGD's response to Mr Hopper's concerns.

AGD advised during the course of the inquiry that all relevant advice should be expected to be contained in the relevant cable, and it would have been irregular for AGD to double check DFAT's advice on consular matters with a separate agency (in this case, ASIO) which was not otherwise responsible for consular matters. AGD also noted that Mr Hopper's concerns were related to Mr Habib's then *current* health, and the cable did not suggest there were continuing issues. AGD advised that Australian government officials had already taken the precaution of ensuring Mr Habib had been the subject of a medical examination. AGD noted that if Mr Hopper had provided additional information, there may have been a basis for AGD to request that DFAT make further enquiries in line with Mr Hopper's request.

Mr Hopper wrote asking for further information about the facilities available in respect of mental health treatment at Guantanamo Bay on 21 February 2004. The Secretary of AGD responded on 25 February 2004 that Australian officials had reported following their visit in November 2003 that 'competent physical and mental health personnel and facilities are available for both detainees to meet any needs that arise'. The Secretary also advised:

> The behavioural health service is composed of a full-time psychiatrist and psychologist, psychiatric nurses and psychiatric technicians.
>
> In addition to the behavioural health service, detainees also have access to a hospital inside Camp Delta. US authorities report: 'The hospital is comparable to a full-service medical facility used by US military forces when deployed anywhere in the world, the state-of-the-art equipment and professional medical staff.'

The only personal information provided by the Secretary in relation to Mr Habib's state of health was that Mr Habib had previously been visited by Camp Delta's behavioural health service for depression, and that if mental health professionals considered it necessary, detainees would be provided with medication and treatment.

Welfare-only visits commence – February 2004

On 4 February 2004, the Consul General from the Australian Embassy in Washington visited Mr Habib in Guantanamo Bay in the company of US officials. This was the first of six visits by the Consul General. No evidence was produced to the inquiry to explain why Australian officials were permitted to conduct a welfare-only visit at this stage when previously only law-enforcement and intelligence visits had been permitted.

The visit was held in an interview room, lasted 30 minutes and Mr Habib was shackled at his hands and feet throughout. The report of this visit notes that Mr Habib was not very communicative, but he claimed that he had been tortured, beaten and buried in the ground without elaborating further when asked. Mr Habib complained about the camp food and the limited exercise time. He said that his family was dead, although he acknowledged that he had received a letter from his wife.

There are no records to indicate that Mrs Habib was informed of the outcome of this visit. Mr Hopper wrote to the Secretary of AGD on 20 February 2004 advising that journalists had told him that Mr Habib would be visited by Australian officials. The response was that the visit had already occurred on 4 February 2004 and that Mr Habib appeared in good condition and had received a letter from his wife.

In response to questions raised at Senate Estimates hearings, the Australian Embassy in Washington was able to provide DFAT Canberra with further information on the conditions under which Mr Habib was being kept, including his cell size and access to exercise facilities. Although not explicitly stated at the time, it seems that the information must have been obtained from the US authorities as none of the Australian officials interviewed for the inquiry were able to say that they, or any other Australian official, had seen Mr Habib's accommodation themselves.

Further allegations of torture surface

Until May 2004, reports of inappropriate treatment of Australian detainees at Guantanamo Bay had been vague. As discussed above, Mr Habib had complained in November 2002 that he was being treated 'very bad in every way, there is no humanity', and claimed in November 2003 that his general circumstances amounted to torture.

Allegations of torture had previously been made by the US-based Australian lawyer, Mr Richard Bourke in October 2003. The Australian Embassy in Washington was tasked to seek the views of the US authorities about this report; however there is no evidence of a US response. Mr Bourke's allegations were that detainees, generally, were being tortured, but he provided no specific information in relation to Australian detainees being held at Guantanamo Bay.

In late April 2004, overseas media began reporting alleged abuse of Iraqi detainees at Abu Ghraib prison in Baghdad by members of the US Defense Forces. The coverage included explicit photos. These revelations were followed up in Australia by media reports questioning whether the same abuses were occurring at Guantanamo Bay in relation to Australian detainees. Interrogation techniques that had reportedly been approved for use at Guantanamo Bay were referred to. Two of the repatriated UK detainees had released an open letter to President Bush in May 2004 accusing Guantanamo Bay authorities of systematic abuse.

The interrogation techniques referred to were approved by the then US Secretary of Defense in December 2002 for use at Guantanamo Bay but were mainly rescinded in January 2003, with the remaining more aggressive techniques requiring the approval of the Secretary of Defense.

The military counsel appointed for another Australian detainee held at Guantanamo Bay said that he was prohibited from speaking about concerns he had about interrogation techniques

at Guantanamo Bay. The lawyer for that detainee spoke about interrogation techniques that he claimed were abusive and a serious violation of detainees' human rights under international law.

On 11 May 2004, the then Australian Prime Minister, Mr John Howard, stated in response to a question without notice in parliament, that he had telephoned Ambassador Thawley in Washington the day before to ask him to raise the issue of the interrogation and treatment of the Australian detainees with senior US officials.

The ambassador reported that US authorities had provided an assurance that the Australian detainees had been treated humanely and would continue to be so treated. The ambassador was informed a senior official had been charged with investigating the conditions at Guantanamo Bay, and that the near finalised report of the investigation would be shared with the Australian Government. Australian officials were provided with a letter several days later reporting on detainee conditions and detainee access to medical care, and provided some general assurances about humane treatment. PM&C noted at the time that these assurances did not satisfactorily address the essence of the allegations relating to alleged interrogation techniques.

US media reports of interrogation techniques

At the same time, AGD raised concerns with the Attorney-General's office about a report in the *New York Times*.[8] US Defense Force officers who had served in Guantanamo Bay reported that interrogation methods used there included depriving detainees of sleep, leaving them in cold air-conditioned rooms, placing them in stress positions and forcing them to stand or crouch for long periods, sometimes with their arms extended until exhausted.

AGD noted that these reports and previous statements by Mr Habib corroborated one another, and placed the Australian government in a position where it could not affirm that it had no reason to suspect that Mr Habib had been mistreated. AGD expressed the view that the Australian Government should tell US authorities that it expected that Australian detainees would not be subject to such techniques.

Senior US authorities at Guantanamo Bay subsequently provided Australian officials with an 'unequivocal assurance' that Australian detainees had not been, and would not be, subject to improper interrogation methods during their detention at Guantanamo Bay.

The Consul General in Washington also consulted the ICRC about whether Mr Habib had reported improper treatment. The ICRC noted that while their discussions with detainees were privileged, it confirmed earlier advice provided in December 2003 that it had not intervened on behalf of any Australian detainee.

Second welfare visit – May 2004

The Consul General visited Mr Habib on 12 May 2004 accompanied by US officials. The Consul General was given access to Mr Habib's medical records, and noted the records did not suggest that Mr Habib had been mistreated. Medical staff confirmed that Mr Habib was

[8] Golden, T and Schmitt, E, 'General took Guantanamo Rules to Iraq for Handling Prisoners', *New York Times,* 13 May 2004

physically in good shape, but that he had stopped taking a course of medication halfway through the treatment. The doctor told the Consul General that he would not force medication on detainees unless there was a wider health risk, which was not the case.

The Consul General requested that a mental health evaluation be conducted because Mr Habib refused to communicate with him during the visit. This report when it was later provided came in the form of a letter, which read:

> Our behavioural staff evaluated Mr Habib on 13 May 2004 … Based on their observations and interactions with Mr Habib, our staff determined that he is adjusting well to his surroundings. He is not suffering from any psychosis and shows no apparent depressive traits or anxiety. No additional follow up care was recommended based on the results of the evaluation.

The Consul General requested further information from US authorities about how Mr Habib's mental health evaluation had been conducted. The office advised that the letter provided was a summary from Mr Habib's medical records, which were reviewed by a senior medical officer to ensure it correctly conveyed the information. The evaluation was conducted by two medical staff members – a Clinical Psychologist and a Board Certified Psychiatrist.

Mr Habib would not speak to the Consul General on this or subsequent welfare visits, or respond to direct questions about his treatment at the camp. Mr Habib declined to give the Consul General any messages for his family, although he received the letters that the Consul General had brought. The Consul General noted that the presence of a US uniformed officer in the room may have discouraged Mr Habib from speaking on this occasion, and suggested that this could be rectified for the next visit.

At the following visit on 30 June 2004, the Consul General was able to speak to Mr Habib without others being present in the room. However Mr Habib still refused to talk to the Consul General. The Consul General reported that from what he was able to observe, Mr Habib appeared to be in good physical health and there was no evidence of torture or abuse. US authorities assured him the treatment of the detainees was appropriate, and that the ICRC was continuing to visit to monitor camp conditions. The Consul General was advised that two guards had been court martialled for physically abusing detainees.

Australian officials were later advised that Mr Habib had told US interrogators on several occasions that he 'had issues with the Australian Government', and that this may be why he would not speak to the Consul General.

Enquiries about Mr Habib's welfare

Mr Habib's lawyer, Mr Hopper, complained to AGD on 20 May 2004 that, despite seeing media reports noting that Australian consular officials had visited Guantanamo Bay, neither he nor Mrs Habib had been informed about what had occurred on these visits. Mrs Habib had been informed that the May 2004 visit was to take place and had provided two letters from her family to be passed to Mr Habib, but had not received a report back. The then Secretary of AGD, Mr Cornall, replied that AGD had attempted to contact Mrs Habib that day unsuccessfully, but would try again. He provided a general summary of Mr Habib's physical condition, access to medical services and advised that the Consul General had asked for a psychological health evaluation. The cable from the Australian Embassy in Washington

reporting on the visit had been sent to Australian government agencies, including AGD, six days earlier on 14 May 2004.

In an email of 9 June 2004, discussing the possible release of the mental health evaluation to Mr Habib's family, DFAT provided advice that it did not have in its possession the usual consular release from Mr Habib. However, documentation indicates that a release had been signed by Mr Habib on 24 October 2001 when he was visited by an ASIO representative in Pakistan. There are no records to indicate that the mental health evaluation was passed to Mr Habib's family.

On 18 May 2004, embassy staff again raised earlier concerns about allegations of abuse by US authorities, and were again reassured that none of the offending interrogation techniques had been used on Australian detainees.

The *New York Times* article was discussed at the IDC on 18 May 2004 in Canberra. The IDC decided that Australian officials should not take action on the issue pending advice from the US about lifting restrictions on communications by detainees' defence lawyers with Australian officials. Ambassador Thawley discussed the matter with US authorities without success. The US maintained its position that defence counsel should raise any abuse allegations with the prosecution (Mr Habib had not been designated for trial at this stage).

In 20 May 2004, Canberra tasked the embassy to push US authorities to expedite the Australian detainees' cases, ascertain whether the detainees had been treated humanely while in US custody (before and at Guantanamo Bay) and to request the restrictions on lawyers speaking directly to the Australian Government be lifted. The US eventually agreed that lawyers could advise the Australian Government directly of any information regarding alleged abuses, provided such information was also made available to the US to assist the US investigation into the abuse allegations.

Australia requests an official investigation into alleged mistreatment

In May 2004, Ambassador Thawley formally requested that the US authorities conduct an official investigation into whether the treatment of Mr Habib had been humane and proper throughout his time in US custody, including during interrogations. The US advised that an investigation into all circumstances surrounding the capture and detention of detainees had been requested, for completion by mid-June 2004.

However, by mid-June, Australian officials had no information about changes in timeframes for completion, or knowledge of which US authority was conducting the investigation. On 22 June 2004, Ambassador Thawley expressed these concerns to US authorities, and emphasised the importance of any investigative body having public credibility, independence and the power to investigate thoroughly, including by interviewing detainees.

Australian officials continued to make representations to senior US authorities to expedite Mr Habib's case during this period. Ambassador Thawley also impressed on the US that the Australian Government was concerned to ensure that the legal procedures applying to the Australian detainees move forward on a fair and 'much more expeditious' basis.

ICRC comments on the treatment of detainees

On May 2004, Mr Roland Hugenne-Benjamin (the ICRC London representative) was interviewed on the ABC's *7:30 Report* program:

> **Interviewer:** The only independent eyes and ears on Camp Delta – the International Committee of the Red Cross – has already expressed serious concerns for Mamdouh Habib's mental health.
>
> **Mr Hugenne-Benjamin:** It is very difficult for any person in detention in such conditions to keep a mental balance. It is obvious that, for many of them, it is very difficult.
>
> **Interviewer:** The Red Cross says it has made expert, independent assessment of Mamdouh Habib, which it can't make public, but which the Australian Government can easily and immediately access.
>
> **Mr Hugenne-Benjamin:** It is rock solid evidence. It is not something that is written lightly or superficially. On the contrary, it is based on visits that go on for weeks at a time.

This report provoked an immediate request from DFAT Canberra to its post in Geneva, to the effect that the information the report conveyed appeared contrary to previous advice that no specific issues had been raised in relation to Australian detainees. The ICRC President subsequently confirmed 'categorically' that no individual cases had been examined, and that the ICRC had not considered or spoken to the press about Mr Habib.

Mr Habib's Sydney-based legal representative, Mr Hopper, had earlier provided information about allegations made by several repatriated UK detainees in relation to Mr Habib's treatment at Guantanamo Bay, which was passed to US authorities investigating the treatment of the Australian detainees. Mr Hopper requested an independent medical evaluation of Mr Habib, an investigation into the alleged abuses, videos of all the interrogations of Mr Habib, and Mr Habib's repatriation to Australia. In June 2004 US authorities confirmed that the information from Mr Hopper was incorporated into its investigation.

Request for access by next of kin and lawyer

On 31 May 2004 DFAT Canberra asked the Australian Embassy in Washington to request that the next of kin be permitted to visit Mr Habib.

Mr Hopper also sought to be given access to Mr Habib to obtain instructions in relation to the abuse investigation. There was disagreement between Australian government agencies about whether or not this request should be facilitated or supported. The AGD and DFAT view was that Mr Habib should have representation for this purpose, however PM&C disagreed. Australian officials subsequently passed on Mr Hopper's request to US authorities. The US advised that it would not agree to Mr Hopper seeing Mr Habib for this purpose, but that Mr Hopper could pass information directly to US authorities.

On 9 June 2004, the embassy advised Canberra that Mr Habib's designation status (as an enemy combatant) was due to begin its approval process in the following week. The embassy intended to 'keep pressing that this process be expedited' and would request that Mr Habib should be able to speak with his family shortly after designation and be given access to legal counsel. DFAT Canberra expressed concerns about the delay in Mr Habib's designation for trial and about the delay in the investigation into the allegations of mistreatment. As a result, Ambassador Thawley wrote to US authorities. On 23 June 2004,

Australia was advised that Mr Habib's designation could be complete by the end of the following week.

Third welfare visit – June 2004

On 30 June 2004, the Consul General made another welfare visit to Mr Habib at Guantanamo Bay. He took with him a letter from Mrs Habib which Mr Hopper had given to AGD.

Mr Habib again refused to talk to the Consul General, although the Consul General tried to coax him to talk on two separate occasions. The Consul General read him the gist of Mrs Habib's letter. The Consul General thought that from his body language, Mr Habib was 'taking on board' what he was being told. The Consul General did not observe any signs of torture or mistreatment. Mr Habib was shackled as usual during the interview. US camp authorities told the Consul General that while Mr Habib was fairly quiet, he conducted normal conversations with guards and other detainees. The Consul General again asked the camp authorities to try to find out why Mr Habib would not speak to him.

The Consul General also spoke to camp medical authorities, who confirmed that Mr Habib was in as good physical and mental condition as could be expected in the circumstances of his detention. He confirmed that Mr Habib was not taking any medication or receiving any medical treatment. Mr Habib had been moved to Camp 5, a new building with air-conditioning where he had his own cell. The Consul General was shown a 'typical cell'.

Mr Hopper was informed about the outcomes of this welfare visit on 8 July 2004 and was told that an officer of AGD would also contact Mrs Habib. Official records indicate that, instead, it was an officer of DFAT who contacted Mrs Habib on that day (see below).

A second investigation into alleged mistreatment

On 7 July 2004, the Australian Ambassador in Washington received a response from US authorities, advising that the current abuse investigation was an exhaustive review of all records related to the capture and detention of the Australian detainees. He was advised that, in response to Australia's concerns, an additional investigation independent of the chain of command and including interviews of each detainee would be conducted.

The second investigation would address allegations of abuse of Australian detainees and broader observations regarding Guantanamo Bay conditions. US authorities provided updates to Australian officials regarding the progress of the abuse investigations at the request of Australian officials.

Mr Habib designated as eligible for military commission

Mr Habib was designated as eligible for a military commission trial on 7 July 2004 and was thus eligible for legal representation. Mrs Habib was briefed on the June 2004 welfare visit on that same day and advised of Mr Habib's designation. Mr Hopper was advised that AGD was prepared to consider an application for a grant of legal assistance to represent Mr Habib for the purposes of the military commission trial.

On 7 July 2004, the US established a new body – the Combatant Status Review Tribunal – to review the status of non-US detainees as 'enemy combatants'. The Australian Embassy in

Washington communicated to the US Australia's preference to be informed in advance of any possible appearance by the Australian detainees before the tribunal and requested that detainees be represented by their military defence counsel.

The embassy also reiterated to US authorities Australia's expectation that Mr Habib be allowed early telephone contact with his family, prompt access to legal counsel and regular welfare visits following his designation. Although military commission rules entitled the defendant to counsel only once charged or if disposed to plea bargain, Australian officials requested that Mr Habib should have counsel appointed as soon as possible.

The Attorney-General approved the release of AFP investigative material on 26 July 2004, subject to relevant restrictions being applied. The materials were provided to US authorities on 16 August 2004.

In November 2004 in response to a Question on Notice, Mr Ruddock, the then Attorney-General, provided a response that noted that as a result of the Government's previous efforts the US had assured Australia that:

- The death penalty would not be sought in Mr Habib's case.
- The Government could make submissions to the Review Panel.
- Should Mr Habib choose to retain an Australian lawyer with appropriate security clearances as a consultant to his legal team, that person may have direct face-to-face communications with their client.
- An independent legal expert sanctioned by the Australian Government could observe the trial.

Mr Ruddock noted that matters relating to the military commission trials were the subject of extensive Government to Government discussions. His answer continued 'while recognising that military commissions are part of the United States law, we have sought to ensure that the fundamental principles of a fair trial are incorporated into the military commission process'.

Fourth welfare visit – August 2004

DFAT Canberra contacted Mrs Habib on 14 July 2004 to start making arrangements for a telephone call to Mr Habib and to seek a letter to hand over at the next welfare visit. She asked for and was given general information about his medical condition and told that Mr Habib was refusing to communicate with the Consul General.

On 3 August 2004, the Consul General visited Mr Habib. US officials sat in on the interview again (despite the Consul General's previously-expressed thought that this might inhibit Mr Habib speaking to him). Mr Habib was informed that he had been listed as eligible for trial by military commission. He was also given a letter from Mrs Habib. Mr Habib refused to talk with the Consul General that day and again when the Consul General saw him the next day.

The Consul General was informed that Mr Habib was receiving medication to treat a skin condition which was self-inflicted as a result of Mr Habib banging his head on the floor. The Consul General discussed this with base medical authorities and a psychiatrist, who said that Mr Habib had been examined by medical and psychiatric staff immediately after this incident

and was assessed as 'not at risk'. The doctor also told the Consul General that Mr Habib had complained of broken ribs but that x-rays had not confirmed this. The doctor said that when told of these results, Mr Habib had said he was confused and the problem could relate to an injury sustained in a period prior to his arrival at Guantanamo Bay.

Arrangements were made for Mr Habib to call his wife and family on 10 August 2004. The call took place as planned although it was suspended by US authorities twice due to the couple speaking Arabic, contrary to instructions given before the call. Mrs Habib was also required to give an undertaking that she would not disclose the call's content to the media; however, the media reported on the conversation Mr Habib had with both her and her son. In September 2004, Australia requested another phone call from Mr Habib to his family, which was refused by US authorities. The stated reason was that no further calls would be allowed until Mr Habib was charged. The Consul General told the inquiry:

> … we got one call – they put very stringent rules around what they could do in the call and he stepped outside that in his call, and I think they broke the call off at one stage and then re-engaged him, I think. But it didn't help, he didn't help himself to help himself, you know what I mean, he got given the parameters to deal within and he stepped outside them which makes it hard next time round to get the same facility given back.

The Consul General was informed that investigators had interviewed Mr Habib in late July 2004 as part of the second abuse investigation. The Consul General had not been informed about Mr Habib's interview. Mrs Habib was later provided with a summary of the Consul General's observations of this and the June visit.

In Canberra, it was suggested by AGD that, given that Mr Habib had expressed 'paranoia' about US officials, perhaps Australia should ask for the Consul General to see Mr Habib alone. DFAT's response was to wait and see if there was a change following Mr Habib speaking to his family.

UK reports of detainee abuse

In early August 2004, a significant amount of media attention was being generated by a report detailing allegations of detainee abuse at Guantanamo Bay, compiled by UK lawyers acting for three of the repatriated UK detainees. Allegations concerning Mr Habib were mentioned in the report to the effect that because of his alleged treatment prior to his detention at Bagram, Afghanistan, he used to bleed from his nose, mouth and ears but that he had not received medical attention for this, despite asking guards for medical help. AGD noted that ASIO officers who interviewed Mr Habib in June 2003 reported that Mr Habib had told them about this bleeding but that he had rejected medical attention because he did not trust US officials (see above). AGD officials told the Attorney-General that the Australian Embassy in Washington had been instructed to advise US authorities that the Australian Government expected this report of the allegations to be factored into the current abuse investigations.

The Australian Embassy was still interested in expediting the abuse investigations. US authorities suggested that an interim report, focusing on Guantanamo Bay (rather than including the whole of the Australian detainees' period of US detention) might be possible.

Legal assistance for Mr Habib

The focus of the Australian Embassy in Washington's work in relation to Mr Habib turned to the appointment of his legal counsel. Mr Hopper asked for assistance from the Australian Government – both logistical and financial – to attend a court ordered meeting that Mr Joseph Margulies, a US attorney, was having with Mr Habib between 30 August and 3 September 2004. Mr Margulies was not acting for Mr Habib in relation to the military commission trial but rather in relation to proceedings for a writ of habeas corpus in the US.

Australia asked US authorities to agree to Mr Hopper accompanying Mr Margulies. While waiting for an answer, AGD agreed to a grant of legal aid to Mr Hopper for him to act as Mr Habib's legal consultant in the military commission. However, the US declined the Australian request because Mr Margulies was acting for Mr Habib only in relation to US proceedings, and Mr Hopper did not and could not act for Mr Habib in those proceedings. Furthermore, the US position was that Mr Hopper should only meet with Mr Habib's military commission counsel, once they were appointed. The US officials advised that they were in the process of appointing such counsel. In the event, Mr Margulies called off his planned visit, and eventually visited Mr Habib between 18 and 22 November 2004. Australian government officials were not informed of the visit until some weeks later.

Update on abuse investigations

Australian government officials were briefed on the first abuse investigation in August 2004. They were advised that, based on the review of medical records and other documents, no information had been found to support allegations of abuse concerning the Australian detainees. Australian officials were advised however that records showed that Mr Habib had been forcibly removed from his cell at Guantanamo Bay on four occasions as a consequence of his refusal to comply with directions by the guard force, but that US officials did not consider that these events constituted abusive treatment.

Mr Alexander Downer, the then Minister for Foreign Affairs, issued a press release stating that the results of the first abuse investigation had found no evidence to support the abuse allegations.

Based on updates received from US officials, the Australian Prime Minister was briefed on the second independent abuse investigation. The briefing noted that Mr Habib had alleged mistreatment during interviews prior to his detention in Bagram Afghanistan, which included such events as being raped, slapped, punched, kicked, electrocuted and drugged. Mr Habib also alleged being beaten by US officials in Pakistan, and being raped (by non-US) officials in Egypt. In relation to Guantanamo Bay, Mr Habib alleged abuse and torture for several months, including being kicked in the ribs. Medical records at Guantanamo Bay did not support the allegations, but did reveal ten incidents of self-harm by Mr Habib from April 2004 to August 2004.

Concern was expressed by AGD regarding suggestions that Mr Habib had attempted self-harm ten times since April (an average of more than twice a month). AGD asked DFAT to advise what the usual procedures were for responding to a consular case where an Australian national imprisoned in a foreign country had been engaging in self harm, and whether DFAT was planning on taking any action in response to the issue. At an IDC meeting on 1 September 2004, DFAT noted that it was prepared to follow up the issue as a consular

matter, but agencies agreed to wait for any findings coming out of the second abuse investigation before taking action. Australian officials attending the IDC also discussed the scope of both inquiries, noting that both were too narrow to address concerns held by Australian government agencies. Ministerial briefings on the abuse investigations did not however include comment on the concerns held by Australian government agencies about the adequacy of the US abuse investigations in relation to satisfying Australian government requirements.

Did the Australian Government appropriately pursue a proper investigation of allegations of mistreatment?

On the one hand, the Australian Government pursued with US authorities vigorously issues that arose about whether the Australian detainees had been mistreated. Officials sought assurances that allegations should be investigated. On the other hand, Australian officials did not seek to satisfy themselves that the ambit of the abuse investigations was sufficient to address the concerns that had been raised by Australian government agencies. In hindsight, it would have been preferable for Australian authorities to request further details regarding the conduct, terms of reference and methodology for the first investigation at the point it commenced. This would have ensured that Australian authorities could not be under the impression that the investigation would be more thorough than it indeed was, rather than recognising the investigation was inadequate two months after it commenced.

However, limits on the ability of Australian government agencies to conduct their own investigations, and the fact that Mr Habib was not forthcoming in his communication with the visiting Consul General, made it difficult for Australian officials to pursue, independently of the US, any allegations or concerns they may have had. No report of any abuse investigation conducted by US authorities was provided for public release.

In my view, the Australian officials dealt with the allegations of mistreatment appropriately, in all the circumstances.

Fifth welfare visit – November 2004

The Consul General made a fifth welfare visit to Mr Habib on 2 November 2004. At Mrs Habib's request, the Consul General requested staff at Guantanamo Bay to assist Mr Habib to write a letter that he could pass to Mrs Habib.

The report of this welfare visit was briefer than others – Mr Habib was reported to be in good physical condition but still refusing to speak to the Consul General, who observed that consequently he again had to rely on the camp authorities for information about Mr Habib's behaviour and welfare needs. He observed that Mr Habib looked to be in good physical condition, was cleanly dressed, and that the graze on his forehead reported at the previous visit had healed. It appears that Mr Habib had not prepared a letter for Mrs Habib as she had requested via the Consul General. US authorities confirmed that there were no further instances of self-harm or forcible removal from his cell. The Consul General asked about Mr Habib's continued refusal to speak to him and was advised such reticence was not evident in his dealings with others, and that in fact Mr Habib was quite talkative with his guards and other detainees.

It appears that Mrs Habib was advised by telephone of this visit on 26 November 2004, but it is unclear from the record if the call was initiated by DFAT or by Mrs Habib. The Consul General told the inquiry that his understanding of reporting back to Mrs Habib was that the embassy in Washington was not expected to have contact with Mr Habib's family; instead information was to be sent back to DFAT Canberra, who would manage it from there.

Further delays with appointing counsel and laying charges

By late October and into November 2004, US authorities still had not appointed counsel for Mr Habib nor had they laid any charges. They advised that this was expected by late December. Embassy staff continued to emphasise the importance that Australia attached to this being done expeditiously, and the commitments that had been given to both the Prime Minister and the Australian Ambassador to the US. Media reports in November 2004 that Egypt was seeking to repatriate its detainees raised some initial concern among Australian government officials that Mr Habib might be included (given his dual citizenship) but the US assured Australian officials that there was no question of Mr Habib being repatriated to Egypt.

Concerns about coordination in Canberra

Responsibility for the coordination role for the Australian Government's input to the military commission trials that were to occur came under question in Canberra in November 2004. The AFP flagged that AGD had to date taken a very active role in relation to the Australian detainees, including chairing the IDC to discuss issues of concern from a whole-of-government perspective. However according to the AFP, AGD had very recently sought to redefine their involvement, to the extent that their role did not extend to coordination of any 'operational matters', and that consequently AGD considered that its role in the coming proceedings should be limited to participating as an 'observer'. The AFP expressed concern that AGD appeared to be distancing itself at this late stage, where it had otherwise performed a central coordinating role to date.

Coincidentally there was a meeting of this IDC on 25 November 2004 discussing a range of issues concerning the detainees. As noted, records documenting the issues discussed at the IDC are patchy. The only document made available to the inquiry regarding this particular meeting did not indicate who chaired or attended the meeting, what was discussed, or what follow-up actions were planned or taken.

New York Times reporting of mistreatment at Guantanamo Bay

On 30 November 2004, the *New York Times* reported that a confidential report of the ICRC alleged that the US military had intentionally used psychological and physical coercion 'tantamount to torture' at Guantanamo Bay. The ICRC would not comment, consistent with its policy that its reports were confidential. In discussions with Australian officials, the US rejected the reported claims.

Australia seeks further information on possible charges

By the end of December 2004 Mr Habib had not yet been charged. On 30 December 2004 Australia was informed that the remaining UK detainees in Guantanamo Bay were to be

repatriated to the UK, including two who had been designated as eligible for a military commission trial. Ambassador Thawley spoke to US officials to express the Government's disappointment that Mr Habib had still not been charged and provided with legal counsel in the timeframe indicated by the US. Ambassador Thawley told US authorities that Mr Habib should immediately be charged or released. US authorities said progress was likely during early January 2005.

On 4 January 2005, Australian officials were advised that the US Appointing Authority had informed the US prosecutors that the material provided as evidence was insufficient to substantiate charges against Mr Habib. In Canberra, various senior ministers considered the situation and decided that if Mr Habib could not be charged with a military commission offence he should be repatriated to Australia. The embassy was instructed to tell the US that if it was unable to lay charges then Australia wanted to publicly announce Mr Habib's repatriation at the same time as the UK was planning to announce the repatriation of its detainees.

Mr Habib's release and repatriation to Australia is announced

Australia was advised on 5 January 2005 that charges would not be laid against Mr Habib. Australia told the US that Mr Habib should be returned to Australia as soon as possible. US and Australian officials discussed the conditions of Mr Habib's repatriation. The Australian Attorney-General and the Minister for Foreign Affairs noted in a joint media release on 11 January 2005 that:

> It remains the strong view of the United States that, based on information available to it, Mr Habib had prior knowledge of the terrorist attacks on or before 11 September 2001. Mr Habib has acknowledged he spent time in Afghanistan, and others there at the time claim he trained with al Qa'ida.

The media release went on to explain Australia's continuing security interest in respect of Mr Habib:

> The Government takes Australia's security seriously. Australia now has comprehensive laws enabling our police and intelligence agencies to deal with security threats. Australian authorities will continue to do everything in their power to ensure that Australian citizens do not engage in, or support terrorism.
>
> Mr Habib remains of interest in a security context because of his former associations and activities. It would be inappropriate for me to elaborate on those issues.
>
> Because of this interest, relevant agencies will undertake appropriate measures. Consistent with long standing practice, I do not intend to detail the nature of these measures.

Mr Habib was notified by Guantanamo Bay staff of his release the same day. The records do not indicate how or when Mrs Habib was informed.

Mr Habib is returned to Australia

Australia was informed on 5 January 2005 that the US would not proceed to charge Mr Habib with any offences. The Consul General met with Mr Habib on 16 January 2005, in the company of Mr Margulies, to inform him of his repatriation. Mr Habib chose to speak

with the Consul General on this visit. Camp medical authorities confirmed that Mr Habib was physically and psychologically fit to travel.

Mr Habib was transferred to the custody of Australian government officials at the steps of the aircraft on 27 January 2005, and arrived in Sydney on the afternoon of 28 January 2005. Mr Habib was issued with a travel document by the Australian Government to allow him to travel following the cancellation of his passport by the Australian Government on 25 January 2005.

Was the question of Mr Habib's legal status managed appropriately?

It appears from a range of documents provided to the inquiry that the view of senior officers in AGD was that until the Australian detainees were transferred to Australian custody, their legal status was a matter for the US to determine.

The relevance of this issue to Mr Habib's circumstances is the inordinately lengthy period during which Mr Habib – an Australian citizen – was held in custody by a foreign power without having any charges laid against him, in circumstances where Australia relied only on the detaining state's assertions that such detention was lawful. By the time that Mr Habib was repatriated, he had been in custody at Guantanamo Bay for over two and a half years. For more than two years of that time, his eligibility for military commission trial was not considered. During that period, Mr Habib had no access to any legal process to respond to the allegations against him (indeed no formal allegations were ever made).

Such circumstances would not ordinarily be permitted under Australian law, and under international law could be categorised as being in breach of a person's human rights. In particular, a person could be expected to have the right to be informed of any charges, to be promptly brought before a judicial officer, or to institute legal proceedings to determine the lawfulness of their detention.

In summary, in my view, given that the stated and clear position of the Australian Government was that if Mr Habib could not be prosecuted in Australia, then the US should prosecute him, Australian officials were diligent and committed in attempting to secure the best and fairest possible arrangements for military commission trials for the Australian detainees.

However, it does appear that while Australian diplomatic and policy attention was focused on discussions over the military commission process, insufficient regard was had to the fact that Mr Habib was being held without charge and without access to any legal process for over two years, and no Australian government agency positively satisfied itself that the detention had a proper basis in law. Mr Habib's best interests should have been the subject of more attention and action by Australian government agencies.

Was Mrs Habib informed appropriately about Mr Habib's welfare?

When an Australian person is detained overseas, the Australian Government has, subject to the person's approval by way of an appropriate release form, a responsibility to inform the person's next-of-kin (or their representative) about that person's welfare. The primary responsibility for this duty falls to DFAT.

In the case of Mr Habib's detention overseas, DFAT had obtained a signed release from Mr Habib to allow the disclosure of information about him to his family in October 2001 when he was in Pakistan.

From the time that Mr Habib was detained in Pakistan until May 2002 (when Mrs Habib received a report from DFAT about the visit by Australian officials) DFAT was the Australian government agency in contact with Mrs Habib. However from May 2002 until July 2003, records do not indicate that DFAT made any further contact with her; rather the responsibility for this appeared to sit with the AGD (at least from November 2003 when AGD asked Mrs Habib if she wanted to provide a letter to be passed to Mr Habib at the November visit).

The IDC on detainees agreed in April 2002 that the then Secretary of AGD would be take primary responsibility for liaising with Mr Habib's Austalian lawyer, Mr Stephen Hopper. However in relation to Mrs Habib, there appears to be no stated explanation as to why AGD in particular was expected to relay information to Mrs Habib instead of DFAT. It is possible that the US insistence that no consular visits could be made to Mr Habib, and the complex legal issues relating to the military commission process resulted in AGD taking primary carriage of the matter.

Whoever was responsible in the Australian Government for being in contact with Mrs Habib, it appears that she did not receive any communication based on the information in the government's possession about Mr Habib's health or welfare between May 2002 and November 2003. ASIO visited Mr Habib on three occasions during that period, and reported via their intelligence reporting what visiting ASIO officers had observed about Mr Habib's welfare. However, no information contained in those reports relevant to Mr Habib's state of health was shared with Mrs Habib. In my view, this omission does not reflect an appropriate discharge of the Australian Government's responsibilities to her. While I acknowledge that the information was gained from intelligence visits, and was shared via intelligence reporting, Australian government agencies should have found some way to inform Mrs Habib about the observations made by Australian officials concerning her husband's health and welfare during this significant period of time.

The internal ASIO report of the November 2003 visit also made a number of observations about Mr Habib's physical and mental health that should have raised serious concerns about the state of his welfare. The DFAT report and cable addressed only his physical health. Mrs Habib was advised by the then Secretary of AGD that he 'appeared to be in good physical condition'. When the then Acting Secretary of AGD responded to Mr Hopper's letter in January 2004 expressing concern that Mr Habib's mental health was deteriorating, he said that the government did not have any information to that effect.

This comment can be contrasted with the internal ASIO report after the November 2003 visit that Mr Habib was continuing to deteriorate rapidly in a psychological sense. It seems likely that AGD had access only to the information from the DFAT cable in respect of Mr Habib's welfare. It is unfortunate that the more detailed information contained in the ASIO internal minute was not reflected in the letters to Mrs Habib or to Mr Hopper. In my view this further demonstrates the lack of effective coordination and procedures to ensure Mrs Habib was properly and fully informed in a timely way.

After the first welfare visit in February 2004, Mrs Habib was only given information via Mr Hopper who had had to contact the Secretary of AGD to obtain it. After the May 2004

visit by Australian government officials, again Mr Hopper had to contact AGD to complain that he had heard about the visit via reports in the media. It appears that it was only Mr Hopper's letter that prompted officers of the AGD to attempt to contact Mrs Habib that day.

After the third welfare visit by Australian government officials on 30 June 2004, DFAT again took up the role of communicating with Mrs Habib, informing her on 8 July 2004 of the outcomes of the visit, and of Mr Habib's designation for trial by military commission. The reports of the June 2004 and August 2004 visits were faxed to Mrs Habib on 12 August 2004.

In summary, there were inadequate mechanisms in place to ensure that Mrs Habib was kept adequately informed about the information Australian government agencies had about her husband's health and welfare. The failure to provide her with relevant information in the period May 2002 to November 2003 is of particular concern.

In Part 4 of this report I found that Mrs Habib was not properly informed of her husband's circumstances when he was detained in Pakistan in respect of a consular letter that failed to provide accurate information. In Part 5 of this report I found that there was no apparent basis for the advice that DFAT gave to Mrs Habib (and to the Minister for Foreign Affairs) that Mr Habib was 'well and being treated well' in February 2002 when he was detained in Egypt.

Section 22(2)(b) of the *Inspector-General of Intelligence and Security Act 1986* allows me to recommend that a person who has been adversely affected by action taken by a Commonwealth agency should receive compensation. I acknowledge that the responsibility to keep Mrs Habib informed was not a legal obligation and, in any event, I have not come to the conclusion that compensation is an appropriate remedy for this lack of coordination and communication by Australian government agencies. In light of these repeated failures, however, I have come to the conclusion that Australian government agencies should apologise to Mrs Habib for failing to keep her properly informed in a timely manner over an extended period of time.

Recommendation 1

Australian government agencies should prepare an apology to Mrs Maha Habib for failing to keep her properly informed about Mr Mamdouh Habib's welfare and circumstances.

Part 7 ♦ Policies and procedures

Introduction

When requesting me to conduct this inquiry the Prime Minister, the Hon. Julia Gillard MP, noted that:

> I consider it desirable that, in developing findings and any recommendations, you give due weight to the potential impact of any proposed adjustments to the agencies' policies and practices on the future effectiveness of the intelligence community in supporting Australia's national security, notably in operations overseas and in relations with foreign agencies. I understand that your inquiry will also need to consider the adequacy of agencies' policies and practices in place at the time of Mr Habib's arrest and detention in 2001, as well as take into account any changes to relevant policies and practices since that time.

As this report has indicated, the main agency policies in play in respect of Mr Habib's arrest and detention overseas were:

- the Department of Foreign Affairs and Trade's (DFAT's) consular policies in effect between 2001 and 2005 (particularly in relation to Mr Habib's detention in Pakistan in 2001)
- an Australian Security and Intelligence Organisation (ASIO) policy in effect between 2001 and 2005 governing the communication of information about Australian citizens or permanent residents to foreign authorities.

Since that time, new policies have been put in place in relation to:

- whole-of-government coordination, in the event that an Australian is detained in circumstances such as Mr Habib's
- the conduct of joint investigations and joint interviews by ASIO and the Australian Federal Police (AFP)
- the obligations of ASIO and Australian Secret Intelligence Service (ASIS) officers in situations involving possible torture or other cruel, inhuman or degrading treatment or punishment.

DFAT consular policy

In Part 4 of this report, I found that an ASIO officer who was required to perform consular duties for Mr Habib in Pakistan was not fully apprised of consular responsibilities. In light of this finding I recommend that the relevant DFAT checklist be amended to ensure that these duties are explicitly stated.

Recommendation 2

DFAT should amend its current 'Arrest and Detention checklist' in the *Consular Handbook* to make explicit that:

- The checklist must be completed by any government official asked to undertake consular duties.
- The checklist must be completed each time a detainee is visited (not only on the first visit as currently required).
- After each visit, the official must provide details of the information they obtain, against the full range of consular functions.
- The official must advise what ability the detainee has to independently communicate with Australian officials or a legal representative – if the detainee has no such ability, this should be immediately drawn to the attention of senior consular officers in Canberra, for a determination of what action might be appropriate.

DFAT has agreed to review the *Consular Handbook* in light of this recommendation.

Having reviewed the current DFAT consular guidelines, I make no other recommendations in respect of DFAT's policies and procedures.

Whole-of-government coordination protocols

As the inquiry has shown, the communication of relevant information between government agencies and the coordination of actions taken was particularly problematic in Mr Habib's case.

On 21 November 2011, the Australian Government approved a protocol which sets out what actions should be taken in the event that an Australian person requires the assistance of an Australian high commission or embassy, in circumstances such as Mr Habib's.

The aim of this protocol is to 'ensure that the various actions taken by the Australian Government across multiple agencies and departments in response to such an event are consistent, appropriate, with security and safety maintained at all times'.

Key to the effective operation of the protocol is that an Interdepartmental Committee (IDC) will be established to coordinate the Australian Government response. The IDC is to be chaired by the most appropriate government agency (as determined on a case-by-case basis), working in close consultation with the Department of the Prime Minister and Cabinet (PM&C) and with membership also being drawn from other relevant agencies (which may include Australian Intelligence Community (AIC) agencies, DFAT, the Attorney-General's Department (AGD), AFP, and the Department of Immigration and Citizenship, among others).

The primary role of the IDC would be to coordinate information flow between agencies.

Given my comments and findings in relation to the lack of coordination in Mr Habib's case, this new protocol represents a considerable improvement in Government policy. Had this protocol not already been in place, I would have recommended that PM&C review coordination arrangements.

In Part 4 of this report I also remarked, in respect of Australia's response to the proposal that Mr Habib be moved from Pakistan to Egypt, that:

> … a broader question is whether ASIO (as an agency with a vested interest in obtaining intelligence from Mr Habib) should have been the agency to take the lead on developing a policy position on this matter, and whether it should have been the only agency with responsibility for responding to the proposal.

Given my concerns in this respect, I would expect that the 'most appropriate' agency to lead such an IDC would be a government policy department, rather than an intelligence agency.

Coordination protocols between ASIO and the AFP

The inquiry has shown that there was a lack of clarity in the AFP's objectives when interviewing Mr Habib at Guantanamo Bay – vis-a-vis ASIO objectives in attending the same interviews.

I note that in 2008 my predecessor as IGIS reported on an inquiry into *The actions taken by ASIO in 2003 in respect of Mr Izhar Ul-Haque and related matter*s and that he commented on the policy framework that existed for cooperation between ASIO and the AFP in the post–September 11 period. He said that:

> 185. It seems that any arrangements and agreements that existed were of an informal nature. It was common practice for counterparts in each agency to speak with each other, on a not infrequent basis, and operations officers in a number of locations were becoming used to working together more often (in particular during joint interviews and during ASIO entry and search operations …).
>
> 186. At that time ASIO managers considered it important that they approach their new counter-terrorism responsibilities in an innovative and flexible manner, and they therefore preferred to agree procedures with the AFP on a case-by-case basis. The idea of a formal memorandum of understanding had been proposed by the AFP, but this possibility had not been taken on board by ASIO.

On 12 March 2008, recommendations to improve this policy framework were made in *The Street Review: a review of interoperability between the AFP and its national security partners.* The relevant recommendations are:

> **Recommendation 2**
>
> The Committee recommends that a Joint Operations Protocol between the AFP and ASIO be adopted formally establishing a mechanism vesting responsibility in the AFP Deputy Commissioner National Security and the relevant ASIO Deputy Director-General that:
>
> (a) provides for a regular and accountable exchange of all information held by each agency that
>
> (i) is relevant to a national security operation of the other agency; or
>
> (ii) is national security related and is of a nature that the other agency has or may have statutory obligations in respect to that information
>
> (b) establishes an accountable handover process where it is agreed that lead responsibility for a matter is to be passed between agencies; and

(c) enables a process for ongoing, regular and frequent consultation at a senior level to review matters being jointly managed, or matters where the AFP and/or ASIO may have an operational or functional interest.

This protocol should be supported by regular exchanges in State and Territory capitals between the state and territory Police and local AFP and ASIO management on threat levels and terrorism investigations. Endorsement of this protocol by the Attorney-General should be jointly sought by the AFP and ASIO.

Recommendation 3

The Committee recommends that the role of the Commonwealth Director of Public Prosecution, consistent with its functions and powers in providing advice and prosecuting counterterrorism offences, where appropriate from the operational planning stage of an actual or likely terrorism offence investigation, be formalised along the lines of the Counter-Terrorism Prosecution Guidelines and Checklist currently being considered by ASIO, the AFP and the Commonwealth Director of Public Prosecutions.

Having regard to the matters raised by this inquiry, I endorse the Street Review recommendations covering a joint decision-making framework, a joint operations protocol, counterterrorism prosecution guidelines, and training enhancements between the AFP and ASIO (as did my predecessor). In its 2009–10 Annual Report the AFP reported that it had completed the implementation of the Street Review recommendations.

In addition, ASIO and the AFP each updated their internal policies and procedures in 2008 to set out a range of considerations that should be taken into account when police are present at ASIO interviews. I believe that the policies and procedures now in place are satisfactory.

I make no recommendation in respect of ASIO–AFP coordination protocols.

Considerations of torture or other cruel, inhuman or degrading treatment or punishment

A critical aspect of this inquiry has been the need to consider what recommendations, if any, I should make in respect of when and to what extent it might be legal or proper for Australian officials to participate in interviews of persons held in detention overseas, or exchange information with authorities involved in the questioning of persons held in detention overseas, if that person may be subject to torture or other cruel, inhuman or degrading treatment or punishment.

In a report of August 2009 on *Allegations of UK Complicity in Torture*, the Joint Committee on Human Rights in the Parliament of the UK took the view that the following conduct would constitute complicity in torture by UK security services:

1. Requests by UK agents to foreign intelligence services, known for their systematic use of torture, to detain and question a terrorism suspect.

2. The provision of information by UK agents to such foreign intelligence services enabling them to apprehend a terrorism suspect or facilitate their extraordinary rendition.

3. The provision of questions by UK agents to such foreign intelligence services to be put to a detainee who has been, is being, or is likely to be tortured.

4. The sending of UK interrogators to question a detainee who is, or should have been, known to have been tortured by those detaining and interrogating them.

5. The presence of UK intelligence personnel at interviews with detainees being held in a place where it is known, or should be known, that they are being tortured.

6. The lack of any apparent action taken by the UK personnel/agency to establish whether torture was occurring and to prevent it from continuing.

7. The systematic receipt by UK agents of information known or thought likely to have been obtained from detainees subjected to torture, without apparent comment on, concern about or action to establish its provenance.

In September 2010, I considered some of these issues in an inspection report into the *Policies, procedures and practices in the Australian Intelligence Community for the exchange of information with foreign organisations*. In it I noted:

> 22. The issue of complicity in torture by allied intelligence services has been the subject of intense public scrutiny following the high profile case of Canadian citizen Mr Maher Arar, and more recently, several high-profile UK court cases alleging rendition or torture against intelligence services.
>
> 23. Prompted by allegations about the UK's purported complicity in torture, the Joint Committee on Human Rights in the Parliament of the UK considered the obligation on the UK Government to refrain from acts of torture and protect against acts of torture by others in a report released in August 2009. The Committee closely examined the issue of 'complicity', and took the view that certain conduct (otherwise permitted under UK legislation) undertaken by UK security services, surrounding both the receipt and provision of information and/or involvement of agents where the torture of detainees was known or suspected, would constitute complicity in torture.
>
> 24. There has been no comparable examination of the issue of complicity in torture in the Australian context. The approach taken by the UK Parliament seems to reflect a comprehensive approach to the issue of torture and the circumstances in which intelligence services might be held to be complicit in torture. …
>
> 25. It is not my view that the criteria set out by the UK Joint Committee as constituting complicity should necessarily be adopted wholesale in the Australian context. However, in the event that I was to inquire into a similar issue in the AIC, I would reflect carefully on the Joint Committee's methodology and views in determining whether an agency had acted improperly.

As part of this inquiry, I engaged Dr Melissa Perry QC to provide legal advice on Australia's obligations both in respect of the matters addressed in the UK report, and related matters of law in Australia.

Dr Perry concludes in her advice that:

> … the position outlined by the UK Joint Parliamentary Committee with respect to the circumstances in which a State will be responsible for complicity in torture departs from the **current** state of international law in material respects.
>
> - I consider in accordance with accepted principles of state responsibility that:
>
> - actual, as opposed to constructive, knowledge of the circumstances of the internationally wrongful act is required; and

- the aid or assistance must be given with a view to facilitating, and in fact facilitate, the commission of the act of torture.

- It follows that I do not consider that mere acquiescence in torture by another state or, for example, the systematic receipt of information from a foreign intelligence service that employs or may employ torture, will necessarily amount to complicity in torture.
- Rather the question of whether such acts constitute or demonstrate complicity in the torture must be determined by reference to their particular facts applying established principles of state responsibility.

I have accepted and relied on this interpretation of the law in making my recommendations.

Policies prohibiting torture and using the products of torture

The agencies falling within the jurisdiction of this inquiry which may require formal policies on how to respond to situations where torture has occurred, or may occur, are ASIO, ASIS and the AFP.

This is because ASIO, ASIS and the AFP are more likely to have direct contact with individual persons. Amongst the AIC, Defence Signals Directorate (DSD) and the Defence Imagery and Geospatial Organisation (DIGO) are otherwise responsible for collecting intelligence using technical means and the Defence Intelligence Organisation (DIO) and the Office of National Assessments (ONA) are intelligence assessment agencies. As policy agencies, PM&C and AGD would also appear to have no requirement for such a policy and the conduct of DFAT officers in relevant situations would be likely to be governed by its consular guidelines.

I am satisfied that it is adequate for the relevant policies in ASIO, ASIS and the AFP to apply to any Commonwealth officer seconded or loaned to those agencies.

ASIO

ASIO currently has an internal policy which prohibits the use of or involvement with torture or other cruel, inhuman or degrading treatment or punishment. The essential principles of that policy are:

- ASIO does not employ torture or other cruel, inhuman or degrading treatment or punishment.
- ASIO does not act in a way that sanctions, acquiesces to or encourages torture or other cruel, inhuman or degrading treatment or punishment by others.
- ASIO passes to the appropriate agencies of Government any knowledge of torture or other cruel, inhuman or degrading treatment or punishment of which it becomes aware.
- Before participating in a custodial interview outside of Australia, ASIO will first satisfy itself (including by reasonable enquiry where necessary) that the individual involved is not being and is not likely to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Would this policy have made a difference in the way that ASIO dealt with Mr Habib?

As mentioned earlier in this report, it is not within my jurisdiction to make an assessment about whether officials of foreign governments mistreated Mr Habib (including by torture).

My findings in Part 4 and Part 5 of this report are that ASIO did not have any knowledge of whether Mr Habib was subjected to torture or cruel, inhuman or degrading treatment or punishment. If the current policy had been in place at the time, ASIO could therefore not have advised other government agencies about such mistreatment, nor could it have been said to sanction, acquiesce to or encourage another state's actions in mistreating him.

However, it is possible that ASIO's actions may have been different in respect of the requirement that:

> Before becoming involved in custodial interviewing, ASIO will first satisfy itself (including by reasonable enquiry where necessary) that the individual involved is not being and is not likely to be subjected to torture or other cruel, inhuman or degrading treatment or punishment

In my view, the phrase 'becoming involved in custodial interviewing' should properly include any action taken by ASIO to send questions or other information to another state in support of a custodial interview overseas. Such an interpretation would represent a significant improvement on the policy framework that was in place in 2001 and 2002 when ASIO provided feedback on information from Mr Habib's questioning in Egypt.

For the avoidance of doubt, I recommend that ASIO amend its policies and procedures to make this interpretation explicit, as I would not consider it adequate for ASIO to take the narrower view (that is, if it applied the policy only when planning to have an officer physically present at an interview).

In making this recommendation, I gave specific consideration to its potential effect on 'the future effectiveness of the intelligence community in supporting Australia's national security' and, in particular, whether I would be setting an unreasonable benchmark for Australian officials to meet, by requiring them to consider whether it is '*not likely* that an interviewee may be subjected to torture or other cruel, inhuman or degrading treatment or punishment'.

I wish to clarify that I do not consider any 'likelihood' test applied by ASIO in future would set the legal thresholds so high that the passage of information would become generally impossible.

In a recent public speech about the role of a security intelligence agency in a liberal democracy, the current Director-General of Security pointed out that:

> … it is a sign of the strength of our democracy that here is a continual, palpable and dynamic tension between the need to ensure the protection of the community and its people from the actions of a few individuals who would do the community harm on the one hand, and the rights of those individuals on the other.[9]

I believe that ASIO will be able to operate effectively in a policy environment that requires its officers to consider the likelihood that a person may be mistreated, and that ASIO officers will have the necessary judgment to apply appropriate risk mitigation strategies to reduce the likelihood of mistreatment. For example, ASIO may wish to consider attaching conditions

[9] Irvine. D, The John Bray Oration, University of Adelaide, 19 September 2011

to any information to be passed (which may govern the use to which it may be put) or obtain assurances from the relevant overseas authority as to the standards that have been or will be applied in relation to a detainee.

Recommendation 3

ASIO should amend its policies and procedures, for the avoidance of doubt, to make it clear:

- that before sending questions or other information to another state, in support of a custodial interview overseas, ASIO will first satisfy itself (including by reasonable enquiry where necessary) that the interviewee is not being and is not likely to be subjected to torture or other cruel, inhuman or degrading treatment or punishment
- any officer approving ASIO involvement in custodial questioning overseas must record what factors he or she had regard to in each particular case
- which Commonwealth agencies might be considered 'appropriate' or 'relevant' to advise or consult, in instances when ASIO becomes aware that torture or cruel, inhuman or degrading treatment or punishment has been used.

ASIS

ASIS was not involved in the arrest and detention of Mr Habib overseas. However, this agency also has a policy which prohibits the use of or involvement in torture.

In an earlier draft of this report, I had flagged my intention to make a recommendation in respect of the ASIS policy which was similar to Recommendation 3 above. On 11 October 2011, ASIS advised me that it agreed to my draft recommendation and, as a result, it issued a new policy on 21 November 2011 which sets out the following three absolute prohibitions:

- ASIS must not employ torture or other cruel, inhuman or degrading treatment or punishment.
- ASIS must not act in a way that sanctions, encourages, aids or abets torture or other cruel, inhuman or degrading treatment or punishment by others.
- ASIS must pass to other appropriate agencies of Government any knowledge of torture or other cruel, inhuman or degrading treatment or punishment of which it becomes aware.

Before attending a custodial questioning overseas or sending questions or other information in support of a custodial interview overseas, the policy requires that ASIS will first satisfy itself (including by reasonable enquiry where necessary) that the interviewee is not being and is not likely to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Should ASIS become aware of any credible indication that the interviewee has been subject to torture or other cruel, inhuman or degrading treatment or punishment after the questioning commences, it will immediately withdraw from any direct or indirect involvement and consult with other relevant Australian agencies to determine what actions

should be taken. Depending on the circumstances, such consultation is likely to include DFAT, ASIO, DSD, AFP and AGD as well as any other agency that has a liaison relationship with the relevant foreign organisation.

I believe that ASIS has satisfactorily implemented my draft recommendation in its new policy.

The AFP

Part 1C of the *Crimes Act 1914* applies to interviews conducted by the AFP for the purpose of gathering evidence. Apart from the general protections it provides to a person being questioned, s. 23Q in Part 1C specifically states that:

> A person who is under arrest or is a protected suspect must be treated with humanity and with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment.

However, there appear to be no AFP internal policies or procedures which include similar human rights protections in respect of the questioning of detainees overseas, when the requirements of Part 1C of the *Crimes Act* do not apply. Such policies would give guidance, for example, if the AFP participated in the questioning of a detainee for information gathering purposes.

Recommendation 4

The AFP should develop a formal policy on what AFP officers should do in the event that they become aware torture or cruel, inhuman or degrading treatment or punishment has been, or is likely to be, experienced by an interviewee who is being held in detention overseas. The policy should encompass the sending of questions or information to support the conduct of a custodial interview, as well as circumstances where an AFP officer is physically present at an interview.

In developing such a policy, the AFP should:

- place a positive obligation on any officer approving AFP involvement in custodial questioning or arrest operations overseas to record what factors he or she had regard to in each particular case
- provide guidance on which Commonwealth agencies might be considered 'appropriate' or 'relevant' to advise or consult, in instances when AFP believes that torture or cruel, inhuman or degrading treatment or punishment has been used.

Prior to the finalisation of this report, the AFP advised me that:

> … a significant body of work has already been undertaken in this area and the policy considerations that you recommend, particularly in the area of investigation of alleged terrorism offences. Additionally, all AFP International Liaison Officers/Investigators deploying overseas are provided with pre-deployment training which, amongst other matters, also addresses the policy considerations AFP officers should have regard to when interviewing persons in custody overseas in circumstances where Part 1C of the *Crimes Act 1914* does not apply.

Given the advanced status of policy development reported by the AFP in this area, I look forward to my recommendations being implemented expeditiously.

Communication of information to foreign authorities

ASIO

As has been noted earlier in this report, ASIO has internal policies and procedures which govern the sending of information overseas.

When taking evidence in the course of this inquiry, I was informed on a number of occasions that it was 'fairly typical' for junior officers to draft the documentation requesting approval to pass information to foreign authorities, and that these junior officers were often not in a position of full knowledge about the circumstances of the case. For example, it appears that the officer who drafted the text of the message sent to Egypt about Mr Habib in October 2001 may not have been aware of the proposal to move him from Pakistan to Egypt.

It was therefore not uncommon for the documentation to provide an incomplete picture of *all* the relevant considerations which had to be taken into account by the decision-maker.

While there is an assumption that the decision-maker will be aware of all of the relevant information, there is no explicit requirement in the policy for that person to document any additional or different factors they had regard to, which were not included in the written request for approval. In the absence of adequate documentation it is not possible to be confident that the decision-maker actually put their mind to all relevant considerations. Any decision-maker should necessarily have regard to any further or conflicting information of which they are aware and good practice would dictate that these additional considerations should be documented if used to justify a decision.

My inspection work in relation to ASIO's more recent compliance with this policy indicates that, while recordkeeping has improved significantly, inadequate recording of the basis for decisions remains an issue for the organisation to address.

Recommendation 5

ASIO should amend its guidelines on the communication of information to foreign authorities to place a positive obligation on approving officers to document the reasons for a decision when any factor of which they had account is not articulated in the request documentation.

The AFP

The *Australian Federal Police Act 1979* (AFP Act) generally prohibits the disclosure of information. It permits lawful disclosure for the purposes of carrying out, performing or exercising a duty, function or power under the AFP Act, Regulations and certain other legislation. This is interpreted having regard to the AFP functions set out in section 8 of the AFP Act which include providing police services in relation to the laws and property of the Commonwealth and safeguarding Commonwealth interests and in relation to assisting or cooperating with Australian or foreign law enforcement, security, intelligence or regulatory agencies.

The *Privacy Act 1988* (Privacy Act) further restricts the AFP disclosing 'personal' information. Information Privacy Principle 11.1 makes disclosure of personal information unlawful unless certain exceptions apply – the most relevant in this case being that it is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person, or it being reasonably necessary for the enforcement of the criminal law.

The AFP provided a significant amount of information, including evidentiary material, about Mr Habib to US authorities. Initially, this information was provided in reliance on s. 14 of the Privacy Act, with a view to identifying further evidence to support an AFP investigation. On 26 July 2004, the then Attorney-General also approved the use of this material in a possible US military commission trial of Mr Habib.

The AFP policy entitled *The AFP Practical Guide on international police-to-police assistance in potential death penalty situations* is relevant to situations such as Mr Habib's. Although I was not provided with the version(s) of the policy which applied between 2001 and 2004, the current policy sets a framework for the exchange of information on a police-to-police basis (that is, outside arrangements under the *Mutual Assistance in Criminal Matters Act 1987*). The policy requires that once a person has been arrested, detained, charged or convicted of an offence for which the death penalty may be imposed in a foreign country, only the Attorney-General or Minister for Home Affairs may approve the exchange of information.

If the current policy had been in place in 2002, the AFP would not have been able to send information about Mr Habib to US authorities without ministerial approval once he had arrived in Guantanamo Bay (notwithstanding that the Australian Government was seeking assurances that he would not be subject to the death penalty). The current policy therefore represents an improvement in the AFP's guidance arrangements and I make no recommendations in respect of it.

Outside of the circumstances described above, the exchange of information by AFP officers is governed by the AFP's *National guidelines on the disclosure of information*. These guidelines provide a number of general principles for decision-makers to consider, when deciding whether to release information. However, the factors listed for consideration do not include the human rights record of a foreign authority or whether the foreign authority might use that information for purposes other than that for which it is provided.

Recommendation 6

The AFP should review its *National guidelines on the disclosure of information* to include procedures for the communication of information about Australians to foreign authorities.

Glossary

AFP	Australian Federal Police
AFP Act	*Australian Federal Police Act 1979*
AGD	Attorney-General's Department
AIC	Australian Intelligence Community
APSC	Australian Public Service Commission
ASIO	Australian Security Intelligence Organisation
ASIO Act	*Australian Security Intelligence Organisation Act 1979*
ASIS	Australian Secret Intelligence Service
Bagram Airbase	US Airforce Base in Afghanistan
Camp 5	Guantanamo Bay detention facility
Camp Delta	Guantanamo Bay detention facility
Camp X-Ray	Guantanamo Bay temporary detention facility
CDPP	Commonwealth Director of Public Prosecutions
DFAT	Department of Foreign Affairs and Trade
DIGO	Defence Imagery and Geospatial Organisation
DIO	Defence Intelligence Organisation
DSD	Defence Signals Directorate
FA	Federal Agent (Australian Federal Police)
ICRC	International Committee of the Red Cross
IDC	Interdepartmental Committee
IGIS	Inspector-General of Intelligence and Security
IGIS Act	*Inspector-General of Intelligence and Security Act 1986*
ISA	*Intelligence Services Act 2001*
ISD	DFAT's International Service Division
ONA	Office of National Assessments
ONA Act	*Office of National Assessments Act 1977*
PM&C	Department of the Prime Minister and Cabinet
PPQ	Possible parliamentary question
SES	Senior Executive Service