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JOINT STANDING

COMMITTEE ON TREATIES

Monday, 23 February 2009

Members: Mr Kelvin Thomson *(Chair)*, Senator McGauran *(Deputy Chair)*, Senators Birmingham, Cash, Farrell, Ludlam, Pratt and Wortley and Mr Briggs, Mr Forrest, Ms Hall, Mrs Irwin, Ms Neal, Ms Parke, Mr Simpkins and Ms Vamvakinou

Members in attendance: Mr Briggs, Mr Forrest, Ms Hall, Mrs Irwin, Ms Neal, Ms Parke, Mr Simpkins and Mr Kelvin Thomson

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 26 November 2008, 3 December 2008 and 3 February 2009

WITNESSES

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ROBERTS, Mr Frank, Head, Defence Security Authority, Department of Defence 1

WEST, Mr Peter, Assistant Secretary, Americas, North and South Asia and Europe, Department of Defence 1

WISHART, Mr John Maxwell, Director, International Government Agreements and Arrangements, Defence Legal, Department of Defence 1

WOOD, Mr Gregory Kenrick, Policy Advisor, International Tax and Treaties Division, Department of the Treasury 19

Committee met at 10.00 am

McCOSKER, Ms Sarah, Senior Legal Officer, Office of International Law, Attorney-General's Department

RAGG, Ms Sandra, Assistant Secretary, Security Policy and Plans, Defence Security Authority, Department of Defence

ROBERTS, Mr Frank, Head, Defence Security Authority, Department of Defence

WEST, Mr Peter, Assistant Secretary, Americas, North and South Asia and Europe, Department of Defence

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MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

Agreement between the Government of Australia and the North Atlantic Treaty Organisation on the Security of Information New York

CHAIR (Mr Kelvin Thomson)—I declare open this public hearing of the Joint Standing Committee on Treaties ongoing review of Australia's international treaty obligations. Today the committee will receive evidence on four treaty actions: one tabled in parliament on 26 November 2008, one tabled on 3 December 2008 and two tabled on 3 February 2009. We will be hearing from witnesses representing various government departments and the Australian Federation of Disability Organisations. I thank witnesses for being available for this hearing. We will now take evidence on the agreement between Australia and NATO on the security of information, and I welcome witnesses.

Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. If you nominate to take any questions on notice could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make some introductory remarks before we proceed to questions.

Mr Roberts—Thank you for the opportunity to appear before you today with regard to the agreement between the government of Australia and the North Atlantic Treaty Organisation on the security of information. Defence led the negotiation of the agreement in close cooperation with the Department of Foreign Affairs and Trade and the Attorney-General's Department. I would note that colleagues from both the Department of Foreign Affairs and Trade, Mr Mason, and from the Attorney-General's Department, Ms McCosker, are also with us today.

The agreement is a joint initiative between Australia and NATO and reflects our overlapping security interests in the current global security environment. The agreement will strengthen

classified information sharing and support of priority areas for Australia-NATO cooperation, the focus of which is our contribution to the NATO-led International Security Assistance Force in Afghanistan. This agreement will replace the exchange of letters between the Australian Minister for Defence and the NATO Secretary-General, dated 1 April 2005, which currently provides for the exchange of information between NATO and Australia. The agreement will satisfy the NATO requirement that international instruments are to be legally binding under international law.

The agreement was signed in New York on 26 September 2007 by the Australian Minister for Foreign Affairs and the NATO Secretary-General. It was tabled in the Australian parliament on 26 November 2008. The agreement sets out the terms for the exchange and protection of information between Australia and NATO. It will serve as the basis for the reciprocal protection of national security classified information exchanged between the Australian government and NATO.

Under the agreement classified information that the Australian government passes to NATO will be afforded protection the same as NATO information of a corresponding security classification. The information will not be used for a purpose other than that for which it was provided and will not be passed to any third party without the consent of the Australian government.

The underlying obligation placed on Australia and NATO is to protect each other's classified information in the same manner as it protects its own classified information of corresponding security classification. Having examined each other's security policy and standards, both Australia and NATO are satisfied that this obligation can be met. The terms of the agreement are substantially similar to the terms of other legally binding agreements for the security of classified information to which Australia is a party. No changes to domestic law or policy are required to implement the proposed agreement.

If the agreement is terminated, the responsibilities and obligations of the parties in relation to the protection, disclosure and use of classified information already exchanged shall continue to apply irrespective of the termination. The authorities responsible for the implementation and supervision of the agreement are the Defence Security Authority in the Department of Defence in Australia and the NATO Office of Security. The Defence Security Authority is in the process of finalising an administrative arrangement with the NATO Office of Security. This arrangement will set out the detail for the administration of the agreement and will ensure that the principles that govern the operation of the agreement remain consistent over the life of the agreement. That concludes my opening statement and I now welcome any questions you might have.

CHAIR—Thank you, Mr Roberts. What would be the implications for failure to comply with the agreement—for example, unauthorised disclosure of classified information? Could either party refuse to exchange further information?

Ms Ragg—There are mechanisms for organisations, for both Australia and for NATO, to undertake investigations. From there it would be presented and then further risk-assessed in terms of what the nature of that particular material was and the implications of that breach.

CHAIR—Have you had experience of that? You mentioned that we have similar agreements with other countries. Have there been any problems in terms of the operation of those agreements?

Ms Ragg—No. We have had no difficulties with the agreements as they stand.

Ms HALL—I am wondering if this will lead to any implications for members of parliament and others in our daily operations.

Mr Roberts—I cannot see how it could. The normal security arrangements for the protection of classified information will continue to operate as they have. There is nothing specific to this that I understand would—

Ms HALL—Impinge on the way we operate in this area—okay. Do you foresee any problems whatsoever?

Mr Roberts—No. I must say that from our point of view it looks straightforward. NATO has a similar security classification system to Australia for looking after classified information. There are some slight changes in the words, but the main categories are very much aligned. The NATO Office of Security has been over here to have a look at our procedures. Some years ago a team from Australia went across to look at the NATO procedures and I understand another visit is planned in the next few months. So from our point of view we are happy that the arrangement is in place and the working arrangements between NATO and ourselves are fine.

Ms HALL—And benefits?

Mr West—The benefits are twofold. Directly, in terms of the operations we conduct in cooperation with NATO, primarily in Afghanistan at the moment, it obviously puts in place a legal framework which replaces the interim framework we have had operating for some time. So it gives both sides legal assurances while continuing the very close operational relationship we have. It also allows us to have a deeper strategic dialogue with NATO. As we are doing more with them around the world, we can talk at a deeper and more classified level about our common interests and common issues. I think there are considerable benefits to both countries and it will help strengthen our bilateral and operational relationship with NATO.

Ms HALL—Thank you.

Mr FORREST—Further to the Chair's question about other agreements, what other agreements exist—ANZUS, I presume?

Ms Ragg—We have nine such agreements at this point in time and five of those agreements are with existing NATO nations. Specifically, the countries that we have arrangements with are: the US, Sweden, South Africa, Singapore, New Zealand, Germany, France, Canada and Denmark.

Mr FORREST—Are they all pretty much identical? There is nothing different about them.

Ms Ragg—They are fairly much identical, that is correct. They all come from the same basis. There may be some slight adjustments depending on the requirements for each nation, but the foundations are very similar.

Mr SIMPKINS—I am down into the weeds on this one a little bit. Do the security classifications, from unrestricted upwards between NATO and us, have basically the same terms and the same responsibilities for handling of those documents?

Mr Roberts—There are four main classification systems under the Australian model: restricted, confidential, secret and top secret. Under the NATO model there is: NATO restricted, NATO confidential, NATO secret, and NATO top secret. At that level they mirror each other very well. It is only when you get into the specific definition of what each might take that there are slight differences. For example, the Australian definition of 'restricted' is when the compromise of the information could cause limited damage to national security. The NATO definition is that unauthorised disclosure would be detrimental to the interests or effectiveness of NATO. It is at that level that there is some slight difference. In the broad, the definitions and guidance to people on how they should classify and particularly safeguard the information are very much the same.

Mr SIMPKINS—Does this cover privacy markings at all?

Mr Roberts—No, this is about national security material. We do not get into the privacy aspect.

Mrs IRWIN—I would just like to follow on from Ms Hall's and Mr Simpkins' questions: will security clearances not be required for members of parliament?

Mr Roberts—That is right. Security clearances are not required for members of parliament.

Mrs IRWIN—For example, would there not be any effect on the operations of the Joint Committee on Intelligence and Security?

Mr Roberts—No, there would not.

Mrs IRWIN—Definitely not.

Mr Roberts—Definitely not.

CHAIR—There is a point where exchanged information cannot be used for purposes other than those laid down in their 'framework of the cooperative activities, decisions and resolutions pertaining to those cooperative activities'. How does that framework get determined?

Mr Wishart—Framework?

CHAIR—It says that you cannot use exchanged information for purposes other than those laid down in your 'framework of the cooperative activities, decisions and resolutions pertaining to the cooperative activity'. My question is: how does the framework get sorted?

Ms Ragg—The framework of cooperative activities is that which is used by the NATO council. That is how they determine how they cooperate with non-NATO nations. That is the mechanism for determining how they cooperate with the Australian government, for example. We then exchange the information within that particular agreement of activities.

CHAIR—The NIA says that the proposed implementing arrangement will detail the standards of the reciprocal security protection for information and material to be exchanged. How is that implementing arrangement going to be negotiated?

Ms Ragg—We are currently negotiating that arrangement. We expect to be completed within the next couple of months following a reciprocal visit to the NATO Office of Security. From the Australian side, the protective arrangements are those which are described in the Protective Security Manual and the Defence Security Manual. We do a test of the NATO equivalent handling procedures.

Mrs IRWIN—I want to follow on from the question that the Chair asked and you responded to that you are negotiating at the moment and you might have an indication over the next couple of months. What month are we looking at? Is it September, December, July or August?

Ms Ragg—Certainly before that time frame.

Mrs IRWIN—Before June?

Ms Ragg—That would be my intention.

Mr FORREST—Is there a time limit on the interim arrangements that are currently in place? You mentioned earlier that we were operating under interim arrangements.

Mr Roberts—We have been operating under exchange of letters and that has been working satisfactorily. As I indicated in the opening statement, NATO has a view that its arrangements with other countries need to be at treaty level. That is why we are moving to it. So it is largely accommodating. Correct me if there is another legal dimension here, but it is likely to accommodate the NATO requirement that agreements with other countries need to have treaty status. As for the day-to-day change for us from the existing arrangements under the exchange of letters, I do not think there will be anything significant.

Mr BRIGGS—So it does not actually change anything. It does not allow you to get anything in addition to what you have previously had. It is just ratifying the procedure or the understood practice between the two—is that right?

Mr Roberts—That is my understanding.

Mr BRIGGS—There is nothing in the past that has stopped you—

Mr Roberts—No.

Mr BRIGGS—You have not run into walls. It is just—

Mr Wishart—Frank would have to answer that. But in terms of the replacement of existing arrangements, NATO apparently have a policy that any document relating to security matters should be legally binding. This is such a document. They require it to be legally binding, so we are accommodating that requirement.

Mr BRIGGS—So since 2005 they have been happy to go along but on the understanding that we would ratify it at some point—is that correct?

Mr Wishart—Yes. That is correct.

Mr BRIGGS—Thank you.

CHAIR—Thank you very much for attending and giving your evidence today.

[10.18 am]

ANTONE, Ms Rachel, Senior Legal Officer, Disability Discrimination Section, Human Rights Branch, Attorney-General's Department

ARNAUDO, Mr Peter, Assistant Secretary, Human Rights Branch, Attorney-General's Department

FOX, Mr Stephen, Principal Legal Officer, Disability Discrimination Section, Human Rights Branch, Attorney-General's Department

INNES, Mr Graeme, Human Rights Commissioner and Disability Discrimination Commissioner, Australian Human Rights Commission

Optional Protocol to the Convention on the Rights of Persons with Disabilities

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. At the conclusion of your evidence would you please ensure that Hansard has had the opportunity to clarify any matters with you. If you nominate to take any questions on notice could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make some introductory remarks before we proceed to questions.

Mr Arnaudo—Thank you, Mr Chair. I will be very brief. This is an optional protocol that is linked to the United Nations Convention on the Rights of People with Disability, which Australia ratified late last year. We were amongst the first countries to sign the convention when it opened for signature on 30 March 2007. We ratified it, as I said, in July 2008. We were able to nominate Professor Ron McCallum, who is the former Dean of the Faculty of Law, Sydney University, to become a member of the committee on the rights of persons with disabilities. It is that committee that is established under the convention, if Australia ratifies the optional protocol, that will be able to hear complaints from individuals who consider that Australia has not met its obligations under the convention.

The second aspect of the optional protocol is that it will allow the committee to hold inquiries into grave concerns that a country is not complying with the obligations under the convention. There are effectively two aspects to the optional protocol: the ability for individuals within Australia who have exhausted their domestic remedies to lodge complaints with the UN committee, of which Professor McCallum is a member for the next two years, and also the ability for the committee to hold inquiries into systemic or grave complaints of inconsistency with the convention as well.

In deciding whether we should become a party to this optional protocol we conducted a range of public consultations to take into account the view of the disability sector, the industry sector, human rights organisations and the broader community, and the national interest analysis sets out the outlines and the range of those consultations. The large majority of the consultations that we

received responses to were very positive in terms of the government taking action to ratify the convention. That is effectively where we stand at the moment. The committee that is set up under the UN convention is about to have its first meeting in the next month or so. It is very much at the beginning of the whole process.

CHAIR—Can someone tell us anything about the domestic complaint mechanisms that are presently available to Australian citizens with disabilities?

Mr Arnaudo—There is a range of legislative measures that are available for people with disabilities who consider that they have been discriminated against, and that often picks up complaints about their human rights not being respected. The principle one at a federal level is the Disability Discrimination Act. It allows people who consider that they have been discriminated against in a wide range of areas of public life, such as accessing goods and services or accessing buildings, to lodge a complaint with the Human Rights and Equal Opportunity Commission. The commission will try to conciliate the complaint to see if parties can come to an agreement. If they cannot, the commission will terminate the complaint, which allows the person to take action in the Federal Court or the Federal Magistrate's Court. The matter is heard by the court and the court then makes a decision and can order compensation, an apology, or injunct people from taking further action, and a range of measures like that.

At a state and territory level there is also anti-discrimination laws which all cover disability as a ground of complaint, so there are avenues under state and territory laws as well as the Commonwealth avenue. More generally, the Human Rights and Equal Opportunity Commission also has a role in terms of holding inquiries into the rights of people with a disability and whether their rights are being protected and promoted. Those three aspects are in general broad terms how domestically we give effect to the obligations under the convention and ensure people's rights are protected.

CHAIR—The text says that complaints may be received by the disability committee if the domestic process is unreasonably prolonged or unlikely to bring effective relief. I suppose the question in the minds of people is: what is unreasonably prolonged and what is effective relief? Who makes that judgment?

Mr Arnaudo—That would ultimately be a matter for the committee in terms of its own practices and procedures, because it is the body that would decide whether or not to accept a complaint. I think this matter is also raised in relation to the optional protocol to the CEDAW convention, the Convention for the Elimination of Discrimination Against Women that this committee considered late last year. The two optional protocols are fairly similar in terms of their scope and coverage and, as was pointed out at that time, that is there to try to cover an area where really, at a domestic level, a complaint just never gets anywhere, it is not dealt with. You can lodge a complaint but it goes nowhere, effectively. I think that would be really what it would be covering off.

Ms HALL—Given what you have said about the referral of a complaint, how will it be dealt with differently and what implications will that have?

Mr Arnaudo—The way it will be dealt with differently—

Ms HALL—Obviously it would not be the court process.

Mr Arnaudo—It is not a court process. It is a confidential process between the committee and the state party concerned, for example, the country that has signed up to the optional protocol. Effectively, the committee would hold its own inquiries and try to establish for its own processes what sort of information is available. It would hear the views of the government concerned and then make recommendations of findings to the country. Again, they are not binding, in a sense, but they are very persuasive and would be things that would be taken into account closely by the government concerned, I would expect.

Ms HALL—At the end of the day, after the hearing and the report et cetera, what action can be taken to address the discrimination?

Mr Arnaudo—In many respects it focuses attention on the issue. A finding would say that a country is not complying with the obligations that it has signed up to under the convention. In most cases most countries take those obligations very seriously. It has a moral force, for example.

Ms HALL—So the power is basically the report with the recommendations and the implication that it has internationally—

Mr Arnaudo—It is an added layer of accountability for countries. There are reporting obligations under the convention, which we already have to meet. The first report is due in two years time and then every four years when Australia as a country has to report to the committee and say that this is how we are ensuring that the rights of people with a disability are complied with. There is already that reporting mechanism. The optional protocol provides an additional layer of accountability. It allows the individual to take complaints but also in situations of grave systemic concerns for the committee, to initiate investigations as well.

Ms HALL—I find it difficult to find a reason to oppose the recommendation. What opposition is put forward?

Mr Arnaudo—From recollection there is broad support. There were 14 submissions received in response to our call for public consultations in finalising the National International Analysis. All but one submission supported Australia becoming a party to the protocol. The general view was that this would enhance Australia's leadership role in international human rights. I cannot recall exactly what that one submission was, but I think its concerns were that there was a threat to Australia's sovereignty.

Ms HALL—That is what I thought.

Mr Arnaudo—Our response is that in a sense it is not, because it is non-binding. It has some persuasive force but it is not a binding finding or recommendation process.

Ms HALL—So there is really no substantive reason to oppose it.

Mr Fox—The submission put a secondary argument, which was their concern essentially about the power of the Australian states and territories.

Mr Arnaudo—It was Family Voice Australia.

Mr Fox—Family Voice Australia indicated that they were concerned that there would be some impact upon the states' and territories' provision for abortion or provisions against abortion. Our view is that it would not have that impact.

Mr Arnaudo—When we consulted the states and territories none came out saying that they opposed ratification of the optional protocol.

Ms HALL—You have already outlined the impact of signing the optional protocol. That really debunks what that opposition is saying, doesn't it?

Mr Arnaudo—As I outlined before, it does not make a binding finding on a country, but it is quite persuasive I would have thought.

Ms PARKE—Thank you very much for coming to give evidence today. Based on what we have heard today, would you agree that acceding to the optional protocol is a logical next step after Australia has ratified the convention and has had a committee member elected, and that it sends a strong message about Australia's commitment to promoting the rights of persons with disability?

Mr Arnaudo—The government's position is set out in the national interest analysis, which broadly reflects the things that you have outlined in your question. It is, as I said before, an additional element to the accountability mechanism as to how Australia goes about ensuring that the rights that are set out in the convention are applied. The fact that we were successful in having Professor McCallum elected as an independent expert to the committee demonstrates that we want to take an active role in this area in coming years, particularly at the international level. It is a new convention, it is going to be a new committee as well, and it is valuable to have someone with Professor McCallum's skills and expertise on that committee.

Mr Fox—The committee itself will be staffed and supported out of the UN human rights office and one would expect, but cannot guarantee, that they would therefore be looking to the other committees within the human rights system to get some guidance about their procedures, about their approaches to issues of receiving complaints and so on, and I think that is a logical expectation. Whether it eventuates in practice, we do not know yet, but I think Professor McCallum certainly is an eminent labour lawyer in Australia, and I think he would give some credence to that approach to precedent and to a proper and adequate approach to determinations of how you take complaints, assess them, consider the nature of those complaints and go through the procedure of any analysis and reporting.

Mrs IRWIN—I am a new member of the committee; this is my first meeting. I just need to get my head around a domestic complaint mechanism. I know that you have outlined that and the treaty states that complaints may be received by the disability committee. I just need to have some clarification—and if you could let the committee know—what would be the process to make a complaint to the United Nations committee?

Mr Arnaudo—As a first step—this is set out in Article 2 of the optional protocol—the complaint to the new UN committee that is set up has to demonstrate that all available domestic

remedies have been exhausted. In Australia's context, that would mean, for example, was there a right or remedy—the Disability Discrimination Act, also the Human Rights Commission or the Federal Court, those sorts of remedies—available and has that person exhausted their remedies at domestic level? If that has occurred, and the person still considers that Australia has not complied with its obligation under the convention, that person would then be able to lodge a complaint with the United Nations committee.

Mrs IRWIN—So that person or organisation could go straight to the United Nations?

Mr Arnaudo—That is right.

Mrs IRWIN—It would be after exhausting all avenues within Australia?

Mr Arnaudo—That is right. Effectively that would be done by a letter. That is the way many other complaints processes are done at the moment, and we expect the same process would be followed with this new committee. Then there is a range of hearings and investigations, discussions between the committee and the country concerned, the Commonwealth of Australia in the case of Australia, which would be coordinated by the Office of International Law within the Attorney-General's Department as with other communications that we have with other international committees well. For example, if there was a concern about the actions of a state government, we would clearly go and speak to the state government concerned to get their views about what happened or what did not happen and feed that back into the committee's consideration to the United Nations committee consideration. After going through that process, the committee would come to a view and express that view and publicise it. It would hear the views of other people involved in the process, for example, the Human Rights Commission. Interested and non-government organisations might also be asked to put a view forward.

CHAIR—I should note we have been joined by Graeme Innes, the Human Rights Commissioner; thank you very much for coming along.

Ms NEAL—I note that Article 1 of the optional protocol provides for the disability committee to take complaints from Australian citizens. What about permanent residents of Australia? Can the committee take those complaints?

Mr Arnaudo—My understanding is Article 1 of the optional protocol says that the committee can:

… receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation—

so it is not really linked to citizenship. But if you are subject to the jurisdiction of, for example, Australia, then permanent residents, people who are subject to Australia's jurisdiction would be entitled to lodge a complaint if that is what they consider. Citizenship clearly is one aspect, but again subject to the jurisdiction of the country is really the criteria.

Ms NEAL—I think the impact statement used the term citizenship as well.

Mr Arnaudo—Perhaps it was more in terms of clearly Australian citizens would be people who would be subject to the jurisdiction would be able to, but if that is a subset of the broader category of people subject to the jurisdiction of Australia.

Ms NEAL—The idea that you have exhaust all domestic avenues, most domestic avenues have a time limit attached to them. If someone has not made a complaint but the time limits have expired, does that amount to exhausting domestic avenues? Of course, if time limits are over you cannot then go there, so can you then go to the disabilities committee and make a complaint there?

Mr Arnaudo—I would have thought that that would be considered to be exhausting your domestic remedies. At an Australian level, I do not think our time limits are that stringent or restricted in that you could still get to the Federal Court in most instances as well. I also point out that the optional protocol here applies to actions commenced from the date of ratification, not in the past, so there is that limit in itself as well.

Mr BRIGGS—My questions go to exhausting domestic avenues as well and follow on from the Chair's earlier questioning. Who decides that all Australia's domestic avenues have been exhausted? Is it the UN committee?

Mr Arnaudo—Essentially, it is the United Nations committee because they are the ones that have to accept the complaint, and under the optional protocol Article 2, it says:

> The Committee shall consider a communication inadmissible when:
>
> … … …
>
> (d) All available domestic remedies have not been exhausted.

So if there was evidence or views that there was still a domestic remedy available to the person, then I am sure the state party concerned would be saying, 'Well, you should be ensuring that that domestic remedy has been exhausted prior to accepting that complaint.' Effectively, the way the optional protocol is set up, it is directed that obligation to the committee in that the committee has to consider communication inadmissible if all available domestic remedies have not be exhausted.

Mr BRIGGS—Presumably the UN committee is also considering what is unreasonably prolonged or unlikely to bring effective relief.

Mr Arnaudo—That is correct, yes.

Mr BRIGGS—In both cases, it is the UN committee's decision not the Australian processor?

Mr Arnaudo—That is right. The UN committee is made up of 12 independent experts elected by the state parties to the convention. As I said before, because Australia ratified the convention in July last year, we were able to nominate Professor McCallum for membership of that committee, and we were able to, with the support of the other countries to the convention, secure his election to it, so he is serving a two-year term on that committee from the beginning of this year. There are other committee members from other countries on that committee as well.

Mr BRIGGS—But they are the ones making the decisions on our country's processes as far as complaints.

Mr Arnaudo—What they are doing is making decisions about whether that complaint should be considered by the committee. As I said before, the outcome of it is not binding on the country; it has persuasive force, I would have thought, in that effectively it is an independent group of experts at international level saying to a country, 'We do not consider you have met the obligations under the convention.' That finding is not binding on a country in itself—

Mr BRIGGS—I understand that.

Mr Arnaudo—but it would be very much a persuasive force I would have thought.

Mr BRIGGS—There are disputes on whether the processes are exhausted; there will be different views on whether processes have been exhausted.

Mr Arnaudo—It is usually fairly clear. I am not really the expert in this area. Perhaps my colleague Ms McCosker, who deals with many of these complaints, might be able to add a bit more background to whether a complaint is exhausted or not.

Ms McCosker—The Office of International Law currently handles the complaints under three other complaints mechanisms: the Convention on the Elimination of Racial Discrimination, the Convention Against Torture and the International Covenant on Civil and Political Rights. When a complaint is received, the committee will send us the complaint and invite the government to submit its arguments in relation both to admissibility and to the merits, and there are two different ways one can go about this. We can either submit our arguments on admissibility first, within a shorter time frame or, as is our current and normal practice, submit both our arguments on admissibility and merits simultaneously within a broader time period. Normally they give us, for example, up to six months to make our response. So the government has an opportunity to put forward its arguments as to admissibility and on several occasions, in fact probably on many occasions, the Human Rights Committee has found the complaint to be inadmissible.

Mr SIMPKINS—This is already been covered. My concern is a complaint has made its way up to the Federal Court and has been dismissed, but then someone can go beyond the borders of this country to raise the issue again. Clearly that is the case. I would say that we are always trying to make our laws in this country better, but at the same time it seems like we are fairly well placed in the world based on the progress that has been made so far—admitting, of course, that we must always to try to do better in the future. Given the fact that that matter has been dealt with, I will ask this: those people who sit on this international committee, some of them are representing countries that have not ratified the additional protocol. Would that be right?

Mr Arnaudo—That is correct. In terms of being a member of the committee, the country can only nominate if they are a member of the convention. They do not have to go to the next step of the optional protocol. In fact, Australia at the moment is one of the countries that are not a party to the optional protocol, but we have a committee member there. When I say we have a committee member, he is an Australian citizen, but he is an independent expert; he is not there representing Australia or the government of Australia. Other countries that have nationals on the committee that are not a party to the protocol are China, Jordan, Kenya and Qatar. Qatar and

Jordan have signed the protocol but they have not ratified it, so they are probably going for a similar set of process as well. The other countries that have nationals on the committee are Bangladesh, Chile, Ecuador, Hungary, Slovenia, Spain and Tunisia. That is reflective of the—

CHAIR—And they have ratified the protocol?

Mr Arnaudo—They have ratified the optional protocol, yes. They definitely have had to ratify the convention, but these other countries—Bangladesh, Chile, Ecuador, Hungary, Slovenia, Spain and Tunisia—have ratified the optional protocol as well.

Mr BRIGGS—Just to clarify this: domestic options do not have to be exhausted do they, because it is unreasonably prolonged. If it is a long Federal Court case, which has occurred—

Mr Arnaudo—I think the state party concerned at that point would probably say, ‘Look, there is a process underway at the moment.’ ‘Unreasonably prolonged’ is a matter of interpretation.

Mr BRIGGS—By the UN committee.

Mr Arnaudo—By the UN committee at the final instance, but in most respects I would have thought that when you look at the context of what the optional protocol is directed to, it is very much directed to situations where the complaint is going nowhere. I do not think we would have a similar complaint process here in Australia because our complaint processes do come out to an outcome, in one sense or the other, through the Federal Court process or the Federal Magistrates Court.

Mr SIMPKINS—Can you make some comments on what I have had to say? I am all in favour of pushing this thing forward, ratifying the additional protocol, but it worries me when there are countries that might eventually judge the performance of this great country, this advanced country, who are not in the same league so far as opposition to disability discrimination.

Mr Arnaudo—I appreciate that concern, but it is important to point out though that the members of the committee that are judging—for want of another word—Australia’s performance are independent experts put forward by that committee. In many of these situations, the members of the committee are people with a disability who have had experience in advocating to the rights of people with disability within their own countries, who also might be legal experts or experts in social policy and those sorts of issues. They are elected by the will of the countries that are signed up to the convention. They are not appointed by another committee somewhere; they have to basically stand up on their own credentials. So the members of that committee are very eminent people, and that is what the convention requires them to be: independent experts in the fields of protecting the rights of people with disability across the world. They are not there as representatives of their governments basically.

Mr Fox—The national interest analysis did note that in relation to many of these matters, they are matters that could probably already be the subject of a complaint under the ICCPR.

Mr Arnaudo—That is correct. Under the International Covenant on Civil and Political Rights, a person with a disability could argue that their rights have been infringed under that

convention already and lodge a complaint with the Human Rights Council, the Human Rights Committee in Geneva now. What this optional protocol and the convention tries to do is put the framework of rights for people with disability within a specific framework for people with disability rather than the general framework of human rights.

Mr FORREST—Is it possible that an Australian citizen can lodge a complaint about the abuse of their rights they might have received in another country? Or is it dependent on that other country being a signatory to the convention?

Mr Arnaudo—I might have to take this on notice. I think the answer would be whether it is on behalf of the individual who is subject to the jurisdiction who claims to be a victim of a violation by that state party. I suppose you could be subject to a country's jurisdiction overseas—

Mr FORREST—My question was about the definition of state parties.

Mr Arnaudo—'State parties' are state parties to the optional protocol. 'State parties' is effectively the nation countries, the sovereign countries that have signed up to the instruments, not the domestic like New South Wales, Queensland state parties.

Mr FORREST—Do you want to take that on notice?

Mr Arnaudo—I am happy to take that on notice just to see if we can give you a more concise answer, but I expect the answer would be very much whether that individual is subject to the jurisdiction of the state party that has signed up to the optional protocol. If it is, then I would expect that they would probably be able to lodge a complaint.

Ms McCosker—If we are able to give a more specific answer, we would be certainly happy to take that on notice, but the term 'jurisdiction' under international law is interpreted more broadly that simply 'territory'. There are several bases of jurisdiction. For example, effective control. If an Australian authority or a person was acting under the effective control of Australian authorities, then that could be a basis for jurisdiction. But as the concept of jurisdiction is quite complex, it might be easier if we were to provide a detailed answer on notice.

CHAIR—Thank you very much for attending and giving your evidence today.

[10.51 am]

HALL-BENTICK, Mr Frank, Treasurer and Australian Federation of Disability Organisations Board International Portfolio, Australian Federation of Disability Organisations

Evidence was taken via teleconference—

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. If you nominate to take any questions on notice, could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. Thank you very much for giving evidence today and I invite you to make some introductory remarks before we proceed to questions.

Mr Hall-Bentick—Thank you for this opportunity to speak at this hearing. I apologise that we are not able to get to Canberra today to appear in front of you, but we are stretched a bit thinly at the moment. AFDO is the national cross-disability human rights organisation representing people with disabilities across Australia. AFDO and our members participated in the development of the convention from 2001 to 2006 here in Australia and at the United Nations in both Bangkok and New York. During this time we conducted a series of national consultations for the Australian government to ascertain the views of Australians with disabilities.

In February 2008, we again consulted the views of Australians with disabilities regarding the national interest analysis for Australia's ratification of the convention. Further to this, our members have contributed to the convention hearings of this committee last year. During all these consultations, we called for the signing of the optional protocol by the Australian government to show a strong commitment to leadership, accountability, transparency and major institutional change. We see accession to the optional protocol as another opportunity to raise public awareness to the barriers faced by people with disabilities and how the public can help us live ordinary lives.

At our consultations and meetings people discussed the wide array of review and appeal mechanisms at all levels of government—local, state and national—as well as in non-government organisations. However, we are not clear as to when these mechanisms are exhausted and a pathway to the expert committee is an option. We would welcome advice in this area.

Lastly, we see the optional protocol as a further way of obtaining expert advice about eliminating discrimination—working with the international community to improve the lives of people with disabilities across the world. Again, thank you for this opportunity.

CHAIR—Thank you very much. Before I invite people to ask questions, you asked us the question about when all avenues of domestic appeal exhausted. It was an issue which the committee took up with the Attorney-General's Department in the hearing just prior to yours, and that transcript will presently become available. Essentially—if I am not verballing them—the response was that this is a matter for the United Nations body. If someone wishes to make an appeal it is for the United Nations committee to determine whether the appeal is within their jurisdiction—that is, that the domestic avenues of appeal have been exhausted.

Ms NEAL—Mr Hall-Bentick, thank you for joining us via this technology; it is working amazingly well and we can hear you very clearly, so that is good. One of the issues that were raised earlier in the hearing today from some of the committee members was in relation to determinations being made by an external committee and whether or not they had jurisdiction. I wonder whether in any of the submissions or during any of the consultations that you have conducted there has been any concern about that issue whatsoever.

Mr Hall-Bentick—No. The Australian disability committee actually welcomed that procedure in that we saw our involvement with the international community as very important. I know the Australian government always participates in UN activities. I think the advice that may come from the expert committee as to ways in which we can improve either our own operations or some of the operations that we participate in, maybe through aid projects overseas, will go a long way to making sure we provide better human rights for people with disabilities.

Ms NEAL—Have you or your organisation ever been involved in any complaints made by individuals from within Australia to an international body?

Mr Hall-Bentick—No, not to any of the UN bodies.

Ms NEAL—Thank you very much.

CHAIR—Frank, have you heard of any concerns being raised as to how people with a disability can access the appeal mechanisms of the optional protocol? Has that come up as an issue at all?

Mr Hall-Bentick—Yes. Looking at other conventions and the work of other expert committees, we see that there are a lot of referrals that their committees have judged to be inappropriate. Because Australia does have a vast array of review and appeal mechanisms, we would like to know whether you finally have to go to the High Court and get turned down by the High Court before you can go to the UN committee. That is why we particularly want to work with Attorney-General's and government, just to have a clear pathway which people can follow so they know what they have to do.

At the moment we have equal opportunity regimes in each state and we have the Disability Discrimination Act. If someone fails under the equal opportunity of their state, do they immediately go to the UN, or is there some procedure they need to follow through the Disability Discrimination Act. So we are hoping to get advice as to those pathways so that we can be clear and advise our members around Australia what the clear path to the UN is.

CHAIR—So there is this question about the means by which an appeal can be lodged with the disabilities committee and the circumstance in which it can be lodged. It sounds like there is scope for further clarification and making that understandable for people.

Mr Hall-Bentick—Yes, we would welcome that.

CHAIR—Thank you very much for joining us this morning and for your comments.

Mr Hall-Bentick—Thank you very much for the opportunity.

[11.02 am]

ALLEN, Mr Malcolm, Assistant Commissioner, International Relations, Australian Taxation Office

COSSINS, Mr Neil, Australian Taxation Office

RAWSTRON, Mr Mike, General Manager, International Tax and Treaties Division, Department of the Treasury

WOOD, Mr Gregory Kenrick, Policy Advisor, International Tax and Treaties Division, Department of the Treasury

Agreement between the Government of Australia and the Government of the British Virgin Islands for the Exchange of Information Relating to Taxes

Agreement between the Government of Australia and the Government of the British Virgin Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. If you nominate to take any questions on notice, could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make some introductory remarks before we proceed to questions.

Mr Rawstron—Thank you. The proposed agreements with the British Virgin Islands include a tax information exchange agreement, a TIEA, and an agreement on the allocation of taxing rights. In our view the proposed agreements will benefit Australia by enabling us to better administer and enforce our tax laws. The agreements on taxing rights, which allocate taxing rights over certain income between two countries, is part of a package of additional benefits designed to encourage jurisdictions to conclude TIEAs with Australia. Essentially that agreement will relieve double taxation of certain cross-border income derived by residents of Australia and the British Virgin Islands. Due to its limited application to government employees and students, the cost of the agreement to Australia will be negligible.

The proposed agreements are an important element of Australia's ongoing commitment to the OECD's efforts to curb tax avoidance and evasion through enhanced international cooperation. Australia, along with other OECD countries, is actively pursuing bilateral tax information exchange agreements with low-tax jurisdictions that are committed to the OECD principles of tax transparency and effective information for tax purposes. The proposed agreement requires treaty partners to have in place necessary legal and administrative frameworks to support their commitment to information exchange and, further, the ability to exchange information cannot be hindered by restrictions such as bank secrecy laws. In conclusion, TIEAs are an important tool in

Australia's efforts to combat offshore tax evasion and we therefore recommend that members of the committee support the treaty action proposed.

CHAIR—Thank you. Are the British Virgin Islands significant from an Australian perspective in terms of tax evasion?

Mr Allen—The British Virgin Islands is one of 35 countries that signed up with the OECD around the transparency initiatives. From that extent, we are interested in signing with all of those countries because from a taxation perspective we do not get to see the whole view of an Australian taxpayer's overseas dealings. In the 2008 financial year about $2.2 billion came into Australia from the British Virgin Islands. As a benchmark, from all those 35 countries there was a total of about $29 billion, so in terms of overall dollar flows it is quite substantial. I would have to qualify that, but a lot of those dollars are legitimate financial transactions that have a genuine business or tourist type purpose. We tend to look more at numbers of transactions. We are more interested in who is doing the dealing and assets that, in those transactions between Australians and BVI, may indicate that there are other dollars of interest to the Tax Office.

Mr BRIGGS—What other countries are part of the 35—Switzerland?

Mr Allen—The ones that we have signed tax info exchange agreements with are Bermuda, Antigua and Barbuda, the Netherlands, Antilles, BVI and the Isle of Man. They tend to be non-OECD countries. Switzerland is an OECD member.

Mr BRIGGS—So it is not part of the 35.

Mr Allen—No. There are other activities within the OECD to look at tax competition between OECD members.

CHAIR—How many countries are covered by this type of agreement and how many are outside it? Are there countries that are regarded as tax havens where we have real problems that are outside the agreement?

Mr Rawstron—There are certainly countries outside the agreement, but our economic relationship with them would be pretty minor. From memory, the 35 comes from work that the OECD did in the early 2000s where they identified countries which had not committed to OECD principles. Obviously countries like Switzerland and Austria are part of the OECD. They may not be fully committed to the current standards but they are certainly fully committed to previous standards which have subsequently been improved and enhanced. I think, for the remaining 35, the only ones which still remain uncommitted are Monaco, Liechtenstein and Andorra. All the others have made commitments. Whether they follow through on those commitments is a different question, but they have all made commitments apart from those two.

CHAIR—How broad is your coverage with this kind of treaty? Do you think you have the places pretty much locked down or do you think there are significant areas where the tax haven that people can use as an offshore mechanism for tax evasion still flourishes?

Mr Allen—We have signed agreements with five countries, and there are probably another six of which we would hope to get, if not all, the vast majority signed this calendar year. The negotiations are close.

CHAIR—Which are they?

Mr Allen—Aruba, Grenada, Guernsey, Jersey, Nauru and the Marshall Islands.

Mr Rawstron—I will also add that, of the 35 countries, Australia was one of the few nations to write to all but two seeking to have tax information exchange agreements. I think the two we did not write to were the two which were not committed.

CHAIR—Given that we are talking about $2.2 billion in transactions, is it your expectation that Australian tax evasion will be discovered as a consequence of this agreement?

Mr Allen—I imagine there will be, based on what we have seen with other countries. I think it is important to note that we would generally identify the taxpayer or the transaction of interest first. The agreement does not let us go fishing for Australians doing business in the British Virgin Islands; we actually have to have a tax reason to go and ask for the information.

Where these kinds of agreements have been useful with those that we have signed to date is where we will find something like a taxpayer using a credit card from one of these countries to repeatedly take cash at automatic teller machines in shopping centres—we are getting people doing up to 200 or 300 withdrawals a year of hundreds or thousands of dollars. This lets us go back to the countries and identify through their banking system who actually owns that credit card.

CHAIR—The way it works is that you identify an Australian who is engaged in financial transactions involving the British Virgin Islands, and if these things cause you some concern about the possibility of tax evasion then you go off to the country and seek further information and detail. You cannot go off to the country and say, 'Tell us about any Australians who are engaged in financial transactions in your country.'

Mr Allen—That is exactly right.

Mr BRIGGS—Are the agreements you have signed already working, in your view? Are they helping with tax evasion?

Mr Allen—Yes, two of the five agreements have entered into force; three of them are yet to enter into force. We have made exchange requests under both of those two, and we have got information back in accordance with the agreement which is helping current audits that we are doing.

CHAIR—Which are the two that are in force?

Mr Allen—Bermuda and the Netherlands Antilles.

CHAIR—Which are the three that you are working on?

Mr Allen—Antigua and Barbuda, the British Virgin Islands—as we are obviously talking about today—and the Isle of Man, which was only signed on 29 January 2009.

Mr BRIGGS—You mentioned you had hoped to do or are engaged in discussions on six more, which is 11 of the 35 all up—is that right? Is that a large part of the $28 billion in economic activity you mentioned earlier? Do the 11 countries cover a majority of that $28 billion?

Mr Allen—They would cover a large part. In particular, a lot of the dealings we are seeing dollar wise come through the Channel Islands, and that is mainly because that is where a lot of the UK banks have branches and subsidiaries set up, so they were a large focus for us. The Isle of Man, Jersey and Guernsey were all quite important ones for us to sign up. I will just clarify one thing: the 11 countries are those that we would hope to have signed up by the end of this calendar year. There are other countries that we are talking to and negotiating with.

Mr BRIGGS—So there are others, but presumably you do not want agreements with all 35—or do you?

Mr Allen—In the ideal world.

Mr Rawstron—Ideally you do, but only because of the cascade effect. You sign up with the Isle of Man—

Mr BRIGGS—And that puts it somewhere else.

Mr Rawstron—and funny money then goes to another jurisdiction. But realistically a number of the 35 will not sign agreements with Australia simply because there is no existing economic relationship and they do not see any reason why they should enter these agreements. Some actually want more extensive DTAs—double tax agreements—rather than just information exchange agreements as such.

Mr FORREST—Obviously there is significant investment from the Australian point of view in all of this. Would that match the expertise in these countries? For example, we would probably have to assist with getting up to speed with the technology and all the monitors. Could you just brief us on what it is costing us to get these things in play?

Mr Rawstron—Certainly the package of additional benefits, as we call it—that is, the benefits Australia offers beyond the tax information exchange agreement—includes technical assistance, so we are willing to provide some assistance to these countries to help them establish the processes they need to actually exchange information with Australia. That includes either sending technical experts to the country involved or bringing them out to Australia for short periods of time to train them. With that particular program, the amount of technical assistance we offer is not a significant amount of money—it is only just over $100,000 a year—but I do not know whether your question goes to the actual cost of us negotiating these agreements as well. It is true to say they are capacity constrained. These places do not have a lot of expertise.

Mr FORREST—I am wondering: what it is in it for the Virgin Islands; what do they get out of cooperating with us?

Mr Rawstron—The reputation issue is important for them. They do not want to be identified as a tax haven which is implicated in hiding fraudulent or criminal activity. Secondly, in some respects they can see the writing on the wall. The G20 is already working on the whole thing about the global financial crisis. One element of that is to what extent tax havens have played a role in creating a lack of transparency, particularly in the financial system, because trying to work out where the assets are and who owns what can be quite difficult if you have established intermediaries in these other countries where there is no prudential supervision or limited and we are not quite certain who owns what. They are a bit concerned about that. They are concerned about the OECD working on the project which has been going for many years. There is a new administration in the United States. The President previously supported the Stop Tax Haven Abuse Bill, which proposed quite significant action against tax havens, which were identified by the United States. They were a bit concerned about that as well.

Finally, there is an initiative by the German and French governments regarding tax havens. They have been particularly impacted upon by the scandals around Liechtenstein, where a number of taxpayers were able to use financial institutions to hide wealth and tax liability. They have been running a series of discussions about what can be done in the European context and more broadly globally.

I think there are a number of factors which these countries are weighing up. If we do not agree, what is the risk we are going to have countermeasures taken against us? Countries are talking about taking defensive measures, either ramping up, say, withholding taxes or denying deductibility for their own businesses investing in those countries. In the case of some of the European and some of the North American countries they have registration processes so you can actually operate your business in the United States if you have an activity in a tax haven. They have all those factors which are encouraging them to sign up, but the main one is reputation. They do not want to be labelled.

Mr FORREST—So we have a bit of leverage then. We are not getting ripped off.

CHAIR—The point I was going to make is that the second agreement that we are considering—this allocation of taxing rights regarding certain individuals—is said to be beneficial and an incentive for the British Virgin Islands to conclude the main agreement.

Mr FORREST—Article 11.1 reads:

Neither of the Contracting Parties shall apply prejudicial or restrictive measures based on harmful tax practices …

The agreement obliges both countries to agree on that, but what does it mean?

Mr Rawstron—Part of the commitment of both countries is that if they do the right thing by us, by entering into the agreement and putting in place the mechanisms to exchange information, we agree that we will not take further steps against them in terms of defensive measures—we will not take prejudicial measures against that country.

Mr FORREST—And they would be looking for that given what Obama has done in threatening them with a big stick.

Mr Rawstron—Certainly I think that issue has been discussed. In the earlier days when the whole harmful tax project started, it was part of the reputational thing—'We want to be recognised as being good guys, but, by the way we also want to be assured that you're not going to take action against us even though we have entered into these agreements.'

Mr FORREST—So it is more in reference to perhaps Australia taking the action. We would not imagine that they could do much to us—there is no reversal. I would not think that the Virgin Islands taking some sort of prejudicial action against us would have much impact.

Mr Rawstron—Most of these countries do not have much in the way of a tax system. They mainly have an indirect tax system; they do not have what we would consider a normal corporate tax base or necessarily an income tax base. Beyond being crude about it and booting an Australian operation out of their country, they do not necessarily have the mechanisms to take action, as I see it. It is not in their interests anyway; they want to attract business to their countries.

CHAIR—Thank you very much for coming along and giving evidence today.

Resolved (on motion by **Mr Briggs**):

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 11.20 am