



COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON MIGRATION

Reference: Criminal deportation

MELBOURNE

Monday, 15 September 1997

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON MIGRATION

Members:

Mrs Gallus (Chair)

Senator McKiernan	Ms Gambaro
Senator Stott Despoja	Mr Holding
Senator Tierney	Mr Kerr
Senator Troeth	Mr Martin
	Mr Sinclair
	Dr Theophanous

Matter referred for inquiry into and report on:

The policies and practices relating to criminal deportation, with particular reference to:

1. the adequacy of existing arrangements for dealing with permanent residents who are convicted of serious criminal offences and whose continued presence in Australia poses an unacceptable level of threat to the Australian community.
2. the appropriateness of existing arrangements for the review of deportation decisions;
3. the appropriateness of the current 10 year limit on liability for criminal deportation;;
4. the extent to which effective procedures and liaison arrangements are in place between the Department of Immigration and Multicultural Affairs and State/Territory Governments for the timely identification and handling of all cases subject to the criminal deportation provisions;
5. the extent to which sufficient weight is being given to the views of all relevant parties, including the criminals and the victim/s of the crime, and their relatives; and
6. the adequacy of existing arrangements for the removal of non-residents convicted of crimes.

WITNESSES

CLOTHIER, Mr Michael John, Solicitor, 343 William Street, West Melbourne, Victoria 3003	179
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Present

Mrs Gallus (Chair)

Senator McKiernan

Senator Troeth

The committee met at 9.32 a.m.

Mrs Gallus took the chair.

CHAIR—I am pleased to declare open this public hearing in Melbourne of the inquiry into criminal deportation by the Joint Standing Committee on Migration.

When the Minister for Immigration and Multicultural Affairs asked the committee to undertake the inquiry he expressed concern at decisions which allowed permanent residents with substantial convictions to successfully oppose deportation orders. This concern has also been raised in the media and the community. As the inquiry progresses we will be exploring this further.

In Australian prisons at present there are more than 300 people who are liable to criminal deportation. This brings into sharp focus the question of whether the current arrangements for criminal deportation provide adequate protection for the interests of the Australian community. The committee will be examining the relevant legislation and administrative arrangements as thoroughly as possible to ensure that they are fair, efficient and effective.

We are particularly interested in whether victims of crime and their families should have a greater say in deportation proceedings. This is one of the more contentious aspects of this inquiry. Today in Melbourne we will be hearing from individuals and bodies which have direct experience of the deportation process as advocates and experts in immigration, criminal or administrative law.

Before commencing with our first witness, I remind everyone that these are proceedings of the parliament and warrant the same respect which proceedings in the parliament deserve. This committee does not require witnesses to swear an oath or make an affirmation, but this does not diminish the importance of these hearings. I am pleased to call Dr Kathryn Cronin.

[9.34 a.m.]

CRONIN, Dr Kathryn, 9 Burton Street, Randwick, New South Wales 2031

CHAIR—Thank you very much, Dr Cronin, for your submissions to this inquiry. I now invite you to make a brief opening statement, if you would like to add to your submission, before we proceed to questions.

Dr Cronin—I think I would only say that the invitation to make a submission to this inquiry was accorded to the Australian Law Reform Commission where I am a commissioner. We generally make a number of submissions to parliamentary committees. We tend to make those where we have an outstanding or an ongoing reference that relates to the subject matter. In fact, some of the subject matter relevant to this inquiry is being considered by the commission, particularly in its inquiry into reforming the adversarial litigation system because we have been particularly asked to look at tribunals.

But, as the matters relate really rather more to substantive issues about how you would structure the criminal deportation policy and process, it would seem to be appropriate that I make this submission in a private capacity, having regard to the fact that I have long been involved in researching and working in immigration law and related areas.

CHAIR—We certainly appreciate your doing this.

Dr Cronin—Apart from that, I have set out fairly briefly what I see as the issues. Clearly an issue is whether or not you have an appeal right at all. All I would say to that is that the weight of international opinion seems to be that you ought to have one. Although you can avoid an appeal system when you are considering deportation—or removal, as we now call it—of those who have overstayed their visas and therefore have unlawful immigration status, it is a different matter in terms of the constitution of international law if someone has a residence permit and you are taking that away in order to deport them. It is that essential difference that tends, in most of the international rules, to indicate that these particular categories of cases are ones where you have an appeal right.

Following on from that, it is really a matter of how you structure your policy and practice. Most of the overseas regimes that I am familiar with tend to have their policy as part of their legislation or their regulations or rules. We are somewhat different in having them in the form that they are in in this guideline that is appended to a migration series instruction.

CHAIR—Could you expand on that? For example, what sort of thing would be in the legislation that is more specific? Can you think of an example?

Dr Cronin—The British one is quite an interesting one. I like the British rules, I must say. I also like the Canadian rules, generally, because they are fairly clear and they are not all that voluminous. America is never one you want to emulate in this area. For example, the British rules simply say, as rule 164, that you consider the public interest as against any compassionate circumstances. Then they go on to recite a variety of things that you have to look at, which are all entirely in keeping with what we have in our guidelines, but they are stated very briefly. They have the age of the offender, the length of residence, personal history, domestic circumstances, the nature of the offence, previous criminal record, compassionate circumstances associated with the case and any representation.

There is only one other thing that they put there which I think is an essential feature of any legislative regime. It says that where the person is a refugee then full account is taken of the convention, and nothing in the rules is to be construed as requiring action that would be contrary to Britain's obligations under the convention. It is a fairly brief recitation.

CHAIR—They have legislated that you have to look at the nature of the offence and the compassion. That still then gets us back to the problem that we have under the guidelines, when perhaps the minister gives one weighting and the tribunal gives another.

Dr Cronin—Absolutely. I think the only way around that is to legislate. Australia's regime is different because the minister's view is much more explicit in our legislation in every part of the regime—or parliament's view, as it is now enshrined in legislation. It is much more explicit than you would get in other systems. It is certainly entirely possible to frame a set of regulations where it is quite clear that where it is this particular sort of offence, that has overwhelming consideration and it requires considerable circumstances to outweigh the presumption that in those cases you proceed to deportation. You could structure that discretion in any other way that you liked.

CHAIR—When we are taking into account the compassionate factors, are we looking at the rights of the potential deportee or the rights of other citizens—for example, his family—or both?

Dr Cronin—It is a vexed question. It has not litigated here, but it has litigated abroad as to what you mean: is it personal to the person or does it have a broader community context? Certainly the litigation in the UK, which is the area I am most familiar with, has had one important case involving a priest from the Sikh community. I must say that was not a criminal deportation case, but the same presumption goes in their general deportation provisions. The litigation that went before the divisional court was saying that if this is a community that is not very well served by religious people, and if it is going to adversely affect the community, is that a compassionate circumstance or is such a circumstance limited to the person?

Generally the view there has been that in most cases it is limited to the person, and that you do not look beyond that to some sort of community aspect. But again it is very important, when you use terms like a 'compassionate circumstance', that you clarify what it is that you mean by it. Otherwise you end up with a whole spate of litigation where people try to put some markers down to indicate the scope for it. So if you want to have a look at compassionate circumstances, I think it would be appropriate to say 'compassionate circumstances relevant to the person' or whatever you might do to tie it down.

CHAIR—Does this then create two kinds of potential deportees: the ones that are lucky enough to have family or compassionate circumstances and those who are unlucky enough not to have those? There is no difference between the two in justice or in what they have done—their crime or their right to individual compassion—but the fact that one has got a dying mother or a wife and children, or whatever the compassionate circumstances are, means that he is then treated differently to the other one on the basis of things that actually have nothing to do with his crime.

Dr Cronin—I think it does, and, again, you see that happening overseas. Essentially, it is a balancing exercise. If you have no real ties in the community other than the fact that you somehow have managed to get yourself a resident's permit, then it does not require a great deal to say, 'This is not a very nice crime; if we had thought you were going to commit this we probably would not have given you residence—therefore, you go home.' It does become a more complicated and potentially more vexed balancing exercise when there are lots of associated ties that the person has in Australia.

I think the interesting literature or the interesting case law that you are seeing develop in Europe is case law that is starting to talk about notions of constructive exile that are associated with family members who are based in the deporting country. This is so particularly if you are deporting, say—as is often the case—a dad, and there are small children who may very well be citizens of the deporting country. They then leave in order to have a family life or they stay and they do not have a family life. So those notions I think are very much part and parcel of case law that is going to Europe.

I think there are three types of cases. There are those cases where you have the family, the constructive exile type issue. You also have those cases where the person came to Australia—or came to Belgium or France—when they were young, and most of their life has been lived in the country that is proposing to deport them—and, generally, also they have family there—but it is also looked at from the point of view of whether there is a responsibility on the country that has bred them, as opposed to birthed them, to keep them, even if they are nuisance offenders. The third sort of case involves refugees. I think in all other cases the balancing exercise is relatively uncontroversial because there is not a lot on the other side to predispose you not to deport.

CHAIR—Do you find it anomalous—and I do not see any way of getting over

this—that you can have someone who has come here, taken out citizenship at the minimum of two years, and has committed a crime, let us say, that has a 10-year sentence, and against that you can have someone who similarly comes here, does not take out citizenship, commits a crime with a two- to three-year sentence, and the latter is liable for deportation but the former is not?

Dr Cronin—Yes, I think there are numbers of anomalies. There is also the prospect, of course, that if you commit your offence overseas you may still get in, and it could be a comparable offence. I think there is one case that has been dealt with in the Administrative Appeals Tribunal very recently where someone committed a very nasty murder as an adolescent but, according to all of the evidence, has since been reformed. There is a very real prospect—certainly the AAT found—that he is of good character now, so he can get into Australia. If he had committed that offence in Australia and been deported, he would not have been allowed to get back.

I think, too, there is the difference between people who have access to proper advice and those who do not. If anyone goes to an immigration lawyer, the standard advice would be to get citizenship as soon as you can. They get that advice because the whole nature of immigration law now is such that residence does not carry with it any sort of certainty. You can lose it if you go overseas and stay there for too long.

Certainly, your children may grow up to be nuisance adolescent offenders and they then are liable to deportation. Therefore, the advice from a practitioner is for people to get citizenship as soon as they are entitled to. The fact is that if they start committing offences down the track they are protected where others who have not taken up citizenship may not be.

I am not saying that that is appropriate or inappropriate but, certainly, if you look at it on the basis of the offences a person commits and what effectively is Australia's responsibility to keep certain people who have got nasty criminal backgrounds, it looks to be somewhat invidious.

CHAIR—I have a lot of questions to ask on your submission but I know the deputy chair is champing at the bit to ask you some questions so I will hand over to him.

Senator McKIERNAN—That latter theme is somewhat of a bone of contention in this inquiry—the matter of citizenship and when a person is eligible for citizenship. One of the fundamentals of adopting Australian citizenship is that the person who does that receives certain rights and benefits by doing so. One of them is that they would not be liable for deportation. Does that apply to countries such as Britain for example?

Dr Cronin—Yes.

Senator McKIERNAN—Canada?

Dr Cronin—Yes. All of them. And some can take away your citizenship generally for certain offences. In the United States you are more liable to get what they call ‘denaturalisation’ for serious criminal offences but they require fairly elaborate hearings. But generally, citizenship is a bar to deportation.

I think the cases where it is a problem are those cases where you have adolescent offenders. A lot of them are persistent and nuisance offenders. They may not have taken out citizenship because their parents did not get it for them. When they reach 18 and they have got a fair criminal record they may not qualify for citizenship on character grounds and they will be very much liable to deportation.

Those cases, internationally, are the ones that go into a European court. They are the more worrying because if someone had thought to take out citizenship for them when they were entitled to it and young enough not to have a criminal record, they would have had that protection. They are not in a position to initiate citizenship applications themselves while they are under 18 and if they have got a nuisance adolescent offender profile they might not get citizenship once they are 18.

Senator McKIERNAN—Generally speaking, our laws on citizenship in the area of criminal deportation would not be that much out of step with the international community.

Dr Cronin—Not at all. It would be absolutely in keeping with it.

Senator McKIERNAN—We have got this 10-year rule which applies in criminal deportation for resident non-citizens. Are there any other places that you are aware of where that rule or a similar rule applies? Is there a 10-year rule or anything like it in Britain?

Dr Cronin—They do not limit it. At any time if you commit serious criminal offences you can be brought up for deportation. Our 10-year rule is really a historical anomaly. It comes from the time when we had a difference between Commonwealth citizens and aliens. At that stage Commonwealth citizens were immune from deportation very quickly and others who were non-Commonwealth got their 10 years. When they clarified the situation, they brought everyone up to the limit of 10 years and it has somehow just stayed there.

I can look it up, but I am not aware of any provision. I would want to have a look at Canada, but certainly in Britain there is not a particular time period within which you must deport. It comes from our old notion of absorption really. And it has just stayed. There is no reason why you would want to put that limit on it necessarily.

Senator McKIERNAN—The limit is unfortunately on it. It is something that we have got to look at in the process of this inquiry.

Dr Cronin—It seems to me to be there entirely as a result of part of the historical patchwork that is this legislation. It has a lot of different time periods written into it and they have become rules of stone but there is no reason why they should have. Again, you have a balancing exercise that says you look at the length of residence. For example, if they have been here for 20, 30 or 40 years that may be a bar to deportation but there is nothing to predispose you not to deport.

Senator McKIERNAN—During the course of one of the chair's earlier questions, you mentioned refugees on a couple of occasions. We are looking at criminal deportation which is different from the removal of people. The danger of refoulement is something the committee is very much aware of. Did you mention it because of a real danger of refoulement?

Dr Cronin—I think you have to take appropriate steps. I suspect the department has now—I do not think it has always had but it has now—what is a fairly good way of screening cases out so that you only put up for deportation those cases where either the person is not a refugee any more or their offence is not sufficiently serious that they are a danger to the community. They have already done that screening exercise. In my view, what is a problem is that there is nothing in the guidelines at present. Indeed the guidelines seem almost to contradict the convention at parts but there is nothing in the guidelines to say that that exercise continues on. Once a person is a refugee or there is a claim that they might be a refugee, then that is something that would have to exercise the attention of the reviewing authority. They would have to, under the convention, come to a finding either that you are not one or that you are one but you are a danger and therefore we can remove you without breaching our protection obligations.

Senator McKIERNAN—Where do the protection obligations end? For example, what if a person is granted refugee status in the late sixties and commits an offence subsequently? Or would the 10-year rule come into play in that regard?

Dr Cronin—Even so, I am aware from discussions with people in the department that there are quite a number of eastern European cases, for example, where arguably the situation has so changed that they are not refugees. I think there is a significant screening that goes on in the department. One hears of fair numbers of these cases but the numbers that actually come into the tribunal are very small. I am not quite sure what the screening test is but those people are, for example, unlikely to be considered to be refugees any more. The whole refugee convention is premised on the fact that you are not a refugee forever; you are only a refugee as long as you continue to satisfy the article one test that you cannot be returned because of a fear of persecution on convention grounds.

Senator McKIERNAN—Thank you for that. The other one I want to test with you is the trigger to make a person liable for deportation—a sentence of 12 months or more. Do you think that is sufficient? Is it too strong or too light? Is it adequate to the task?

Dr Cronin—I think it is probably adequate. To give you the example of Britain, Britain has a situation where the sentencing court makes a recommendation for deportation. Whenever the person is a non-citizen, as part of the prosecution brief, the sentencing court is told, ‘This person is liable for deportation if you want to recommend it’, and it is the recommendation for deportation that is then considered in the civil immigration proceedings. I have certainly been in cases there where people have got a recommendation for deportation on very trivial matters and it is expensive then to have to push them through a review system, so I think that 12 months is probably adequate. It is generally regarded as indicative of a fairly severe sentence. You might want to monitor it in terms of what is now the variety of different sentencing regimes and to make sure that that is still a clear test of seriousness.

I suppose one of the problems about having a 10-year rule is that sometimes people’s criminal profile starts small and builds up. If it is conditional on there being a 12-month sentence, they may have within the ten years committed two relatively minor offences that did not add up to the 12 months but, subsequent to that, committed something very serious. You are not then able to go back to the offences that they committed within the 10 years and use those because they might be under the tariff.

All of these ‘gateways’ into the deportation system operate so as to preclude you deporting in cases where you might have wanted to. That is why you might at least want to think of getting rid of the time bar, for example. As long as you were satisfied that, within the array of criminal legislation throughout the states, you could still be satisfied that 12 months was a real indication of seriousness, then I think it is appropriate. If you are finding, in fact, that the tariff has dropped and that a serious offence, or one that in the deportation arena would be considered a serious offence, might now only get you six months, then you might want to drop your tariff.

Senator McKIERNAN—One of the submissions we have gives the example that three sentences of 11 months—which is pretty serious—served concurrently would not exercise the trigger. Is the sentencing a good measure of the crime? That is probably an unfair question to direct to you, but it concerns me sometimes that different sentences are handed down for crimes against a corporation, for example, and where somebody commits a murder or manslaughter and the sentence appears to be relatively mild. It is a comment we can make after looking at the interpretations put through our newspaper. I will leave it at that for the moment, Chair.

Senator TROETH—Dr Cronin, I notice in your submission that you say that the present guidelines should be clarified. Could you give us an indication of the way in which you think they should be clarified?

Dr Cronin—They are old, for a start, and even on that basis they probably need some rethinking and redrafting. Where I am concerned about them is paragraph 14, which says:

Australia does not have an obligation to provide sanctuary for people who have broken the laws of another country.

Well we do, in fact, under the refugee convention. Very often refugees have committed crimes, but we give them sanctuary anyway. It goes on to say:

In any case it is neither feasible nor proper for the Australian Government to consider the propriety of the operation of criminal codes in other countries—

Again, I think that is something that is both feasible and appropriate, particularly where you are dealing with a refugee case. But in some instances it may well be relevant in balancing the other part of your discretion.

I would also say in relation to paragraph 22, the claims for refugee status, that it is not enough that this is a matter that is decided by the minister. It is very much something that has to be weighed up by the tribunal. You do not see it so much in the most recent criminal deportation cases involving refugee claims—they do seem to deal with the convention; but in the earlier ones they are very unsatisfactory, in my view, in the way that they deal with the refugee convention. There is no indication there that they know what they ought to be doing or what role the convention plays in an assessment of whether or not to proceed to deportation.

Senator TROETH—Right. So certainly an updating in terms of modern conventions and the way things are dealt with now?

Dr Cronin—Yes; and, I would have thought, a clarification of those lines of cases that we know internationally are the vexed cases. I do think it would be better to have some clarification of those cases where you have a long period of residence. Paragraph 20 says:

A sensitive issue concerns the liability for deportation of an adult who arrived in Australia as a minor. It is not the Government's intention that such people should never be deported. Where there is a pattern of criminal behaviour indicating a likelihood that the person will commit further serious crimes, deportation should be seriously considered.

I would not argue with that as a proposition, but there is a lot more to talk about in terms of giving clarification and guidance to a tribunal—for example, how long they have been here, how many family they have, what sort of offending you might be looking at. It may be different in these sorts of cases if there are significant crimes of violence as opposed to repeat petty fraud offences, for example. Those sorts of clarifications, which you could get by looking at some of the international case law on it, are quite interesting.

The other thing is this issue about where you have a young child present. These guidelines were not written at the time that our deportation operated as banishment—and I use that word as the appropriate term. It is a very, very severe criminal deportation policy

that we have. I do not know of comparability overseas.

Senator TROETH—I think you mentioned somewhere that it is extremely difficult, if not impossible, for a deportee ever to return to Australia.

Dr Cronin—Absolutely. You cannot really envisage it because the only way you could get back in, under any circumstances, is if you were overseas and you were able to apply for one of those visa classes that gave you a review right and, as a condition of that review right, you were allowed to access the minister and to get the minister, in their residual discretionary capacity, to say, ‘We will set aside a review decision and let you in.’ And that has to be tabled in parliament. It is a very, very severe test to get back in.

I would be very surprised if you found anything comparable to this as a rule overseas. You might ask the department, but I do not know of any situation where you get it as a life ban. Where you have children, of course, that is a very real consideration. If they do not have the capacity to go overseas—and they may not—and if they do not have the capacity for visiting you in the future, then you have effectively put down a very clear block in terms of their maintenance of any family life.

Senator TROETH—I think you said that sometimes a person who has reached the age of 18 may be disadvantaged because their parent had not applied for citizenship. Where would you draw the line or set the barrier at crimes serious enough for a person to be deported? For instance, would a history of petty crime, perhaps breaking and entering or minor burglary—a successive building up of offending in that area—be enough to warrant it? Is murder perhaps at the other end of the scale? Where would you set the line?

Dr Cronin—So long as you make it banishment, you put the stakes up so high that you really do not feel constrained to deport very many people. I actually think you are much better grading the exclusion period and bringing more people into deportation. It is perfectly appropriate for a country to say, where you have a persistent nuisance offender who keeps on offending, that you do not want them. There may well be a time in the future when they see the error of their ways and reform, in which case you might consider, if they have family here, that they could come back. By having it as a permanent lifetime bar we have actually limited our deportation policy ourselves. I think it is much better to have graduated exclusions so that you feel better able to say, ‘We do not want you here.’

The way the exclusion period operates in the UK is that the deportation order survives for three years. In criminal deportation cases, you have to apply for it to be revoked. The minister first of all has to decide whether to revoke it and all that does is make you eligible to apply to come back. So it is an exclusion similar to ours in the sense that you have to really justify getting back into the country. But it does not have this psychological notion, which I think is a very serious one not only within the tribunal but also within the department, that means that because we exclude them forever we only pick

our most serious cases. There are probably within the caseload others that warrant an exclusion for some period of time but that you may not be disposed to proceed on now because you have set your exclusion test at such a high level.

Senator TROETH—What is your view of the arrangements currently in place between the department and the states for the identification and handling of deportation cases?

Dr Cronin—I probably could not comment on how they deal with the identification of it. What I have said in my submission is that I think there probably ought to be better transparency in terms of their decision making. That is really what I think was alluded to in the opening statement of your chair: other people have an interest in seeing people deported. I am aware at least here of one case where a person sought to intervene in the Administrative Appeals Tribunal to ensure that the person was deported.

Certainly in England, again that is very common for people to put in an application to ask that the person be deported. You might get better transparency if you had guidelines equivalent to the DPP guidelines for when they prosecute, so that people could have a better sense of how this deportation regime applies, because it is an area in which the department really ought to be publicly accountable.

Senator TROETH—You have mentioned previously in your remarks the possible effect on families if people are deported never to return. What weight do you think should be given to the views of the deportees and their families in those matters?

Dr Cronin—The weight would vary from case to case. All I would say is that they are clearly relevant, but in each case they may be more or less relevant. It may be a family that could offer them some support and try to monitor their offending, in which case they may be decisive, or it may be a family who is compounding their offending. It would vary very much from case to case, but certainly they would be relevant.

Senator TROETH—What about a young family with small children, if the possibility of deportation meant that they would never see their parent again?

Dr Cronin—If you look at international law, that is the area where I think we fall down in our criminal deportation provisions. Certainly, under the Convention on the Rights of the Child, there is a requirement that you facilitate the child's right to maintain family life. For those where you have got children under 18, it is a very significant matter.

Again, the cases vary. Ones that you are seeing now in the tribunal tend not to have facts and situations that deal with the person having a very close attachment to that child, so they may have a child but not necessarily really be parenting the child. I suppose in terms of family law that does not give away the right of the child themselves to seek to get to know them at some later stage. I do think they are worrying. Again, it is this notion

of a permanent, once and forever bar. You cannot even come back for the purpose of a visit and I think that makes the outcome such a draconian one that it then converts these cases into much more problematic cases than they need to be.

CHAIR—I have just a couple of things; I know the deputy chair has more questions. The Vienna convention requires access to communicate with a consular office. Do you have any information whether prisoners who are told they are liable for deportation actually do contact the consul?

Dr Cronin—I think they do in some cases. Some of them do have problems with travel documents and so forth. Mostly in international law, this is an issue that is a state-to-state issue, ‘You have got to look after our nationals, and if you don’t we can hold you to account.’ So it is in that context that most of the international conventions are focused. I am only aware of these cases as they come through the end point. I do not do advisings here, so I am not sure. You get a sense from reading them that there has been some consular involvement in a number of them, even if it has only been to get them travel documents.

CHAIR—Under the International Covenant of Civil and Political Rights there is the right to have the case reviewed by a competent authority. Does this imply something like the AAT or could it include the right to judicial review through the court?

Dr Cronin—It could just deal with judicial review. There is a fairly important European case called *Vilvarajah* where they said that most of those provisions were complied with if what you gave them was a prospect of judicial review as opposed to merits review. It is not saying that you have to have an AAT, although that tends to be the way most countries have set it up. You could simply have it as judicial review.

The problem of having them as judicial review—and probably the reason that most states have gone against them—is that the facts are often messy. It is difficult to throw them into a superior court, a federal court, where they are not used to finding facts and where you have cross-examination and so forth. It is easier to put them down in a tribunal where the messiness that is associated with the facts is clarified for you and you have all the findings—for instance, that there is a likelihood of recidivism or that the family is there but not really supportive. Those facts are sorted out and, if it ends up going on judicial review, you are only dealing with the sorts of issues of law that derive from that.

CHAIR—I am going to put you into hypothetical land, just for fun, to see what you think. You might not have an answer. At present, the minister is not happy with the fact that the AAT has overturned some of his decisions but, as you point out, if you look at the history, only seven per cent of all decisions have been overturned.

Dr Cronin—And he is not the only unhappy minister. I think it has been a long tradition.

CHAIR—In our hypothetical case, if we did not have an AAT and these cases went straight to judicial review, would your feeling be that the overturning of the minister's cases would be greater or less?

Dr Cronin—Probably greater.

CHAIR—I was wondering about that.

Dr Cronin—You certainly get a very considerable well of sympathy in the Federal Court. These are judges who do not actually deal with litigants for the most part. They do not have that experience and you do not see that quite robust jurisdiction that you get in the lower courts which are used to finding facts and which have a certain scepticism about litigants and so forth. You do not see it in the Federal Court. When you read Federal Court cases, you get a very considerable sense that there is a fairly deep well of sympathy that resides in that court for individual litigants, particularly in this jurisdiction.

CHAIR—You also have court judges who are very independent whereas, on the Administrative Appeals Tribunal, they do have an eye to their reliance on the minister.

Dr Cronin—Yes. They are on a closer leash, if you like, whereas there is that very clear demarcation of independence that you get in the court. The other thing is that they are cases that are not necessarily clear. Once you have a deportation, it is like a family case. A lot of matters are relevant—Mum and the kids, the family, what you did and the victim. There are a lot of interested parties in these cases. If you are going to litigate them only in the Federal Court, you have very expensive hearings. I would have thought that, in itself, would predispose you against it.

Senator McKIERNAN—I was smiling because I am here in Melbourne tomorrow on a different committee, looking at the Migration Legislation Amendment Bill No. 5, which includes a prohibitive clause to stop people having access to the courts.

CHAIR—I am also here on a different committee tomorrow. Melbourne must be full of committees during the break.

Senator McKIERNAN—I was smiling because of what was said about access to the courts.

CHAIR—You have said that the tribunal ought to find explicitly either that a person has ceased to be a refugee or constitutes a danger to the community, and such findings are not always made in these cases. You actually say that the tribunal decisions evidence a lack of understanding about the convention and its relevance to criminal deportation decisions. How do we get over that? Is this a matter of educating the members of the tribunal or of a better selection process for tribunal members? This is putting you in the hot seat, but this should not be happening. If this is happening, then it is wrong.

Dr Cronin—Most of the problem is the guidelines, at this stage, because the members really do look at these guidelines and seek to follow them fairly carefully. Because the guidelines indicate that refugee matters are for the minister and not for the tribunal, in various cases they have avoided looking at it. It has only been when these cases have gone on to the Federal Court and the Federal Court has actually done the analysis that you are now starting to find the tribunal doing the analysis. In recent cases it is better but that has come to them because of guidance from the Federal Court as opposed to guidance from these guidelines.

I think it has always been a bit unsatisfactory that you have had the AAT with its immigration jurisdiction: it is not really an expert jurisdiction. But that will probably be solved because of the restructuring of the whole administrative review system.

CHAIR—You say ‘whether or not there is sufficient transparency in the Minister’s decision to proceed to deportation’, which suggests there might be questions about sufficient transparency. Do you have anything you can tell us that is a little more specific?

Dr Cronin—I sit on the very edges of this system but I am certainly aware of fair numbers of cases that potentially are deportation cases. I am thinking of a case called Mezbur that went to the tribunal and then to the Federal Court, as I understand it, but has been lost in some sort of limbo. I was interested to see it go back or even be dealt with in the Federal Court.

You get a sense that there are numbers of cases which are being compromised by the department—I think even the figures show that—or that may not even be proceeded with as deportation cases. Even in the ones you get, you get a history of repeat warnings going on for quite considerable periods of time before they actually proceed to deportation. There does not seem to be any clear consistency in the way that cases are dealt with.

I think that, as you have indicated in your opening statement, there is a very clear public interest in deportation. It is everyone’s community that is being safeguarded. That transparency is required not only so that you get consistency between one case and another—I know from practitioners that people do complain of being treated inconsistently with other people that they know of—but also because, publicly, the department has to declare to the community the guidelines that it is operating under in deciding whether to give warnings, and then to proceed to deportation, or to compromise a matter that has been decided as one appropriate for deportation. As I said, certainly the AAT cases indicate that a lot of cases get flicked out by the department as opposed to the person themselves putting their hands up and agreeing to go.

CHAIR—Just following on from that you say that it is clear that ‘many of the cases commenced in the Administrative Appeals Tribunal are compromised by the department.’

Dr Cronin—It is not very clear. Suddenly they disappear from the AAT so that one has a sense that either they have given them a second chance—

CHAIR—So they have just said, ‘It is too hard so we are not going to deport them’.

Dr Cronin—You do not get an indication of their reasons. There is a good deal of compromising that goes on in any event in all of this litigation. A number of cases that go up to the Federal Court are compromised but in this case the compromise, as I would see it, would generally be that if it is by the department that they will give you a second chance, that this will be a warning as opposed to a deportation decision.

CHAIR—This takes us back to, as you say, things simply disappearing out of your sight.

Dr Cronin—Yes. I think I agree where you say that whatever decisions are taken concerning review arrangements for criminal deportees are essentially political or policy ones.

CHAIR—It comes back to the politicians again, doesn’t it?

Dr Cronin—Absolutely.

Senator McKIERNAN—You have outlined your concerns about No. 14 on the current criminal deportation policy. Let us say the policy was rewritten to say:

Australia does not have an obligation to provide sanctuary for people who have committed serious non-political crimes outside Australia.

Would that allay your concerns?

Dr Cronin—Yes. The reason I find it difficult is that where the person is not a refugee that is a perfectly appropriate statement to make. You could even put it in those terms. Where the person is a refugee, whether their crimes are political or non-political, you may still have a requirement to offer them sanctuary because the exclusion provisions operate in two ways. In article 1, you have particular exclusion provisions that say that if they have committed serious offences then they are excluded from protection. You also have article 32 which says that if they are a danger to your community, you can return them. So it operates at two points.

If you look at our visa criteria for refugee matters, it has a modification there of the public interest criteria. Some of them would have ordinary criminal offences but because they are refugees you let them in anyway. It is very difficult, as I see it, to recast that other than to state it as a proposition that applies to everybody other than refugees

and then to go on to say that the refugee convention means that you have got a whole different set of criteria when a refugee is concerned.

Senator McKIERNAN—The comment that I quoted was in an attachment to the department's submission. It is a draft of an update of the policy. It is much more elaborate than just that one part that I read there. I have a question about the guidance we are receiving in Australia from the judiciary from our own decisions. The Teoh decision caused some concern some years ago but the decision is there. Since then, there have been two joint ministerial statements on how Teoh ought to be interpreted. It would appear, from evidence I have received in a different committee, that the High Court decision is coped with and catered for in the operations of the deportation policy. Would you agree or disagree with my conclusions?

Dr Cronin—Absolutely emphatically agree. The Federal Court in two recent cases has said that the only thing that Teoh said is that you have a legitimate expectation that you would be asked for a further comment, basically, before they decide to depart from the convention. The tribunal itself, with Paul Gerber sitting as the deputy president in a case called Yad Ram said that 'the Teoh principle does not really apply to the tribunal because you are giving them a hearing in any event. They can say whatever they like.'

That case has gone on to the Federal Court and the Federal Court has emphatically endorsed that view, that Teoh is only really relevant to cases where you do not have a review right. Of course, Teoh was the old regime. Teoh was a pre-1989 deportee. So all of the problems of Teoh, in a sense, relate to the past in immigration rather than the present where you have a very elaborate merits review system. So its implications for immigration cases is probably very small now, I would think.

Senator McKIERNAN—Thank you for that. The McCafferty case relates to some of the comments you made earlier about coming here as a minor, being part of Australian society and then being liable for deportation at a later time. Being brought to Australia as a minor and not achieving citizenship has now been tested in the McCafferty case in the Federal Court, has it not?

Dr Cronin—Yes, and it was earlier than that in Nolan. If you are not a citizen, you do not have a right to stay. Australia tends to pick up on European jurisprudence. In the European court of human rights they are very emphatic that your right to remove a person is certainly a right that you have if the person is not a citizen. But they also say that there are limitations to your right to remove a person who is a resident alien—those are those Nasri, Beljourdi and Moustaquim, the French and Belgium cases. All I would say is that it is a sort of 'watch this space' caveat. You will find that a few years down the track Australia will start picking up on the jurisprudence that is becoming very clear in Europe. It would not surprise me if you did not start to get that notion slipping into the way the higher courts look at these sorts of cases.

Senator McKIERNAN—Yes, notwithstanding the fact that we have got a 10-year rule in Australia. I am sure that would have had a bearing, had European courts had a similar—

Dr Cronin—Yes, although in one of the European cases the person they sought to deport was just out of adolescence. He was in his early twenties, so he was certainly still within the 10 years.

Senator McKIERNAN—The final judicial one was a very recent one, and I was out of Australia at the time. The Ervin case went directly to the High Court. Would you see the Ervin case coming within the category of criminal deportation?

Dr Cronin—He would not be a resident, so he was let into Australia as a visitor.

Senator McKIERNAN—As a visitor, yes.

Dr Cronin—Ervin came in as a visitor, and so they proceeded against him under the normal cancellation provisions, and that is generally under either of two sections. I cannot remember whether with him they went under section 109, which is about incorrect information on the visa application, or under section 116; but either one would justify you cancelling the person and removing them. But that is a removal as opposed to a deportation.

CHAIR—Dr Cronin, thank you very much.

Dr Cronin—It has been a pleasure coming here. It is a bit like old times, really.

CHAIR—You obviously have special status, which is why we gave you absolutely no hard questions at all.

Dr Cronin—It was very nice to come, and I wish you all the best with your reference. It is a very interesting one.

[10.30 a.m.]

JOHNSTON, Mr Stanley William, 4 A'Beckett Street, Kew, Victoria 3101

CHAIR—Welcome. Do you have a comment to make on the capacity in which you appear?

Mr Johnston—On this occasion I am appearing in a private capacity.

CHAIR—The committee has received your submission and has authorised its publication. Do you wish to make an opening statement to go with that before we go to questions, or would you be happy if we proceeded straight to questions?

Mr Johnston—Briefly, I have two sheets of paper to add to my submission as an addendum. The first one relates some experience which I hope gives me some qualifications as a witness before your committee.

CHAIR—It looks fairly impressive.

Resolved (on motion by Senator Troeth):

That this committee authorises publication of the addendum to the submission by Mr Johnston.

CHAIR—Would you like to make an opening statement as well as your submission?

Mr Johnston—I have one slight correction in paragraph 3 of the addendum. In the first line the word 'Australian' should read 'Victorian'. That is a tiny matter. To sum up, I have a feeling that most of the contention can go out of deportation if we substitute 'repatriation' and make it manifest that we are collaborating with the criminal, his family, the victim's family and the two countries concerned.

Unilateral deportation, it seems to me, is bad penology, bad human rights and bad economics. I am particularly appalled at the decision in Archibald McCafferty's case. After 23 years here at taxpayers' expense this was an appalling decision. If it was proper that he go back to Scotland then he should have gone back in the first few months, so that he could have begun to settle down in his intended community. To exact our pound of retributive flesh here and then to throw him into a community which has become quite strange to him was bad management.

CHAIR—Your submission emphasises very much the rights of the potential deportee. How do you balance the rights of a potential deportee who has committed a crime against the right of the community to have people removed when there is a fear that

their presence will impact negatively on that community? Obviously we cannot remove the majority of people, but there are some who can be removed. How do you balance those two rights? In your submission I do not feel that there is a balancing of them. I am not saying it is wrong, but you have very much concentrated on the rights of the criminal deportee.

Mr Johnston—I hope that I am equally concerned with the rights of the present victims and potential victims. I do not see that a concern for rehabilitating a criminal is in any way antipathetic to the interests of the community. On the contrary, I take crime very seriously, and it is for this reason that I look to its optimum management. I think it is simplistic to throw bad news over the fence. It is putting it under the carpet. It is like trying to execute HIV sufferers or something like that. I do not see the conflict that you are aware of. If a criminal is bad news here, he is going to be worse news in a country with which he has lost contact. I do not hold with the Pauline Hanson view of a fortress Australia. We are, very largely, one world community, and we want reciprocal cooperation with all governments. We must respect their community needs and expect them to respect ours.

CHAIR—I do not think you would have any disagreement on the theoretical level but, I suspect, when it comes to the practical politics of life it is a little utopian, but quite correct.

I notice that you mentioned the Martinson statistics to show that recidivism is not as high as we all presume it to be, and you have used these figures to support your claim for rehabilitation. Would you accept then, though, that there is not inevitable rehabilitation and some people who have committed a drug crime, for instance, are likely to recommit that crime, and those who are deemed likely to recommit that crime are a threat to the Australian community?

I suspect, just hearing what you said before, you might admit that in saying, ‘But then what right have we got to send him back as a threat to another community?’ I am guessing your reply, but I think it might be self evident.

Mr Johnston—I am assuming that criminals are serious problems. That seems to me why we must handle them rationally and settle them in some community. A drug runner or trader who is known to the police is not a serious threat to our community.

As to the recidivism that you mentioned, it is a matter of how we take the statistics, and that is why in the graph here I have given you a global view. This is a universal constant. The minor figures and ages may change, but the graph is constant globally. People simply stop re-offending. The recidivism that you point to is an extrapolation from youngsters and from addicts—alcohol or drug addicts. People simply stop offending.

Of course we must fear crime. That is what the criminal law is all about. But there is no warrant at all for panic; that is a neurotic and very unhelpful reaction. When we deport a person without regard to his family and social needs, we are making him a worse threat.

CHAIR—But we do have regard—that is part of the guidelines—to his family and his compassionate circumstances.

Mr Johnston—If that were the guiding principle, then we would collaborate with the receiving government. I repeat: then the angst would go out of this.

CHAIR—There are situations when the criminal deportee agrees to leave and we also deport the family, so they go as a family. What about the situation when the potential criminal deportee does not want to go? In this case you are saying it is bad for him and bad for the foreign community to which we are sending him to actually forcibly repatriate him.

Mr Johnston—As I have said in the major submission, I think that our Prisoners (Interstate Transfer) Act has got the principle straight. We are contemplating bilateral treaties for exactly that. My recommendation is that we move toward a multilateral or global convention on this. Of course, there are times when we have got to send a criminal away, but I do not see any reason at all why a good theory cannot be made good practice and that we should aim for the collaboration of everybody, as we do between the jurisdictions within Australia.

CHAIR—What do you think would be the community reaction if, in principle, we agreed with you and said, ‘Alright, we will look at rehabilitation and rehabilitating the person back into this community if they do not want to be deported’? We would actually remove our right of forcible criminal deportation. What do you think would be the reaction in the community?

Mr Johnston—I think you have put your finger on it instantly. The community has to be reassured that this is the best management of a serious problem. If the community thinks we are threatening future victims then we have got a problem, and we must not do that.

CHAIR—I think we have got a problem. I suspect if you listen to some of the DJs that you get on the radio—talkback hosts—who influence a lot of public opinion, I would say to you that in the end we would definitely have a problem. I can see that my phone at my office would never stop ringing with objections from the community if we were to take that line.

Mr Johnston—It is a matter of substituting rational fear for idiot panic, Madam Chair.

CHAIR—If you have found a way to do that, Mr Johnston, I would be very happy to hear it.

Mr Johnston—We did find a way with HIV. In centuries past we reacted to infectious diseases like that by burning people in their houses. We do mature. It is a matter of recognising the limits of the threat and managing this threat in a rational manner. You will see from my record there that I am as much concerned with victims as with criminals.

CHAIR—Yes. Senator McKiernan, I can see you are ready.

Senator McKIERNAN—I did not actually get that impression at all from the latter comment in reading your submission. I did not; I certainly did not. Just as a ballpark question to start it off, do you think Australia should have a right to deport people who are non-citizens of this country?

Mr Johnston—We do have the right, Senator.

Senator McKIERNAN—Should we? I know we do. I asked, should we?

Mr Johnston—I would not recommend abandoning this power until we have a better system in place, which is what I am recommending.

Senator McKIERNAN—You have used some emotional words like ‘panic’.

Mr Johnston—Yes.

Senator McKIERNAN—In six years, just over a hundred people have actually been deported under the criminal deportation provisions—just over a hundred. Is that your measurement of panic?

Mr Johnston—I think the unprincipled deporting of one person is an error, yes. I would say any unprincipled behaviour is a form of panic, yes.

Senator McKIERNAN—You twisted the question somewhat.

Mr Johnston—I am sorry; I do not want to be evasive.

Senator McKIERNAN—I did not say ‘unprincipled’.

Mr Johnston—I am not playing games.

Senator McKIERNAN—Australia, in six years, has deported, I think, 136 persons who have committed offences in Australia. After examining their cases we decided to

deport them. That to me does not stretch to a panic measure at all.

Mr Johnston—Sir, a panic does not have to be general. An over-reaction with one case—the mishandling of one case—is a form of panic, and each of these 136 cases is a criminal with family. There are victims and victims' families, and the community that we are sending them to.

Senator McKIERNAN—Of those 136, can you instance one when the wrong thing was done to them and their family by virtue of the fact that they were deported from Australia?

Mr Johnston—I did instance Archibald McCafferty. I believe that was a radical mistake—the manner in which it was handled.

Senator McKIERNAN—Archibald McCafferty, as you heard the previous witness state, was tested through the courts in Australia. It was not just a unilateral decision of the minister, it was not a decision of the Administrative Appeals Tribunal; it was actually tested in the Federal Court of Australia.

Mr Johnston—I am not saying for an instant that it was illegal. I am saying that, if it was proper, if Scotland was his best community, we should have sent him back in the opening months of his sentence instead of holding him here at our taxpayers' expense for 23 years, committing him to a community with which we were declaring he would have no connection. That is thoroughly unprincipled and, in his case, a panic reaction, yes.

Senator McKIERNAN—Panic to me—and I do not know what the proper dictionary definition of 'panic' is—is something that is done unthinkingly, and I think that McCafferty—and I pick the individual because you mentioned him—was far from unthinking. That was done in the broader interests of the Australian community, and in migration policy matters that is what has to come first and foremost: what is the broader issue for the Australian community. I would have thought, in terms of McCafferty, that there was far from panic—quite the reverse, as a matter of fact.

Mr Johnston—Why did we not send him back 23 years ago?

Senator McKIERNAN—He had not committed the offence 23 years ago to the best of my recollection.

Mr Johnston—He was in gaol, I think, for 23 years, though.

Senator McKIERNAN—That was so, to the best of my knowledge. When did he commit the offence?

Mr Johnston—Shortly after he came here; I am not too sure of that.

Senator McKIERNAN—He came here as a child, he committed the offence as an adult and he re-offended later on: that is my knowledge of the case.

CHAIR—I certainly do not think he was in jail for that length of time.

Senator TROETH—Yes; it is my understanding that he was not in jail for the 23 years.

CHAIR—He came here as a child, he had a bit of a record, and he went into jail. I cannot tell you the length of his sentence, but it was for that sentence that he was then deported, because he had never actually come as a permanent resident. In that, it is a very unusual case. He had actually no status here in the country at all.

Mr Johnston—It is a matter of terminology. If someone comes into this room, I will overreact with that one person, but I do not have to overreact generally.

Senator McKIERNAN—Does Australia, in your opinion, have a policy of unilateral deportation?

Mr Johnston—Yes.

Senator McKIERNAN—In the criminal deportation arena?

Mr Johnston—Yes.

Senator McKIERNAN—There is unilateral, single determinant, single decision making?

Mr Johnston—It is the decision of our government, regardless of the wishes of the criminal, the receiving country and the victim's family.

Senator McKIERNAN—Are you aware of how many convicted criminals in Australia are considered for deportation in a year?

Mr Johnston—No.

Senator McKIERNAN—How many of those that are considered are then told that they are going to be deported?

Mr Johnston—I do not know that data.

Senator McKIERNAN—How many persons are told they are not going to be deported but are given warnings? Do you know how many of the number of those who are given warnings and are not asked to leave Australia who then re-offend whilst they remain

in Australia?

Mr Johnston—No, Senator.

Senator McKIERNAN—Yet you come here and say that we are making unilateral decisions.

Mr Johnston—I do not use that adjective with a sense of provocation, Senator. I am surprised that you find it difficult to accept.

Senator McKIERNAN—Whilst there may be some problems with certain elements of our deportation policy, I think that governments in every country throughout the world should have a right to retain the ability to deport. It is a matter of how we test that decision making process. As we have heard in other instances—for example, in McCafferty—there is the ability to test the decision of the decision makers, be they doing it by delegation on behalf of the minister or through the courts if the minister has made the decision.

Mr Johnston—With respect, sir, does that mean that you are rejecting the principle set out in article 10.3 of the Covenant on Civil and Political Rights, a provision which Australia has accepted, to the effect that prisoners are entitled to programs, the essential aim of which is their reformation and social rehabilitation? Are you rejecting that?

Senator McKIERNAN—No, I am not; and that is a consideration that is taken into account in the decision making as to whether a person is deported or not.

Mr Johnston—You see, I am very happy with the idea of repatriation directed at the rehabilitation of the criminal—for the sake of future victims, apart from the criminal himself. I think you are interpreting my notion of rehabilitation as soft, lenient and irresponsible. I am sorry, but that is your error, Senator.

Senator McKIERNAN—I did not think I was making that interpretation at all, because to the best of my knowledge I have not questioned you in regard to what your interpretation of rehabilitation is at all. I have not raised the issue. I did not. I find it very strange that you can now come back in this very accusing manner to put words in my mouth which I have not used at all, or an argument I have not used.

Mr Johnston—I apologise. Madam Chair said at the outset, very helpfully to speed up the exchange, that I was in effect overly lenient—these are not her exact words—and that I was discounting the interests of future victims and the safety of this community. But that is not my idea of rehabilitation at all.

Senator McKIERNAN—I have not used the rehabilitation argument.

Mr Johnston—No; I apologise for that.

Senator McKIERNAN—One area you do raise, which is of concern to me as an individual, is when a person should be considered for deportation. Should it be in the very early stages of their sentence, after they have been convicted and sentenced, or should it be in the very early months, or should it be towards the end of the sentence before they are eligible for parole?

Part of the difficulty with that is their rehabilitation. When a person is considered for rehabilitation, they get a certain status in some of the states' prison institutions, if they are liable for deportation. That status in some instances does not allow them to participate in work release programs. Turn your mind to what we can do in regard to that. If a person is sentenced to five years imprisonment and they are told they are going to be deported in the first 12 months, it just blocks them out from any parole type of rehabilitation programs.

Mr Johnston—The pattern of repatriation of criminals is that they serve their sentence in their intended best community. So, indeed, the expression then is not 'deportation' but 'repatriation'. And if you have got a criminal on a long sentence, discipline in the early years is strict and it then tapers off, but his rehabilitation starts on day one. You do not capriciously punish someone, throw him into the sea and then fish him out. Retributive discipline is as strict as you require: no-one goes to prison unless this is the parsimonious sentence. This is standard penology.

As set out in article 10 of the Covenant on Civil and Political Rights, every day must be directed at his ultimate rehabilitation. With interstate transfer and with international repatriation, the prisoner does his time in the receiving country, but at least you have got him where it is generally agreed his chances of effective discipline are best. My answer to your question is that I would start planning or considering repatriation on day one and, if it is appropriate that he go elsewhere, then the sooner the better.

Senator McKIERNAN—That could lock that individual out of any rehabilitation programs that may be in existence within the prison or within the state system—the parole system, for example.

Mr Johnston—I do not see that.

Senator McKIERNAN—I am not sure which state it is in, but if a person is liable for deportation they are given a specific category within the prison system and as such, for example, they are not eligible for day release, which is part of the rehabilitation program.

Mr Johnston—Indeed, that is the problem with deportation as it is practised; yes. It is contrary to the program of rehabilitation. It is not in the interests of the criminal or of future victims.

Senator McKIERNAN—But the deportation is actually done in the interest of the Australian community.

Mr Johnston—In a superficial view of that interest.

Senator McKIERNAN—It would be interesting for you to give a non-superficial view of what the public interest ought to be.

Mr Johnston—Reducing the criminality of a serious criminal.

CHAIR—I think Mr Johnston has indicated he sees it more as a global issue, rather than a country-specific issue.

Senator TROETH—Mr Johnston, I am still not quite sure what you see as the difference between the present process of deportation and what you call ‘collaborative repatriation’. Would you like to explain that?

Mr Johnston—Thank you, Senator. To repeat somewhat, by ‘unilateral deportation’ I mean the decision of the Australian government, whether the criminal agrees, whether his family agrees or whether the receiving country agrees or not. We have in place between the states of Australia an interstate transfer system. Many countries have what I call world’s best practice: an international repatriation scheme in place whereby the criminal and the two governments all agree that a transfer or repatriation is the best management of this criminal.

In fact, my system will do more to safeguard the Australian community, simply on the numbers. We have more foreign prisoners here than there are Australians in foreign prisons.

Senator TROETH—Have you tracked any deportees in recent years and the treatment that they receive when they return to their home country?

Mr Johnston—No.

Senator TROETH—I assume that, when deportations are made, the receiving country must be in agreement to receive the deportee?

Mr Johnston—I have never heard that they are consulted.

CHAIR—If they still retain the nationality of that country, the country has no choice.

Senator McKIERNAN—Yes, they do, as a matter of fact.

CHAIR—Do they?

Senator McKIERNAN—Yes, because the individual has to get travel papers in some instances.

Senator TROETH—Yes, that is true.

Senator McKIERNAN—For example, there are difficulties in repatriating some individuals back to Vietnam. The Vietnamese government are not being particularly helpful. There have also been other instances of countries being very reluctant to take the individual back.

CHAIR—Even if they have kept the right of nationality?

Senator McKIERNAN—Yes.

CHAIR—I thought that, if the criminal had nationality, that country had to take them back—even if reluctantly.

Senator McKIERNAN—They have to, but then the international bodies have to enforce that right.

Senator TROETH—I was trying to find out where the main differences lay between your view of what should happen and what actually happens now. In view of what has just been said, it may be that the main departure from that is with regard to the views of the person who is being deported.

Mr Johnston—And those of the receiving government.

Senator TROETH—We may have to explore that.

Mr Johnston—The Vietnam situation would be fairly unique. I think most countries receive their own nationals back without question.

Senator McKIERNAN—We have other examples of difficulties where a country would not issue a travel document for the individual.

Mr Johnston—For their own citizens?

Senator McKIERNAN—Yes. It is a matter of when you open and close the embassy, as well: there are various ways and means around rules!

Senator TROETH—If you were going to take into account the views of the deportee and his or her family, how would that evidence be given? What sort of

framework should that evidence be given in?

Mr Johnston—Exactly as it is done with the interstate transfer of prisoners. There would be reports from the criminal, from parole officers in each state, and the ministers in each state or jurisdiction would agree.

Senator TROETH—What would be your view of a case where a person—let us say it is a male—did not want to be deported but where his wife and family might feel that, for their own safety, he should be deported—which would split the family but nevertheless guarantee them a degree of physical safety. I have had such a case in my electorate office. How would you then weigh up the views of the conflicting parties in that way?

Mr Johnston—The victim's rights are important but not conclusive. Again, there are the interests of future victims and whether his present family—which apparently is breaking up—or his future relationships will be best protected by settling him in his best community, wherever that is.

CHAIR—I have a bit of difficulty with that. In reality, you get some really nasty people who can focus on a broken relationship. We have had instances—as Senator Troeth has said—of a wife, or other person who has been physically harmed or is terrified by this person, asking for their removal.

I accept that rehabilitation is an excellent concept; but, when you have some of these people in the actual flesh and you realise the terror that some of them do inflict on those remaining, if there is an option that they be returned, then that must be done for the health of those people, because it physically removes the two parties. My philosophical problem is that, yes, this problem works very well, but it is limited to people who have not had advice to take out their citizenship; and therefore we are in a way discriminating against a group of people because of their lack of knowledge. I have problems with that.

Mr Johnston—This discrimination is significant, but it is nevertheless incidental or peripheral to the main principles. I do not believe my position is radical. It is simply a principled pursuit of normal prison management. Go into any prison: it does not matter how bad the crime is—and the emphasis in press releases, even this year, from the minister, has been on the gravity of the crime. That is simply not enough. The threat is posed by the personality, the job stability, the family relationships and stability of the criminal: his social ties are the important thing for the protection of future victims.

CHAIR—In a hypothetical example, let us say you have a person who has a two-year conviction for physically harming members of his immediate family. He is liable for criminal deportation and the family are requesting that he be deported but he does not want to be deported. He says he has been here for so many years now and the crime was committed a couple of years ago, so maybe he has been here for 15 years. He has no ties

back in his own country and so he is requesting not to be deported. His family is requesting that he be deported, and he is liable for deportation under the guidelines. How would you respond to a particular case like that?

Mr Johnston—On those facts, Madam Chair, I would say that it looks as if Australia is his best community and we must wear it.

CHAIR—This is where you and I part company, Mr Johnston. How do you justify that? Are you justifying it on his future good?

Mr Johnston—The fact that he is a criminal threat: he is a serious man. He must be handled properly, optimally.

CHAIR—But you are saying not to deport him but to leave him here, where he is a threat.

Mr Johnston—Not just making him serve retributive time. He is making his decision that this is his best community on continuous advice from social workers, psychologists, chaplains or whatever.

CHAIR—But you are suggesting here that everybody who is in this situation can rationally know what is best. His main preoccupation may still be revenge against what he perceived were the actions or thoughts of his wife. As much as he might say, ‘Yes, I’m going to rehabilitate’, the thing that got him into gaol in the first place, which was an extraordinary anger, is still there and he wants to act out on that.

Mr Johnston—We must look at the data.

CHAIR—We have a hypothetical case here, so I am leaning it in my favour.

Mr Johnston—I am happy with that. A lawyer should not accept a hypothetical question, but I am happy to, because it is not uncommon. The fact is, looking at the global picture, that the most serious criminals are not recidivists; it is the youngsters and the pathetic addicts who are the recidivists. It is very important to understand the figures that, being misinterpreted, lead to this pessimism about rehabilitation. The man who has not learned to manage his anger can be put into counselling and groups where he will learn better.

CHAIR—I wish I had your optimism, Mr Johnston.

Mr Johnston—You cannot run a prison without it. It is not naive.

CHAIR—I would not deny that there is rehabilitation but we part where you hope for rehabilitation for everyone.

Senator McKIERNAN—Mr Johnston is coming at matters from a legal or a prison perspective whereas that is not where the committee is operating from. Indeed it is not a position that we should be operating from. We are looking at migration matters and we should not be in the position of being judgmental on whether a person is convicted of offences or not.

Mr Johnston—May I jump in here? During Dr Cronin's evidence, the case came up of someone who was deported for three years. That is obviously a retributive reaction and then we will let him back. It is mincing words to say that—

Senator McKIERNAN—No. Sorry, obviously somebody was not deported for three years. Deportation is a life exclusion.

Mr Johnston—But he can come back after a retributive penance of three years?

Senator McKIERNAN—Dr Cronin said this?

Mr Johnston—No, this came up in discussion with—

CHAIR—I think Dr Cronin was suggesting that she would like to see a possibility of a review after some time. I am not sure that three years was mentioned, was it? But she mentioned a possibility of a review after deportation because if somebody commits a crime in their own country, they can get in but if you have committed a crime here and been deported, you cannot get back. It was maybe just a misunderstanding.

Senator McKIERNAN—I had not heard about this retributive three years.

Mr Johnston—I'm sorry. I interrupted.

Senator McKIERNAN—Forgive me if I am wrong, but in a sense you are saying the Minister for Immigration and Multicultural Affairs should be making judicial decisions on the rehabilitation of individuals? Am I correct in that?

Mr Johnston—This is the human right of every prisoner, yes.

Senator McKIERNAN—I put it to you then that the reverse is the case. The courts and the tribunals ought to be making those decisions. The minister has to look at, as his obligations under the act, the best interests of the Australian community and where non-residents fit into that. He must make the decision of exclusion by not allowing people into the country in the first instance and by removing or deporting them in the second instance.

Mr Johnston—I am happy enough with our selection criteria for immigrants. In the early publicity for this inquiry, the minister said that he had to protect the integrity of the immigration process. In my paper to you, I have respectfully suggested that we have to

protect the integrity of the sentencing process and the deportation process is an official governmental response to serious crime. It is, in practical terms, part of the overall sentencing process. It must not deny the human right of every serious criminal—by that I mean prisoners—to programs aimed essentially at their rehabilitation.

Senator McKIERNAN—But the deportation is a consequence of the sentencing.

Mr Johnston—Yes, it is part of it.

Senator McKIERNAN—No, it is a consequence.

Mr Johnston—Different governments reach different conclusions as to whether or not it is part of sentence. Effectively, it is part of the government's response to a serious crime.

Senator McKIERNAN—No, it is a consequence I put to you. I stay with that for this reason: deportation does not apply to a convicted felon who is an Australian citizen.

Mr Johnston—It is part of the management of a serious criminal.

Senator McKIERNAN—Secondly, it does not apply to a non-citizen resident who has been in Australia for more than 10 years. Thirdly, it only applies if the sentence has been more than 12 months. These are consequence rather than being an intimate or integral part of the sentencing procedure.

Mr Johnston—With respect, Sir, I think that that is quibbling and I think that the 12 months and 10 years equally are quibbling. We have got serious criminals here as the chairman keeps reminding us and to set arbitrary limits of 12 months and 10 years is to play games with serious problems.

Senator McKIERNAN—You do not agree with the 10 years or the 12 months?

Mr Johnston—No.

Senator McKIERNAN—Right. Few other countries have got a 10-year limitation in the sense that Australia has.

Mr Johnston—Other countries are coming around to the principles of repatriation.

Senator McKIERNAN—We have not been given evidence of that as yet.

Mr Johnston—This proposal is before the Australian government now. There is a bill—I do not know its state, but it is for the international repatriation of criminals. It is working between the states of Australia. In my paper I have alluded to the existence of

these treaties in North America and in Europe. This indeed is the way of the future.

Senator McKIERNAN—It would apply where an Australian person convicted in the United States could serve the sentence in Australia. But with all due respect we are not looking at that. What we are looking at is criminal deportation from Australia and I do not believe it can apply in the international sentencing of—

Mr Johnston—But it does.

Senator McKIERNAN—What bill are you talking about? An international transfer of prisoners bill would apply to Australian citizens, would it not?

Mr Johnston—I am not sure about that. I suppose it will. It will apply to the decision on where is the criminal's best community. Your artificial distinction between the administrative processes of deportation and the judicial process of sentencing disturbs me. These two must be merged. This is the integrity we need—an integrity linking sentencing with deportation so that they do not cut across each other. They both constitute the management of serious criminals. I think it is you who are not taking crime seriously enough, with respect.

CHAIR—Would you like to see a procedure by which during the sentencing process of somebody who is not an Australian citizen and it is within the 10-year period, it should be decided, as part of the whole assessment, whether or not the sentence should be served here or overseas? Going from what you previously said, it would have to be with the agreement of the criminal or potential deportee. But, if you excise from that your preference for it to be with agreement and take what is the existing law, which is a judgment of the immigration minister, do you not get problems? By getting the person to serve the sentence overseas you then remove all the considerations about compassionate circumstances that the tribunals go into. They become up-front rather than after the person has had a chance at rehabilitation in the gaols in Australia.

Under your own very rules of the rights of rehabilitation—that one of the aspects that we look at when deciding whether someone is deported or not is their record in prison and whether they have shown a change and therefore are more likely to be accepted back in the Australian community—you remove that sort of consideration from the process. You are doing it right up-front and saying, 'Well, the whole thing will now go overseas. You will serve your sentence overseas'.

Mr Johnston—That is nice point, but indeed we are not simply delaying the major decisions concerning the rehabilitation of the serious criminal. There is no point keeping him here at our taxpayers' expense just so that he can demonstrate that aye or nay about his maturing. The fact is that rehabilitation is not simply a matter of mucking along quietly in custody. It is a matter of establishing satisfying community links—prison does not cut him off from the community totally. He has got visiting and vocational links that

are being shaped all the time.

CHAIR—Senator McKiernan, I am sorry I cut in there. Mr Johnston, I think we could have this discussion for a lot longer. I think it has been a very interesting one. I think you have brought in some philosophical questions which I certainly, personally, found interesting, even though perhaps they are not strictly under the guidelines of this inquiry. I thank you for taking the trouble to submit to the inquiry and to raise these very interesting points.

[11.40 a.m.]

NEAVE, Professor Marcia Ann, President, Administrative Review Council, 5th Floor, Canberra House, GPO Box 3222, Canberra, Australian Capital Territory

CHAIR—The committee has received your submission and has authorised its publication. Do you want to make a short opening statement to go with the submission?

Prof. Neave—Yes, I will do that. My opening comments will be fairly short, because most of the issues we want to tackle are dealt with in our submission. Our comments are confined to your term of reference 2, the appropriateness of existing arrangements for review of decisions, because that is our area of expertise. We do not profess an expertise in issues relating to migration generally.

You probably all know something about the role of the Administrative Review Council. Our basic function is to oversee the operation of the systems for judicial review and administrative review of administrative decisions. The council was set up at the same time as the unique package of administrative law reforms that were introduced into Australia in the 1970s. Basically our function is to look at systems for judicial and administrative review and to act as an advocate for the values that are expressed in the system that we have in Australia. Basically the system is about ensuring that bureaucratic decision making is transparent, fair, rational, open and efficient.

You have to look at review systems not only as a means of achieving individual fairness but also as a means of ensuring that primary decision making is the best that it can be. That is an emphasis that the council is increasingly discussing, because the system is part of a system of ensuring that when an officer in a department makes a decision they are aware of the possibility that their decision can be checked elsewhere. That should help to guarantee improvements, and continuous improvement, in the quality of primary decision making. I think you have to keep your eyes on both those aspects of what administrative review is for. Sometimes the discussion focuses very much on the position of the individual who may benefit from being able to have a decision reviewed, but we would want to look at the other aspect of the system as well.

Sometimes the view has been expressed that only citizens should be entitled to safeguards of this kind—safeguards of administrative review and so on. That is not a view that the Administrative Review Council holds. The view that we take is that you judge the fairness, rationality and lawfulness of a system both of primary decision making and of review by the way that it treats not only citizens but other people who may not be citizens. In a sense, you can say that you can test the fairness of a system by the way that it deals with people who perhaps are not regarded as rights holders in other contexts. That is the sort of general context in which our submission is made.

We are talking here about two sets of decisions. Firstly we are talking about the

review of deportation orders under sections 200 to 203, which is what our submission primarily focuses on—in particular section 201, which is the section that is most commonly used. That is the section which allows deportation of a permanent resident of Australia or a person who holds certain other sorts of visas who is convicted of an offence for which they can be sentenced to death—I do not think that applies in Australia any more—imprisonment for life, or imprisonment for a period of not less than a year. That is the primary section that is used to justify criminal deportation.

But reference should also be made to section 501 of the act, which we did not say a great deal about in our submission. Section 501 is the section that allows cancellation of a visa if a person is likely to engage in criminal conduct. That does not require a conviction, and it can apply to people who have been here for longer than 10 years at the time that the offence is committed.

It is not, strictly speaking, a criminal deportation provision, it is a provision which simply allows the cancellation of a visa. The person then is unlawfully in Australia and so they then can be required to leave. To get the whole picture in terms of criminal deportation, you not only have to look at the specific provisions dealing with criminal deportation in 201 to 203 and the review of those provisions, but also at the cancellation of visa provisions.

It is fairly obvious, given where I come from, that the council does support the retention of review rights in these areas and has consistently done so. You will be aware that the right of determinative review of deportation decisions did not come into existence until 1992, but prior to that time the council had argued for determinative powers of review in the case of section 201.

We also think that section 203 is rather anomalous. Section 203 is a survival of older provisions, and it provides for review not by the normal AAT process but by a commissioner appointed for the purpose. At the time that those provisions were put in, parliament obviously thought that deportation was such a significant decision in the context of those offences that there needed to be some process of review. It would seem sensible now to bring that process of review into line with the other processes of review which are provided.

The first broad argument that we make in favour of a determinative power of review in the Administrative Appeals Tribunal is the significant effect of a decision to deport a person, not only on that person but on his or her family and other attachments in Australia. Not only is the person being removed from the country, but a lifetime ban is being imposed on them returning, which can be highly significant if they have relatives—children or whatever—in this country.

Our arguments in favour of a determinative power of review are partly those arguments about the significance of the decision for the individual concerned, but they are

also about keeping the bureaucrats honest. 'Honest' is perhaps too strong a word, but we are concerned to ensure that the processes of primary decision making remain lawful, fair and open, so that bureaucrats remain accountable through that review process.

In that context it is important to notice that there is a relatively low reversal rate. Sometimes alarm has been expressed about particular decisions that have been made by the AAT, and of course anyone can make mistakes: the AAT can make mistakes and so can primary decision makers. There may well be decisions that we would individually not agree with, but if you look at the reversals they have to be put in the context of the actual reversal rate.

I have some more up-to-date statistics than those that were in our submission. I think that you have also had those statistics. I think the AAT has updated its submission to you. If you take the four years 1993-94, 1994-95, 1995-96 and 1996-97, the total number of applications lodged for review of criminal deportation decisions was 104. Note that these are not the 502 type decisions, these are criminal deportation decisions in the strict sense. There were 104 applications lodged over that period.

Looking at the results—and I should warn you that these are not necessarily the identical cases, because the two sets of statistics do not fit perfectly—84 decisions were made over that same period. Of those 84 decisions there were only seven set aside after a hearing and there were four decisions set aside by consent, where presumably the department conceded that if the matter went to hearing they would not be able to justify the decision. If you add the seven and four you get 11 of 84, but probably a more reliable statistic in a sense is the seven set aside after a hearing. So I do not think there is any evidence that there is a widespread process in the AAT where huge numbers of people who have had orders for deportation made are having those decisions set aside.

Senator McKIERNAN—Can I just clarify something. In your submission, on page 4, you have figures for 1993-94.

Prof. Neave—We did not have the 1996-97 figures at that time.

Senator McKIERNAN—What was the 1996-97 figure for the year itself?

Prof. Neave—Applications, 42; heard, 34; and of those 34, three set aside. So in the year 1996-97 there were 42 applications for review lodged; 34 determined; three set aside after hearing; and one set aside by consent. I think there has been a bit of an increase in numbers of applications but in terms of set asides I do not think there is any evidence that there has been any particular change. I am looking at something you do not have in front of you but I can provide a copy of it. I think it is in the AAT submission.

Senator McKIERNAN—We do not have that in front of us now.

Prof. Neave—If you look, for instance, along the line which says ‘set aside’, there were two set aside by the AAT in 1993-94, one in 1994-95, one in 1995-96 and three in 1996-97. They were the set asides. For those by consent, there were none in 1993-94, one in 1994-95, two in 1995-96 and one in 1996-97. So the figures of set asides are extremely low and I think criticisms that have been made of the process have to be looked at in light of that fact. That does not mean that there are not improvements that could be made to the system, however, and I will say a bit about that.

The other issue that needs to be looked at in this context is that we are looking at a changing world in a range of areas around migration. You will have seen the two bills that are in parliament at the moment that introduce more restrictions on judicial review of decisions, that is privative clauses. I note also the two press releases by the minister, one of 13 June and one of 21 August. The one of 13 June suggests that the good character provisions are going to be altered. That will be relevant to the powers under section 501 to cancel visas, which could apply to somebody who has been here for more than 10 years. The press release of 21 August says:

The Minister would have special powers, when acting personally in emergency cases, to refuse or cancel a visa and detain the criminal non-citizen without prior notice. In this situation, the person would have a subsequent opportunity to respond to the decision but could not appeal to the AAT.

So in both those media releases there are suggestions—and, at this stage, one does not quite know what the full implications of these proposals would be—that there may be some further restrictions that will operate, at least on the 501 and 502 provisions, which will give the minister relatively broad powers to cancel visas. So, in effect, you could achieve the same result as you do under 201 by using the 501 process.

I can say no more than what is in the press releases. It is not entirely clear what is being spoken about there, given, in addition, that there is already a power in section 502 for the minister to exclude review under either 200 or 501. Section 502 says:

- (1) If:
- (a) the Minister, acting personally, intends to make a decision:
 - (i) under section 200 because of circumstances specified in 201; or
 - (ii) under section 501;—

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 - in relation to a person; and
 - (b) the Minister decides that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person;
 - the Minister may, as part of that decision, include a certificate declaring the person to be an excluded person.

That then means that you do not have the normal AAT process operating. Section 502 also says that the minister is required to cause notice of the making of the decision to be laid

before each house of parliament.

Basically what I am saying is that to some extent it is difficult for us to make comments not knowing what is being proposed. We have consistently taken a position supporting review, for the reasons that I have outlined. We have also tended to be critical of the use of privative clauses. You cannot exclude a view by the High Court, as is guaranteed by the constitution, and you may have the effect of forcing cases elsewhere. I think there is some evidence in the past that that has occurred.

CHAIR—A privative clause?

Prof. Neave—Basically it is a clause which restricts, to the extent that this can be done, judicial review, court review. As I understand it from the explanatory memorandum to those two bills, the idea is that people should go to the merits review process and should not have the judicial review process; they go down one track and do not have the alternative of both tracks. That, I think, is the policy that is expressed in the legislation.

We have tended to say that privative clauses do not work. For a start, they are not always upheld by courts—and there are constitutional issues there. But sometimes they force people off to, say, the High Court: if they cannot go to the Federal Court, they go to the High Court. If court review is going to be restricted, as it is, it makes it all the more important to maintain a proper merits review. Do you want me to elaborate on the distinction between merits review and judicial review?

CHAIR—I think we will just go into questions at the moment.

Prof. Neave—Did you want me to say anything about the comments that we made about the interaction between the Family Court and the removal of—

CHAIR—Again, I suspect we can bring that up through questions.

Prof. Neave—Fine. I am sorry if I have gone on too long.

CHAIR—No, that is fine. You mentioned, in your verbal submission, the need for transparency. Dr Kathryn Cronin was here earlier and she suggested there was a lack of transparency in the process, mainly when appeals against a criminal deportation order were before the AAT and suddenly they disappeared altogether—the department had withdrawn their original decision. She said that made it very difficult to know on what basis these sorts of decisions were being made. She was saying very clearly that there was a lack of transparency in what went on in the department's decisions when they went to the AAT and were then brought back. Would you agree with that?

Prof. Neave—I do not know that I could make a comment on immigration specifically. But it is certainly true that if the department withdraws a case or concedes a

case in any context, that will be an issue. Looking at these statistics, I notice that there have been some cases of that kind: there were 10 cases there that were dismissed by consent and withdrawn.

CHAIR—Do you think the department should then publish its reasons?

Prof. Neave—I think we would have to look at that, not just in the context of immigration but across the board. You could say that it might add another layer of bureaucracy to the whole process. That is the argument against it.

CHAIR—But isn't the argument for it that you have a system of guidelines and, unless we know under what guidelines the department is acting, it is very hard to say that we have consistent treatment of all potential deportees?

Prof. Neave—Yes, and I think it is a problem about squeaky wheels in a sense. It is a problem I have experienced many years ago in the context of Social Security, that is, that if a case is fought then the department concedes, whereas people who do not actually go to the tribunal will be bound by the original decision.

CHAIR—They get stuck with it.

Prof. Neave—Yes. I would not be surprised if that were a problem. I cannot speak authoritatively about whether it is more of a problem in this area than it is in other areas.

CHAIR—One of the other things I would like to touch on is the 1996-1997 figures which you gave us. I think the figures in fact indicated that there had been three overturnings of the AAT of the department's decision.

Prof. Neave—Yes.

CHAIR—Can you see then that the minister would be starting to get somewhat irritated that, in the 18 months that he has been minister—certainly in a year of that time—three of the department's decisions were overturned?

Prof. Neave—There were two in 1993-1994, so there is one more.

CHAIR—Yes.

Prof. Neave—It may well be that the minister is concerned about the particular decisions. In fact, I heard him speak at a tribunals conference where he said that, and he used a particular example of a case which he thought the AAT had got wrong. We can always have differences of view about whether or not that is so. If the set asides had suddenly gone up to 20 or something, I could see that there would be then perhaps some basis for concern.

The other issue is that it is always open to the minister anyway under section 502, provided that the matter can be brought within 502. It is always within the scope of the minister's power there—

CHAIR—To exclude.

Prof. Neave—To deal with it that way, yes.

CHAIR—That is the one where he can actually exclude, but that has to be put in front of the two powers.

Prof. Neave—That is right.

CHAIR—Yes, which becomes a fairly onerous process in itself.

Prof. Neave—Yes, but that is another possible way of dealing with it. The other issue that might be relevant here—this is not something that I had thought of, but it came up in one of the submissions to you—is that if you restrict review there may sometimes be cases where the department does not deport, and there may be someone with an interest in arguing that the person should be deported. There has in fact been one case where it was held—it is referred to in one of the submissions—that the person who was the victim of the crime had standing to go to the AAT and argue that the person should have been deported.

If you cut off review in the context of the deportee, you also cut off review in the context of a person who may have an interest in ensuring that the person is deported. It can cut both ways—you cannot cut it off to one and not to the other.

Senator McKIERNAN—Where are we cutting off review for a merits review?

Prof. Neave—No, I am sorry—I mean if this were to happen.

Senator McKIERNAN—But migration amendment No. 4—

Prof. Neave—Does not.

Senator McKIERNAN—It does not happen?

Prof. Neave—No, that is right.

Senator McKIERNAN—So that is not a factor?

Prof. Neave—No, it is not.

CHAIR—You are hypothesising.

Prof. Neave—I am hypothesising. I am saying that when one reads the two press releases, there are a number of possibilities. I do not know which of these possibilities are valid. Perhaps I am being paranoid, but it would, for instance, be possible for the minister to use what appears to be a proposal to make changes—there have already been some changes made—in relation to the withdrawal and cancellation of visas. One could use that process to deport a person who, for example, fell outside the 10-year period.

But you are right. What we have before us at the moment is a situation in which—with the exception of 203 which I think does need modification—the provisions are all right as they stand. I would wish to support the retention of the existing provisions relating to the review of deportation.

CHAIR—Just finishing on the three overturnings in the year, that actually takes us up to about 10 per cent overturning—three over 34 is 10 per cent—which is not much when we were on seven per cent before. Would you see that there is a trend here? Could there possibly be a trend in increasing overturned decisions or is this just one of those little blips that we get?

Prof. Neave—I think any statistician—I am not a statistician; I do work with statistics a bit—would tell you that one case is not an indication—

CHAIR—But have you any feeling in your gut that we are going to get more of those?

Prof. Neave—No, I do not. In the context of judicial review, certainly the message has been clearly sent that courts should not be looking over bureaucrats' shoulders and making sure that they do absolutely everything perfectly. That is in the context of judicial review. It may well be that that has some influence in an indirect sort of way on the AAT. But no, I would have thought that it would be very hard to make a case for that. I think the problem was that one of those cases was one to which many people felt unsympathetic and felt that the decision reached was the wrong one.

I actually sat and read—just to prepare myself for this committee—about 10 cases. I did not read any of the reversals; I read all of the upholds—just because I can get them out of my computer more quickly. I do not really see a tendency in those, which was also only a small sample, to suggest that the AAT is suddenly going soft in this area.

CHAIR—Having recently read those, would there have been any decisions about which you would have said, 'I'm not sure that I would have made that same decision as the AAT'? In fact, would you have had a greater inclination to overturn than the AAT?

Prof. Neave—Yes, there was one—but not a strong inclination. You could see the

case on the other side.

Senator McKIERNAN—Where do you see sections 501 and 502, which you have mentioned, fitting into the terms of reference of the inquiry?

Prof. Neave—If one reads your terms of reference narrowly, you are concerned primarily with criminal deportation, which does not include 501 and 502. However, I note that DIMA's own submission to you specifically referred to their powers under 501 and 502, so they obviously think that that is a kind of back-up provision. Do you want a reference to that?

Senator McKIERNAN—Please.

Prof. Neave—I think it is at the very end of their submission.

Senator McKIERNAN—Is it page 21, paragraph 100?

Prof. Neave—Yes, that is right.

Senator McKIERNAN—Is that what provoked you to raise that matter here this morning with the committee?

Prof. Neave—No. I think what prompted me to raise the matter was my thinking more broadly about the immigration issues and reading again last night the press releases and the legislation. It just made me think about the overlap between the two sets of provisions. I must say that I do not know as much about 501 and I was a bit nervous about raising it because I thought you might ask me some difficult questions about it.

Senator McKIERNAN—Hopefully this is not a difficult question: would you know the number of times that either of the provisions has been used in the last six years?

Prof. Neave—No, I do not.

Senator McKIERNAN—You talked about the migration bills which are before the parliament at the moment. I think you mentioned in your submission that the bills have now been separated so that the more contentious parts are in bill No. 5. Bill No. 4 sets up the migration review body—

Prof. Neave—Yes, the new body.

Senator McKIERNAN—Would you see that as being a positive thing? The AAT turns over 10 per cent of the cases and it is not a specialist body.

Prof. Neave—Again, we have fairly consistently taken the view that it is not a

very good idea to have specialist tribunals and that it is preferable to have a super tribunal that does all of the different things—for a whole number of reasons which are discussed at length in our *Better decisions* report. Of course, there are some arguments in favour of specialisation, but that can happen within the AAT. There are some members who sit in particular areas because of their expertise in those areas. But the advantage of having things done by an overarching body is that you get expertise across boundaries about things like case management issues. It is also probably easier to ensure that public concerns about independence—and I do not take the view that AAT members are judges—are met in a larger tribunal rather than a smaller one. That is a general answer to your question rather than a specific answer. The council has not made any public comments in relation to these bills, so it is a bit difficult for me to say much more about that.

Senator McKIERNAN—We might with a different committee get to talk to you further on that one, at a later time, because your *Better decisions* report has been one of the things held up to justify the changes that are being made in this. The point I am trying to come to in terms of this inquiry is that, if the objectives are achieved in the establishment of an MRC, we are going to have a specialist tribunal who will be, one would hope, very skilled in the area and the body of law to which the appeals would be directed. In that sense, there would be a lesser need for judicial review. Would that fit into the better decision making idea?

Prof. Neave—The council has consistently taken the view that you need both—that they are not alternatives to each other because they do different things. That being said, I do concede that there is a problem which exists in the migration jurisdiction—which does not exist in some other areas—of people using judicial review processes to delay the inevitable. The argument that has been consistently put by DIMA is that it is justifiable to cut off judicial review in this area because of the incentive that people have to use the processes to stay in Australia a little longer. I am not so sure that that is quite such a powerful argument in the case where a person is in custody.

Senator McKIERNAN—Part of DIMA's argument might be that people have used the administrative review processes and then have sought to use the judicial review thereafter.

Prof. Neave—Yes; that they are having two bites of the cherry. I guess the question is whether one is convinced that immigration is so different from the other areas that we should have different principles operating in those areas. It is an argument that one could apply right across the board. One could ask, right across the area of Commonwealth decision making, why have any judicial review if one has merits review, and that I do not think is a view that my council would take. The view that my council would take is that you need both, because they fulfil quite different functions; and it is important sometimes to have judges ruling on issues that are of public significance and that set precedents and do all of those sorts of things in ways that AAT decisions do not.

The question is whether one can justify distinguishing between migration on the ground that it is different. As I said, the view that the council has consistently taken is that, no, we do not think it is significantly different and we think that there are some merits in judicial review.

Senator McKIERNAN—There are two other areas I want to go to. You make a comment at the bottom of page 5.

Prof. Neave—Can I just back-track a little? When I say ‘my council’, obviously different council members have different views on this, but I am talking about the majority view—which is always reached after lengthy debate on these issues. There would be some members of council who would probably not agree with the view that I have expressed, but the corporate position of council is the one that I have described.

Senator McKIERNAN—I think I thank you for that further explanation. I think I do. I will see what it reads like afterwards! At the bottom of page 5, you make mention of the problems that the AAT encounters with criminal deportation matters. Justice Mathews is quoted there, talking about the delays. What is the decision making time within the AAT? There is not a huge number of cases: just over 100 cases in the four years that we have been talking about. How long does it take to get a decision?

Prof. Neave—They have some figures on that in their own submission. We have not included them, because we assumed that they would include them. The delays are quite lengthy. The department says there is a difficulty, which is that their decision when they start proceedings is affected by a whole range of other matters. Then the AAT comes under pressure to make the decision quickly. The AAT would say in defence that they would prefer the department to have initiated proceedings earlier, in some cases. I do not think there is evidence that the number of days taken to resolve is longer in this area than it is in other areas. The sorts of delays that we are talking about are across the board.

Page 4 of their submission says that, on present time standards, the tribunal aims to complete 80 per cent of cases within a year. Of the matters included, 79 per cent were completed within that period. So their own time standard is 80 per cent within 365 days, and they completed 79 per cent. There is an issue there about what causes the delay and there is a tendency to assume that all the delay is tribunal caused. Some of it may well be, but it may also be caused by a variety of other factors.

Senator McKIERNAN—Including, for instance, on page 5 from Justice Mathews, the provision of legal assistance.

Prof. Neave—That is right.

Senator McKIERNAN—Earlier on that same page you make a point about what matters the tribunal should take into account. You state:

AAT takes into account the person's behaviour in the period between release into the community and the AAT hearing. This would include both good and bad behaviour.

Could that not be preferred as a reason for ensuring that a delay takes place within the hearing, so that a person could establish a good behaviour pattern?

Prof. Neave—If you mean a strategic delay on the part of the applicant so that they could do that, that is certainly right. There will be applicant-caused delay, which is strategic. There will be delay caused by processing in terms of the tribunal. There will be delay caused by problems about legal representation. There will be delay caused by things that happen within the department. I cannot give you a figure as to what proportion can be attributable to what. It is something that would be worth exploring with the AAT.

Senator McKIERNAN—From reading other parts of your submission—

Prof. Neave—Sorry. I should also say that, in taking that into account, they are applying the department's own guidelines, which set out the factors that are to be taken into account. Obviously, that includes evidence that the person has been rehabilitated—which could include good behaviour. Interestingly enough, in the cases that I read, there was a degree of scepticism about people who suddenly reformed when the criminal deportation order was before them. They do not necessarily say that the person has managed to get by for six months without committing a criminal offence and therefore they are totally reformed.

Obviously, they have to look at the past pattern. If it is somebody with a fairly serious first offence, but it is their only offence, the argument about reform might weigh more heavily in that context—particularly if there is some explanation for the offence—than it would in the case of somebody who has had a lengthy pattern of criminal behaviour and has had a number of warnings, but who suddenly reforms when it looks as if they really are going to be deported.

Senator McKIERNAN—I was leading to the issue of when the decision on deportation ought to be made. We have had different views put forward to us that it ought to be made early or that it ought to be made late. I have deduced from your submission that it should be made later in the sentence rather than at the beginning of the sentence, in order to give offenders the opportunity to rehabilitate and prove that they can be reformed.

Prof. Neave—Yes; although I do think that there is a worry about the processing decision being postponed until just before the person is going to be released. We would want to have it early enough in the sentence so that you do not have a situation where the person's prison sentence expires and it is not until then or shortly before then that the decision to deport is made—because then you have problems about what you do with the person and whether you confine them after their sentence has expired but before they are actually deported.

We did think that some delays might have been caused by the fact that the department may leave this relatively late. The department's response to that is, 'We do that because of concerns about allowing the person to have rehabilitation,' which we do not think is now a well-founded concern. The ombudsman's suggestion that perhaps the decision should be made at about the time that parole is being considered might be quite a sensible one.

But I have to say that is not within the sphere of expertise of the ARC. But, at the time a parole decision is being made by the state authority, they will be considering issues about rehabilitation, likelihood of re-offending and so on, and they will have had some pattern of behaviour in prison to go on; and that would seem like a sensible time to be thinking about it.

Senator McKIERNAN—How much of a consideration would it be for a parole authority also to be considering at that time whether a person is liable for deportation or not? Do you think that would have any influence?

Prof. Neave—There is some suggestion, again in the submissions to you, that sometimes parole is refused on that basis. So a person who would otherwise get paroled does not get paroled, because they are possibly liable to deportation. So you could see how somebody could be caught up in a fairly endless loop. There probably needs to be some more work done between the state authorities and the Commonwealth authorities on that. It is difficult for DIMA always to get the two systems working sensibly together.

Senator TROETH—Do you think it should be possible for deportees to return to Australia after a certain time? If so, what conditions would you impose on their return?

Prof. Neave—I do not think the council has an official position. I do not think that is something that we have really looked at. I can give you a personal view, but that is probably not very helpful to you.

Senator TROETH—I would be interested in your personal view.

Prof. Neave—The notion that if you are deported you are deported forever could, in some circumstances, have relatively harsh effects, if the person's family is here. You can imagine a circumstance in which they—

Senator TROETH—Yes; we were discussing this earlier today.

Prof. Neave—They come to Australia as a child, they commit a serious offence in their adolescence and they are then deported: if they then have a period of 10, 15 or 20 years during which they are completely crime-free, I would have thought there should be some possibility to reconsider; but that is a personal view and not the view of council.

Senator TROETH—I was interested in your views of 501 which moved to the cancellation of a visa. Would you ever see that as taking the place to some extent of the provisions that we are taking about now—in that, if a person can be deported for a serious offence, 501 could also be used perhaps to cancel the person's visa?

Prof. Neave—Yes, I think it could. If that were then reviewed—and there are then those proposals about good character which may restrict the review of that—it might well be that a reviewing body would say, 'In effect, you are doing the same thing that you are doing under section 101, so we should take into account the same sorts of factors.' But, if those comments in the press release are implemented, it is hard to see how the two will fit together, and there may be some restriction of review in that context—because it becomes harder to argue the good character point.

Senator TROETH—I also wanted to ask you about the proposed amalgamation of the various administrative review bodies into one single tribunal. What effect do you think that will have on the review of deportation orders?

Prof. Neave—Given that the precise shape of the amalgamation is not yet public, it is very hard for us to comment. We proposed an amalgamation, but on a certain basis. Whether that is what the government will actually do in the end, we do not know. It is difficult to make a comment on that in the abstract.

Senator TROETH—Could I ask you the basis on which you proposed the amalgamation?

Prof. Neave—We have consistently opposed the fragmentation of tribunals, for a variety of reasons. We think that tribunals that are located within particular areas are perhaps less likely to be seen as independent. We think that there are some opportunities for the spreading of expertise if you have a number of divisions of a tribunal. For instance, the Social Security Appeals Tribunal is widely regarded as pretty successful. It may well be that, if you brought tribunals together in a group, some of the things that they have done which people regard as good could be borrowed by other divisions.

I was very surprised when I came to the council at how little contact there was between the disparate tribunals. We have been trying to do something about that. We have had a number of sessions discussing ethical issues, which tribunal members seem to have appreciated. There does not seem to have been an enormous amount of cross-fertilisation between the tribunals. We have said we supported the amalgamation, but there were a number of other things we thought were important. We do not yet know what the government precisely is proposing in terms of amalgamation.

Senator TROETH—The other thing I wanted to ask you about was the Family Court aspect. I would like you to elaborate on that.

Prof. Neave—Yes. I am afraid we could not find an answer to this, and no-one seemed to know the answer, so we raised it as a problem. Our concern was this: there is provision in the legislation that, if a person is to be deported, their spouse can request that they be removed too.

Senator TROETH—That the spouse be removed?

Prof. Neave—Yes. That works all right in an intact family situation, because the spouse and the children would presumably go with the other person to wherever they are going. What we were concerned about was a situation where, for instance, there may not be a spouse and there might be, say, grandparents of the children, and the grandparents might apply for a residence order in the Family Court by saying, ‘We do not want the children to be taken back to where they came from: they were born in this country, they have no links there and they know nothing about it. We want them to stay here.’

We could imagine a problem where you could have deportation proceedings being challenged in the AAT and would have an application for a residence order before the Family Court. We asked Justice Mathews what she would do in those circumstances and she said, ‘We would adjourn until the Family Court made its decision.’ But the Family Court may think that the father is an adequate parent and that the children would be better off with the parent, provided that the parent was staying in Australia—because they would obviously have to look at issues such as where the children go to school and all those other questions that they look at. No-one, including the department, seemed to be able to tell us how that problem was dealt with. It may be that it has not arisen and that it has not been a practical problem and it is all sorted out, but we were slightly concerned about that.

Senator TROETH—It bears some interesting thought.

Prof. Neave—I am afraid we do not have an answer. You can again see that there could be delay in that context. The other problem is that it could be used. There are some legitimate concerns about these processes being used to delay deportation, so you could see how that could be used tactically too. There are real difficulties, and it is something that needs to be looked at.

Senator TROETH—Yes.

Senator McKIERNAN—Would that situation not have already been tested, to a degree, in the making of the deportation decision, in any case? Within the decision now the rights of the children have to be taken into account because of the Convention on the Rights of the Child.

Prof. Neave—They would certainly have to look at that in the context of the deportation order, but the answer might be that it is not really relevant because they are

going to have to deport the father anyway. Then the issue is: do the children go or stay?

The other thing that we were a bit concerned about is that the deportation order might be made before the grandparents even know. You could have a situation where the deportation order is made, the father says, 'I am taking the kids with me,' and the grandparents do not actually know this is happening. They have to rush off and presumably they would then have to get an injunction. In my other life I am a family lawyer. They would have to go off and get an injunction from the Family Court, and that raises all kinds of horrendous issues. I do not know whether the Family Court can give an injunction—

CHAIR—Against a deportation order.

Prof. Neave—I do not think it can, but please do not quote me on that.

Senator McKIERNAN—I am not too sure it can, but it certainly could prevent the removal of the children from Australia.

Prof. Neave—Yes, it could prevent the father taking the children with him. It is a messy jurisdictional situation, that is what I am saying. I do not really know.

Senator McKIERNAN—The potential for it to be messy is there; but if a decision has been made to deport a male person convicted as a non-resident, he is going to be deported, and he or his spouse request the spouse to accompany him and be part of the deportation order, then in making the decision on deportation the welfare of the children of the couple would have to be taken into consideration. One would assume that as a last resort the decision to deport would take into account the separation of the family.

Prof. Neave—It would, but the AAT might say—and it has said—'We accept that these children are going to be adversely affected, but when you weigh everything in the balance it is only one of the primary considerations to be taken into account. We have decided that in light of this person's criminal history and in light of the harm they might do in the Australian community, while we recognise that this is going to be hard on the children, on balance, the father has to go.' Then the issue arises of whether the children go with the father. If the mother is going too then you would normally think that it is appropriate for the children to go, but you can imagine a situation where there is no mother. In fact, the legislation at the moment covers only lawful spouses and not de facto spouses, so a de facto spouse cannot request removal.

Senator McKIERNAN—I think the problem should be directed to the family law committee rather than the migration committee. It would not be a criminal deportation where the children are involved, in any case.

Prof. Neave—The AAT upholds the deportation decision, and the children are

going to go. The grandparents then make an application to the Family Court. The timing is—

CHAIR—That is difficult, because if the male is deported he cannot answer the injunction that has been brought to keep the children here, because he has already been sent off. They would have to delay deportation for him to answer the charge in the Family Court.

Prof. Neave—As I said, when we discussed this with Justice Mathews, she said she thought the AAT would actually postpone its decision: it would actually adjourn until the Family Court matter was resolved.

CHAIR—But then the Family Court might say they cannot resolve it until they know what the AAT is going to do with them.

Prof. Neave—That is right. I think there is a potential problem. This is something I saw when I thought about the mechanics of it. I do not know whether, in practice, this occurs. Have you seen the officers from DIMA yet?

CHAIR—No, we have not. We have had a briefing, but we have not had them—

Prof. Neave—It might well be worth talking to them about that as an issue.

CHAIR—Could the AAT refer it back to the Family Court before making the deportation order, to say they would like the advice of the Family Court on the effect? No?

Prof. Neave—I do not think so. You can make an application to the Family Court if you are not a party to a marriage, but I do not think the AAT could do it.

CHAIR—That becomes crucial; because then, does the AAT have the expertise to look at the whole range of issues where grandparents come into it?

Prof. Neave—It is very messy, as I said, and it may only arise in a very, very small number of cases. It probably does. Perhaps, in practice, it has not given rise to any difficulties; but, given that we were looking at this, we thought it was worth mentioning as a problem.

Senator McKIERNAN—Have you got a view on the 10-year limitation?

Prof. Neave—The council does not have a view on it, because we have confined ourselves to the issue of reviewability of decisions. There are lots of things I have views on myself.

CHAIR—Thank you very much for coming before us today and for giving the evidence that you have.

[2.15 p.m.]

LESTER, Ms Eve Marjorie Rose, Research and Policy Officer, UNIYA Jesuit Social Justice Centre/Jesuit Refugee Service, PO Box 137, Parkville, Victoria 3052

NORDEN, Father Peter Julian, Director, Jesuit Social Services, PO Box 137, Parkville, Victoria 3052

CHAIR—Welcome. We do not have a formal submission from you. I believe you actually have not made a submission yet. Is that true? Would you like to speak instead of making a formal submission, or do you have something you would like to hand over?

Ms Lester—We have actually prepared a submission which we would like to hand up, but we thought it might be of assistance to speak to it first and hand it up afterwards.

CHAIR—Okay. Rather than reading it word for word, perhaps you could keep your comments general, because the committee will be able to have a look at the full submission.

Ms Lester—Yes, that was the intention.

Father Norden—We are making a joint submission today between Jesuit Social Services and the Jesuit Refugee Service. Perhaps I could give a little bit of the background of the organisations that are represented, because it is out of that context that we will be speaking today. Jesuit Social Services is an organisation of the Australian Jesuits which runs a number of social service programs here in Victoria. They include the Brosnan Centre, which works with young offenders after they are released from custody; Richmond Community Care, which is based in the North Richmond high-rise estate, which has a high representation of the Vietnamese and now the Timorese community; Connections, which works with young people with mental illness and drug addiction; and the Vietnamese Welfare Resource Centre in Flemington, which works with Vietnamese families and the Vietnamese community.

I am also the chair of the UNIYA, a Jesuit Social Justice Centre which incorporates in Australia the Jesuit Refugee Service. The Jesuit Refugee Service has been operating now for about 15 years. It was established largely in response to the needs of refugees in this region. It is an international network, and Eve is employed as a research and policy officer for that organisation.

Our submission today is based on an acknowledgment of the need for criminal deportation in certain circumstances. What we want to do as part of our submission is to suggest some of the limitations and some of the concerns that should be taken into account in assessing the nature and the extent of the power to deport people with criminal convictions. It comes out of an awareness of some of the background experiences of

people who are refugees and of some of the circumstances of people who find themselves with criminal convictions. It comes particularly out of the experience of the last 20 years of the Brosnan Centre's work with offenders, but also out of the fieldwork experience of the Jesuit Refugee Service.

Ms Lester—In putting together this submission, we have tried to combine our experiences with Jesuit Social Services and the Jesuit Refugee Service. In doing so, rather than addressing the overall issues relating to criminal deportation, we have seen it as appropriate for us to focus on the social policy implications of the resettlement and deportation of refugees.

I can say from my own position that I have been working with refugees for some years now—since 1991—in various capacities, mostly as a lawyer representing asylum seekers. I have had less to do with the specific issue of criminal deportation, and so it is the intention to focus on the international obligations that pertain to refugees, viewing those in the context of criminal deportation.

I think it is fair to say—and the committee will see this from the submission that we have prepared—that there are many issues relating to refugees which are relevant to criminal deportation. But the current criminal deportation policy tends to focus on the question of whether a person would face well founded fear of persecution upon return to their country of origin, and so we have sought to highlight some consideration of the pre-arrival experiences of refugees.

A very obvious example is the Vietnamese who left Vietnam and often by hazardous journeys found themselves in refugee camps, probably somewhere in South-East Asia. Some of them, of course, came directly to Australia. Following the experience of protracted periods in refugee camps in South-East Asia, some of them have been resettled under what can be described as a generous humanitarian program allocation coming out of the comprehensive plan of action.

What has happened to these people is that they have gone through the dislocation of the initial flight that is part of the refugee experience, and there has also been the experience in the refugee camps themselves, which we have described in the submission as a bit of a law of the jungle in some cases. In coming to Australia, some have come as unaccompanied minors and others as members of families that have themselves suffered and have become somewhat dysfunctional as a result. This can often lead to the detachment of these young people from their families.

Then we lead into the post-arrival experiences that they have: the difficulties that they have within their own communities, and the ostracism that they can experience in relation to both their families and other members of their community. This can lead to a tendency to seek some support amongst their peers in an unhelpful but perhaps in some cases unsurprising way. Often this can lead to substance abuse and the corollary of that,

which is the possibility of criminal activity.

It is those issues relating to the prior refugee experience which we would like to submit to the committee as something which is relevant in terms of our social responsibility towards refugees globally and refugees being resettled in Australia, and which could be given greater weight in considering questions about deportation.

Perhaps Peter could speak a bit about the Brosnan Centre.

Father Norden—Yes, I will say a little bit about the background experience that we have had in working with young people, many of whom are from ethnic communities. Of course, a lot of them are not people with a refugee background, but more recently we are seeing increased numbers of young Vietnamese. At the present time, 25 per cent of the population in juvenile institutions in Victoria are people from Vietnamese families. There has been a huge increase in the proportion.

That does not necessarily represent the criminal activity of that population; it could represent more a targeting of that community because of particular concerns that have reached the media. Vietnamese young people are certainly being targeted in the central business district in Melbourne at the moment. I think about 80 per cent of the drug charges in the central business district of Melbourne at the moment are laid against Vietnamese people, but I suggest to the committee that it is more as the result of the easy identification of people of Asian extraction and a policy of Victorian police to target this particular group. At the same time, the problem of drug use and drug trafficking amongst those young people has increased, although perhaps not to the degree that is indicated by the arrest rates or the incarceration rates.

The background of all young people needs to be highlighted in terms of unemployment rates. In Victoria the current unemployment rate for 15- to 19-year-olds seeking full-time employment is 30 per cent. In rural Victoria that figure is 40 per cent of 15- to 19-year-olds seeking full-time employment, and in metropolitan Melbourne it is 26 per cent. Amongst those figures, young people from ethnic communities and those most recently arrived in Australia are, quite naturally, going to be over-represented.

So unemployment is a very close determinant of criminal behaviour. We might say that criminal behaviour is something that relates to free choice and decision making but, if we do a review of criminological libraries throughout the world, we will see that poverty and unemployment are very close correlates with criminal behaviour of some form or another.

I was talking to the federal immigration minister about this matter only two or three weeks ago, and we were talking particularly about the nature of how you could define a serious criminal offence. Drug trafficking, particularly trafficking in heroin, would normally be classified as a serious criminal offence, and the community would have very

little sympathy for people who might be convicted of trafficking in heroin. I pointed out to the minister—and it was illuminating because of his response; he asked his advisers to seek further information about it—that most people who are addicted to heroin also traffic in heroin.

They are not the big international drug traffickers but, particularly amongst the youth population, if you are using heroin and you do not have an independent source of income, I would say perhaps 80 or 90 per cent of young people who are using heroin are also selling heroin. They might sell it to two or three other people. Some, of course, might sell it to 200 people. If they are that well organised, usually they would not be heroin addicted themselves, they would be trafficking purely for profit, but the distinction does need to be made that the vast majority of young people without independent means who are addicted to heroin will also sell heroin in order to raise the money for their own personal use.

There is a distinction there between someone who might have, on their criminal history sheet, a conviction for trafficking in narcotics, but the circumstances of that trafficking really need to be examined if the full significance of that conviction is to be ascertained.

Senator McKIERNAN—I am sorry, you have left me cold on that. I need further evidence, because I think trafficking is trafficking is trafficking. It is the people at the end of the line who are encouraged to get into it and whose lives have been damaged. Now it does not matter to me whether it is a person who is only selling two shots or 200 shots, it is still damaging. Does that impact to you?

CHAIR—Perhaps we could let Father finish what he is saying and then we could all have a go.

Father Norden—I am happy to answer the Senator's question.

Senator McKIERNAN—I will not interrupt again.

Father Norden—Before we lose that point, I certainly think trafficking in heroin is objectively harmful to whoever is trafficking in it and in whatever circumstances, so objectively it is a harmful activity and it is probably going to have the same sorts of consequences on the victim. But I am suggesting that the circumstances of someone who is addicted, who then traffics, does affect the responsibility, in terms of the complete moral responsibility, in terms of addiction. I would see a difference between a person who is addicted to heroin, or the seriousness of that crime, as against someone who is purely trafficking in heroin for monetary profit.

There is a value difference there, and the courts would have recognised that. The sorts of sentences normally that are imposed vary accordingly. Objectively, the harm is the

same to the victim or the person who receives the drug. I certainly agree with that.

At the moment, I think the estimates that we have, at least from the Penington inquiry in Victoria, suggest that close to two per cent of the Australian population has at some stage used heroin. Two per cent does not seem very high, but I think it is an alarmingly high figure. I think there is a distinction between people who are trafficking for profit, and particularly people who are trafficking for large profits and making lots of profits, but the objective consequence, I think, is quite the same on the victims or the people who receive it.

CHAIR—Is there anything else you want to add?

Father Norden—One of the things that I should point out is that, from our work with young people from 17 to 25 at the Brosnan centre—particularly from some ethnic communities, and the Vietnamese community is a good example—where there has been criminal behaviour or even a period of incarceration, whether in a youth training centre or prison, our experience has been, within the Vietnamese community particularly, that there is an ostracisation from the family. So the capacity for that young person to maintain their social supports is very difficult.

What often happens is that, for a period of two or three years sometimes, that person goes through a period of continued offending, but it is not necessarily a pattern that is going to last for the next two decades of that person's life. Very often, as a result of the interventions that we have through the employment of workers from the same ethnic community, we find that after a period—certainly not six months or three months but often after a period of 18 months or two years—that person is able to get through this period of their life. It might mean another period of incarceration, but then, getting through the more traumatic period—often as a result of the establishment of a more stable relationship or, and this is not so possible in these days, if there is some training possibility or in some circumstances an employment opportunity—that person then settles down after a period of a couple of years. So there are no short-term fixes, particularly for people from the community that I have described, because of the social isolation that very often occurs as a result of the incidence of the earlier criminal convictions.

I would have thought that the nature of a serious criminal offence needs to be determined taking into account the social context in which the offence occurs. If, as Senator McKiernan has suggested, trafficking in heroin does not have a social context, then the person's intention to be doing harm to the community in which they are living needs to be assessed in terms of such a serious factor as heroin addiction itself. I am just saying that the social context and family support available needs to be taken into account.

CHAIR—Thank you very much, Father Norden. Ms Lester, you are saying that you both come from the same principle. You are saying there should be in the guidelines some consideration of the past life of the criminal deportee, especially in the case of

young refugees, because their past life has influenced what has happened and the difficulty of their past should be taken into consideration, whereas, Father Norden, you are saying there are extenuating circumstances in some of these cases in as much as some of these young people are addicted to drugs and are acting not out of pure monetary gain but because of the force of their habit. Also, they are acting out of a dislocation in the community and they are further dislocated in gaol, and we could not expect to see the rehabilitation going on in gaol because it will take a while before they settle down. It might actually be after some gaol terms that you see that rehabilitation.

Where do you actually draw the line here? I will go back to you, Eve. It takes in both. Everybody's actions, to some extent, are determined by their past. You might have a very sympathetic story of a young man who has been tossed around from refugee camp to refugee camp. You say they are jungles. But you might say the same of any person who has come up through a lifestyle where perhaps his or her parents were drug addicts, were particularly harsh in their discipline, or were a totally dysfunctional family and never gave the sort of instruction that you and I received as children. You are asking us to draw a line in the case of one nationality and say, 'Well, it is all right fudging; your experience is one nationality.' But, in refugee cases and with people who have come through that sort of system because of the past, are you saying that they have special considerations? I am putting to you that I think in anybody's past you can always find the reasons for what they do or why they are doing it.

Father Norden—I think the judiciary in Australia does take those circumstances into account in sentencing, within limits. For instance, a criminal deportation from the country would be an extreme sanction. We suggest that that should be imposed in some circumstances but only in extreme circumstances.

CHAIR—Is not the prime consideration here the protection of the community rather than a sympathetic and compassionate approach? And let me say that it is not part of the guidelines that we have to have a look at those sorts of issues.

Father Norden—Yes, I think it is. The community should be protected from someone who is trafficking in drugs, for instance, and who has profits of perhaps several thousand dollars a week. There are people who are in that category who would not be Australian citizens. I think the case could be argued very strongly that the protection of the community justifies someone, in those circumstances, being deported from the country.

CHAIR—Fortunately or unfortunately, we cannot deport Australian citizens, and please do not bring up that subject because we went through it in our Sydney hearings. I do not think we want to go through it again.

Father Norden—Yes, Mr Holding had something to say about that.

CHAIR—I share the deputy chair's concern over some of the things that you have

said about having drawn a distinction between crimes on the basis of the motive of those crimes. I am not sure that when you are looking at the protection of the community that is appropriate. Ms Lester, you wish to reply.

Ms Lester—There were a couple of issues. Obviously the protection of the community is an issue but that also needs to be weighed against the protection of the individual concerned. That is more relevant when one is talking about whether a person would face persecution were they to return to their country of origin now. In that sense—the issue about people's past experiences—I acknowledge the distinction that you draw there and the comparison you make with the experiences that other people have had in dysfunctional families. I guess it is a question of the nature of the sanction. There is a sanction already for a person who is convicted and incarcerated for a criminal offence and then, over and above that, the criminal deportation serves as a further sanction. The question is to whom should that apply and to whom is it not so appropriate to apply such an additional sanction.

One of the issues that comes out of that is people's past experiences of torture and trauma and so on. The Brosnan centre that Peter has been speaking about has been doing work in that area. There are now also other services available, which have grown significantly over recent years, such as the Victorian Foundation for Survivors of Torture and STARTTS in Sydney, which is the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors. These sorts of services and supports, if they are given an opportunity to work, can often operate effectively as a circuit-breaker.

Ultimately, we have responded in a humanitarian way—resettling people from refugee situations abroad or where people have been granted refugee status here. I think it needs to be seen that the responsibility that we take on board in that context is something which can often involve a long and hard recovery phase. It can often involve a lot of work and a lot of time. As we have been saying, a lot of the people who are involved in or are the subject of either consideration of criminal deportation or criminal deportation orders are young people.

So it is really a question of looking at what we carry as a social responsibility towards refugees in terms of acknowledging the long-term need of a recovery phase rather than saying, 'You have come here; we have offered you protection and, notwithstanding the experiences that you have had, we will now send you back to the country of origin.' We cannot have direct involvement over there in the same way in the social rehabilitation of those people.

CHAIR—Under our international obligations, we cannot send that person back if they are still under threat of persecution.

Ms Lester—No, I agree with that. Obviously there are situations—people cease to be refugees as well—where it may be established subsequently that people who have come

here for humanitarian reasons do not have a present and well founded fear of persecution.

CHAIR—As a community, do we have the right to say that we will take migrants into this country but that if before they have taken out Australian citizenship they knowingly violate the laws of our country, we will deport them? You are saying that there should be extenuating circumstances, above the compassionate ones of family connections on the background of that person. You also believe that you have systems in place at the moment to assist refugees because, as you might see it, they have only committed the crime because of the refugee background. That is something I would also like to question because you are assuming cause and effect there. It may not be cause and effect at all: the person may be a criminal because they are a criminal, which has nothing to do with their refugee status.

Ms Lester—That is absolutely right. But I suppose, and Peter was saying it earlier, it is really a question of the information that is taken into account in sentencing—whether it takes account of a person's background in the same way that a decision that is taken in relation to criminal deportation might also appropriately take into account the background and experiences of that person. I think it is fair to see the reality of criminal deportation as something that serves as an additional sanction over and above the sentence that has already been served by the person following the conviction for the offence.

CHAIR—I think Senator McKiernan might want to argue on that point.

Senator McKIERNAN—I want to go back to my intervention earlier. You may or may not be aware that there has been a spate of deaths on the streets of Perth from heroin shots. The kids are falling over. I am watching this as a person who is uninvolved in it. With respect to the person who gives the young person the shot of pure heroin that ultimately kills them—I am putting it on the table from my perspective—I see no differential between whether that person earns \$10 or \$100 or a \$1,000 from giving that kid the shot. It is still a murder in my opinion. It is the pieces that you have to pick up afterwards. That is where I am coming from but I recognise indeed where you are coming from. There may be somewhere along the line that we can meet but when we have a dead body between us there will be some difficulties.

Father Norden—Sure. I have been burying them in Melbourne, too. There have been quite a number over the last three years with the high grade heroin that is arriving. I see it from both points of view and I am equally horrified when I have the family of the young person, who is often only 16 or 17, there at the funeral.

I guess I would compare it with some of the criminal legislation that allows long-term imprisonment for hardened offenders or for dangerous offenders. There is legislation in some of the states, and certainly in overseas countries, which allows almost permanent incarceration—that is, life imprisonment, and no release for someone who is considered to be dangerous and will remain dangerous.

There are usually, as a prelude to that imposition of that more serious sanction, all sorts of other impositions such as terms of imprisonment which might be of a more limited nature. But we may get to a certain stage where we decide that this person is such a danger to the community that we do not want them back into the community until they die. With criminal deportation, it seems me that there are some parallels in deciding whether a person should be deported because of their criminal behaviour or whether they should be incarcerated for a more limited period of time.

I have one example. I do not suppose it is appropriate to mention a name, but the person was deported and I represented his case before one of the appeal tribunals several years ago. He was a young Italian man. All of his family took out citizenship. At the time, he was only 10, I think, and he was in a youth welfare centre rather than a youth training centre. He was the only member of his family who did not become an Australian citizen. He developed a heroin addiction at the age of 14. That continued, and in his late teenage years—he may have been 20 or 21—he was finally deported. All of his criminal convictions, and there were a number of them, were related to his heroin use. He was deported back to Italy where he did not speak the language and where none of his immediate family were present. Within the space of a couple of years, he got on top of his heroin addiction, and he is well and truly settled now. You might argue that getting him away from his associates or whatever may have been—

CHAIR—It sounds like this was a fairly good result.

Father Norden—This might be good therapy to solve some of our problems. It could well be the case, but I would suggest that it was not. There is a maturation stage that takes place with about 80 per cent of people who offend. Most people stop that offending behaviour at the latter or middle part of their 20s. In heroin addicts, it sometimes lasts a bit longer. He has settled and he has stabilised.

One of the other cases was a Yugoslav man. We represented his interests several years ago now. This was just about the time of the outbreak of the war. Again, he did not speak Yugoslav, he had no family that he knew of in Yugoslavia, and his appeal was successful. I think the circumstances need to be taken into account. I repeat that we are recognising the need for criminal deportation in some circumstances, but we recognise it, if you like, as a final sanction of the courts, which is almost the equivalent to life imprisonment or permanent incarceration.

Senator McKIERNAN—I come back to a refugee matter which is of real concern. In the immediate past few years, have there been any cases that have concerned you of people who may have been in that position, where Australia was breaching our international obligations on refoulement? Have you got a specific case in recent times?

Ms Lester—The reason for raising the issue was not to say that Australia is not complying with its obligations. I am afraid I cannot think of any such cases off the top of

my head. Perhaps that is a point at which I can make some comments about our international obligations, and I think we are on common ground that obviously a person cannot be deported under criminal deportation provisions.

Senator McKIERNAN—I am comforted by your response in the first instance. I am asking the question in order to put it to you that perhaps there are safeguards in the system now that would prevent us from getting into that position where we did, unintentionally—even if it was unintentional—breach our international obligations.

Ms Lester—In looking at the current policy, we have made comments in the submission on only a couple of points. It is really a point of clarity rather than absence of acknowledgment of those obligations. I have cited the convention against torture, which obviously has an application. The non-refoulement provision in the convention against torture applies more broadly than that under the convention relating to the status of refugees.

It is helpful in the policy to specify some of the particular obligations that are held there. In relation to refugees, of course, article 33(1) of the convention related to the status of refugees is the provision which describes the prohibition against refoulement. Article 33(2) does acknowledge that there are certain circumstances under which the non-refoulement provision would not apply and those circumstances would include where people have committed a particularly serious offence. The submission relates to clarity in the policy rather than a suggestion that those obligations are not acknowledged in some way already in the policy.

Senator McKIERNAN—You may not have seen the department's submission to the committee, which we only released a couple of weeks ago. There is an attachment to that which is an update, a redraft, of the current policy. Have you seen that?

Ms Lester—The policy that I have is attached to an MSI. I have got an MSI issued on 13 May this year.

Senator McKIERNAN—Yes, it would be the current one. If you do get your hands on that other one, I would appreciate your views. I refer to that comment about the targeting of Vietnamese people in Melbourne. From our experience, people who get into Australia under our refugee and humanitarian policies actually take Australian citizenship very quickly. Of the 25 per cent of Vietnamese that you were talking about, how many would be Australian citizens as opposed to people who are non-Australians, who are merely residents?

Father Norden—I would not know, Senator. I imagine, as you say, that most of them would have taken out Australian citizenship within the space of 12 months of arriving.

Senator McKIERNAN—Well, they cannot. They have got to wait two years before they can apply. They look forward to the date like birthdays.

Father Norden—So most of these probably would be Australian citizens, I would imagine, because they are not people who have arrived in the last 12 months or two years.

CHAIR—On a point of clarification, it depends on whether they actually take out the citizenship. They could have been here for five, six, 20 or 40 years and still not be citizens. So you have got to actually take up the citizenship.

Father Norden—But the ones who came through the refugee program, as the senator is suggesting, are more likely to have taken it out as soon as it is possible.

Senator McKIERNAN—That has been the experience, would you agree?

Ms Lester—That they are more likely to have taken out citizenship?

Senator McKIERNAN—They take it out as soon as they possibly can.

Ms Lester—Yes. There are some cases where you have got families that are Australian citizens and someone has fallen through the cracks, or whatever, but I think generally that is the case.

Senator McKIERNAN—The two international conventions that impact on this area of criminal deportation are the Convention on the Rights of the Child, the CROC, and the ICCPR, the International Covenant on Civil and Political Rights. Both of them seem to be accommodated within the policy. We have had the High Court decision on Teoh which highlighted the CROC convention. The evidence that we have got so far seems to be that there is minimal concern in those areas about the fulfilment of Australia's obligations. Do you have any comment on either of those two?

Ms Lester—I do not have any particular comments in relation to the Convention on the Rights of the Child. It is usually the case that deportation takes place once the child has actually become an adult, although they may have arrived as a child. I am certainly aware of one case where a person is subject to a criminal deportation order. The person has children who are Australian citizens. There is a very real question about the access that those children would have to their father in this case, in the event that he is deported. The social and economic situation is such that it would not be conducive to the children being able even to travel to visit their father in the country of origin. Obviously, he is permanently barred from returning, in the event that the deportation order is executed.

Senator McKIERNAN—The prosecution is going on at the moment, is it?

Ms Lester—Yes.

Senator McKIERNAN—In the Federal Court?

Ms Lester—No, I do not think so. I am only aware of it in a secondary sense but, no, I do not believe so.

Senator TROETH—Going on from that, would you consider that other things should then be brought in as factors such as the family situation if the person is to be permanently deported from Australia? Would you perhaps want, if not the Family Court, a social welfare agency such as your own to have some input into that decision?

Ms Lester—I think that would be a very helpful part of the decision making process. Obviously it is something that must be decided on by a case-by-case basis, but to acknowledge the need to give due weight to issues such as that would be very helpful. If there are support services and networks available that are able to contribute in a constructive way to that decision making process, that would be very helpful.

Father Norden—We are not suggesting that the social circumstances should always be determining, but we are saying that sometimes they could be important. Therefore, the imposition of a sanction which is mandatory is often a very blunt instrument in dealing with circumstances and it is important to leave the freedom and the opportunity available for taking those circumstances into account.

Senator TROETH—That was what I was trying to indicate by the question, that perhaps other factors could be taken into consideration when the deportation order is made. Obviously the deportation order will be made by the immigration authorities but perhaps other things should be brought to mind.

Senator McKIERNAN—Deportation in criminal instances is not mandatory?

Father Norden—No; but there has been some suggestion that in some circumstances it should be mandatory.

Ms Lester—I think the idea was floated a couple of months ago—

CHAIR—Certainly it is not in the guidelines at the moment and we have not had that come before us.

Senator McKIERNAN—It has not come to us and it is certainly not in the revised draft of the guidelines that I drew your attention to earlier.

Ms Lester—A comment has actually been made in the submission about mandatory deportation. That was on the basis that I had understood that this idea had been floated. If it has not, that is a good thing. Nonetheless, the comments that we have made in relation to mandatory deportation are obviously important because it would be

inevitable that injustice would be done in some cases.

Senator TROETH—I wanted to ask you your view on whether deportees should be able to return to Australia if they are deported, which is normally permanent?

Father Norden—I have had inquiries from the family of the young man that I referred to who was deported to Italy. He is well and truly settled and is wanting to remain in that country but would like to be able to return to visit his family. At the moment he does not have the capacity to do that. In some circumstances there should be an option to consider an application of that sort.

Ms Lester—I had the opportunity this afternoon to have a brief look at Kathryn Cronin's submission and I think that was pointed out where she talking about graded exclusions of people. That strikes me as being a very constructive way of looking at deportation. There is no reason why specific conditions could not be imposed on the issue of future visas, and so on.

CHAIR—One thing I want to clarify, Father Norden—and this may have been a misunderstanding on my part—is in relation to where you were talking about the use of deportation as a further punishment against the criminal. The immigration act is very clear that this is not a punishment; it is a consequence of what has happened here and the sentence that the person has received, and it is not to be considered as a further punishment.

Obviously, that is the position of the immigration department. I suspect that if you were in that situation you might regard it as a further punishment, but that is not the purpose. It is not say, 'We have punished you by sending you to gaol. Now we will extract this other punishment by sending you out of Australia.' That is not the reason that it is there.

Father Norden—No; and of course the person is expected to complete their period of punishment, imprisonment or whatever it might be, first and then the deportation occurs. But the consequences of deportation can in fact be seen by the person being deported as a further punishment in terms of separation from family and perhaps the country where they have grown up.

CHAIR—In your contact with the people who have committed a crime and are to be deported, have you had any complaints about the way it is done? There has been some evidence given to us that the deportation orders are not given early enough and, therefore, if there is an appeal to the AAT it has not been resolved by the time the person comes up for parole and they suffer incarceration for a longer period of time while that is determined. On the other hand, some witnesses have suggested that the later in somebody's sentence you can leave this decision the better it is because it gives more time to assess the criminal's chance of rehabilitation, which might act as a positive in his

favour when the department assesses the likelihood of deportation. Do you have an opinion?

Ms Lester—It is my understanding that once a criminal deportation order has been made the access to rehabilitative services is restricted.

CHAIR—Yes, that seems to be true.

Ms Lester—Maybe that is something that of itself requires review. It is a very difficult issue. It has been raised in our submission and a case study is given of somebody who committed a serious criminal offence, was convicted, about three months prior to coming up for parole was interviewed by the immigration department and about three or four days before he was to come up for parole was issued with a deportation order. He now finds himself still in a penal institution having already served his sentence.

CHAIR—Because you are waiting on the AAT.

Ms Lester—The AAT has made its decision and the deportation order has been upheld in this case. The individual concerned has agreed to depart, but now there are delays in securing documentation.

CHAIR—Getting travel documents.

Ms Lester—This is an interesting issue which relates generally to questions of immigration detention but particular to this case where somebody is sentenced and is able in their own mind to prepare themselves for the duration of that sentence. This person, having prepared his mind for that, finds, three or four days before he is due to come up for parole, that he is not going anywhere. The psychological impact of that on people is a very serious consideration. The other consideration that arises there is that you have someone who has served their sentence and remains incarcerated in a penal institution rather than in an immigration detention centre. They continue to be treated as somebody serving a criminal sentence when in fact they have served it out.

CHAIR—Did you want to make any final comment, Father Norden?

Father Norden—Yes, just in response to your last question. Other than the effects of the passage of time I would not put too much on the impact of rehabilitation taking place within our correctional institutions. I really think it is more a matter of maturation or the passage of time. Any rehabilitation that may take place takes place in the community after release, not during the period in prison.

CHAIR—I am sorry you did not have the chance to talk with one of our earlier witnesses, Mr Stanley Johnston. I think you would have found it a very interesting, if somewhat different, point of view. Thank you very much, Father Norden and Ms Lester.

Would you like to table your submission?

Ms Lester—Yes, thank you.

[15.04]

HOWLETT, Mr Max, Solicitor, Family and Civil Law Division, Victoria Legal Aid, 350 Queen Street, Melbourne, Victoria 3000, appearing in a private capacity

CHAIR—You have made a submission, which we have. Are there any comments you would like to make before we go into questions on that submission?

Mr Howlett—Only that there are two typographical errors, which I would like to correct. On page 7 in the second paragraph, in the third line of the extract from the High Court case, the word ‘like’ should read ‘lie’. On page 9, in the recommendation at point 1, the word ‘sentence’ should be ‘sentenced’. Otherwise, there is nothing further.

CHAIR—Thank you very much for your submission. It makes its points quite clearly. The examples that you have given clearly indicate the problem that we have, which is the lateness of the department looking at the deportation issues; so, by the time the department has done that and then there is an appeal referred to AAT, we have the situation that the person is kept in gaol—or otherwise in an immigration institution, but mostly in gaol—pending the result of that appeal, and that amounts to an extension of his sentence, which was never meant to occur.

Mr Howlett—That is correct.

CHAIR—You have three recommendations and they are all clear. The decision should be made ‘as soon as practical after a certain person is sentenced and has become liable for deportation’. That is a thing that we are getting from many of the witnesses. But we have had a contrary suggestion that, if it is done early, it is too early to see whether the person involved is going to show a change of heart from their criminal activities, and that the longer you leave it the better chance you have of assessing that this person is not likely to re-offend if he or she is returned to the community. What comment would you make on that?

Mr Howlett—From a practical point of view—and I was present when the last witnesses were giving evidence—there is not a lot of access to rehabilitative programs in prison, and that is partly as a consequence of being liable for deportation whilst you are in the prison system.

CHAIR—You say ‘as soon as practical’—or is there a minimum time before parole is due that you would like to see? If somebody has a one- or two-year sentence, I can see that ‘as soon as practical’ is a sensible suggestion. What if they have an eight- or nine-year sentence: would you then also say ‘as soon as practical’, or would you say ‘two years before the parole is due’?

Mr Howlett—It might be up to the resources of the department to put them in

order. I cannot really comment on it, because it is really outside my area of expertise, except to say that the policy does recognise that it is important that it be done as soon as practical. Obviously, each case is different and, if it is a longer period of time, they might need to take that into account.

CHAIR—Your second very important point is the catch-22 situation of rehabilitation and the classification of the prisoners. The state policy puts them on as As or Bs if they are liable for deportation, and that excludes them from this rehabilitation. But the department itself washes its hands of this and says that rehabilitation is not its affair, as it has simply to state whether this person is liable for deportation. It seems to be a problem with the legislation that there is not a clarity here so that we can avoid that situation.

Mr Howlett—If you are looking at the question of whether someone is able to show that they are rehabilitated whilst they are in prison, it is pretty important that the state prison authorities are aware that liability to deportation should not mean that they should not be able to access these programs. Mr V was the example I gave. He wanted to enter a program called STOP, which was for the treatment of sex offenders, but he was not able to do that, because he was a person who was liable for deportation. Ultimately, he was not able to get the benefit.

CHAIR—Is this a problem in the state legislation, or is it a problem in the federal legislation?

Mr Howlett—It is more likely a problem in the state guidelines rather than in the legislation, but there is an important responsibility on the department to keep the lines of communication open with the state prison authorities. That is recognised in the 1995 report from the ombudsman, in that you do not want to have a situation where someone is put into the state prison system and then left alone by the immigration department.

CHAIR—Your recommendation is that the immigration department should make it very clear to the prison authorities that they will not take a further role in it and that it is up to them.

Mr Howlett—It could probably go one step further and say that the fact that a person is liable to deportation should not prevent them from being able to access whatever rehabilitative programs are available within the prison system.

CHAIR—And that, also, when we are looking at the deportation we will be looking to see to what extent they have been rehabilitated—which means that you really should have been putting them through a rehabilitation program.

Mr Howlett—It is certainly not made clear in the classification guidelines. I should point out that those classification guidelines may have changed recently because

the state prison system is going through a privatisation process and they may be issuing new guidelines as a result.

CHAIR—I have one more question to ask you, and it has got nothing to do with your submission. We received some contrary evidence earlier on in the hearing, and that was on the extent to which people who were not Australian citizens and would be liable for deportation were actually identified within the prison system. We got two pieces of information. One was from Correctional Services in New South Wales, who indicated that they thought that probably, if somebody just did not declare it on their form, they would not be picked up as being a non-citizen liable for deportation. Contrary to that, the Federal Police said they could not believe that, because certainly, once the person was being investigated by the police, he or she would have a complete record, which would include their status as an Australian citizen or otherwise.

Mr Howlett—You would have to ask the department for their practices on that point. But, in some of the files I have seen under freedom of information legislation, there are letters going from the deportation section of the immigration department to the state prison authority, saying, ‘Please be advised this person is a person who is liable to deportation.’ That does not mean they are going to be deported. It means they come within the terms of sections 200 and 201.

CHAIR—Have you any idea how they found out that that person was there?

Mr Howlett—If you read their policies in the migration series of instructions, they go through a number of areas, including reading the law lists in the newspapers, but in one of the MSIs—I could probably refer it to you, if I took it on notice—they give a list of procedures the departmental officers are to use to identify people who come within the terms of the deportation policy.

CHAIR—Yes. It is an interesting area and we obviously need to follow that up further with the correctional services. We are not talking to Victorian correctional services, are we? Perhaps we could write them a letter and ask them for their practices.

Senator McKIERNAN—I refer to the advice in the attachment that the immigration department gave to the committee about that. They told us that, from Victoria, the Melbourne office receives a computer print-out information sheet (PIMS) from the Office of Corrections, on all persons charged with a criminal act who give their place of birth as outside Australia. A second PIMS advice is received if and when the person is subsequently convicted of the charge. In another part it says that the information provided is: the prisoner’s name; date and place of birth; nationality; year of arrival in Australia, as supplied by the prisoner; name of ship or airline; current location; prison remand or free; number of prior convictions; court remanded—to which court and the date; offences and sentence. The information they receive from the department in Victoria is actually more comprehensive than some of the other states and territories get. In terms

of the rehabilitative programs, where does parole fit in? Isn't that part of rehabilitation?

Mr Howlett—Under the various state and territory corrections legislation, they would include parole and pre-release schemes—and under the federal system, you are released on licence—in the notion of rehabilitative schemes.

Senator McKIERNAN—The previous set of witnesses gave an instance of where a person was eligible for parole, but then was hit with a deportation order. That would lead me to believe that rehabilitative programs, or at least some of them, are open to some people who are liable to deportation within the Victorian prison systems.

Mr Howlett—That may be the case. The difficulty arises if someone is hit with a deportation order when they become eligible for parole. Normally a notice will be given under either section 253 or 254 of the Migration Act for that person then to be held in custody. In that way, the person will not be able to access parole or whatever pre-release scheme it is.

The other problem that arises is one that happened with Mr K, whom I have mentioned on page 3: when he became due for parole, the Parole Board deferred consideration of his parole, pending the outcome of the Administrative Appeals Tribunal review. In a sense, they took a hands-off approach because he had a deportation order issued against him, and he is still waiting for his decision from the Administrative Appeals Tribunal now, despite being eligible for consideration for parole on 16 July.

Senator McKIERNAN—Unfortunately, the dates do not work out, to me. You say he had a minimum term of 18 months and that he was due for parole on 16 July, but that is only 14 months.

Mr Howlett—There may have been time that he spent in custody—

Senator McKIERNAN—Before, which would be taken into account.

Mr Howlett—prior to being sentenced, and that time was taken into account. Effectively, the sentence is backdated to the first time he went into custody.

Senator McKIERNAN—He can be held on remand and that is taken into account. Thank you for clarifying that. You can see that it does expose the problem to us as to when the decision is made on deportation. If a decision were made in that instance on deportation, one would suspect that the individual would have had to serve three years and six months before being eligible for deportation. There would be no eligibility for parole, one would assume, if deportation was going to be at the end of the line.

Mr Howlett—I think the way it would work is that he would still be eligible for parole on 16 July. But say that he had been through the system of being considered for

deportation and he had appealed to the Administrative Appeals Tribunal and lost that appeal, and the decision of the department had been affirmed: on 16 July, the immigration department would then have served a notice under 253 or 254 and taken him into immigration custody and then executed the deportation order at that point in time. So he would not be required to serve the remaining 18 months of his sentence.

Senator McKIERNAN—How would that be? Would there be automatic parole in that sense?

Mr Howlett—There would not be automatic parole, no. If he became eligible for parole and he were granted parole, the immigration department would most likely act to take him back into immigration custody, because the deportation order had been issued and had been affirmed by the Administrative Appeals Tribunal and he was liable to leave.

Senator McKIERNAN—Changing the subject matter, one of the earlier witnesses mentioned how the Administrative Appeals Tribunal was being clogged up because of self-representative litigants before the tribunal, with no legal aid available. How much legal aid does Victoria Legal Aid give to persons in the criminal deportation area?

Mr Howlett—It is not a matter which is normally granted legal aid. I have actually brought in copies of the relevant parts of the Victoria Legal Aid handbook for the committee, which set out the grounds upon which you might be granted legal aid, which are basically that you must satisfy a means test and a merits test. Legal Aid issues guidelines to say what sort of matters are normally granted legal aid, and deportation matters are not included in those guidelines. The cases that would go outside those guidelines but where you would still get a grant of legal aid would normally be where there was some sort of refugee related matter. For example, you may have come to Australia as a refugee, or you may have been granted refugee status in Australia, and there may be the non-refoulement provisions to consider: you may get a grant of legal aid in those circumstances.

Senator McKIERNAN—Is that grant of legal aid for a deportation matter?

Mr Howlett—Either for a submission to the immigration department when they are considering deportation or for representation to the Administrative Appeals Tribunal for the actual review of the deportation order.

Senator McKIERNAN—The current guidelines on criminal deportation provide for a claim under refugee status, and that matter can be, or is, dealt with by the minister rather than by the tribunal. Is that not the case?

Mr Howlett—I am sorry, I missed the question.

Senator McKIERNAN—Where a criminal deportation provision is going to be

enacted or actioned, and the individual is in the firing line of that, if they make a claim for refugee status or make a claim for protection, the matter is directed to the attention of the minister, is it not?

Mr Howlett—There are probably three situations there, and I am not quite sure which one I should be directing the answer to. The person can make an application for a claim for refugee status, after a deportation order is issued. That would then go through the normal processes of being assessed by the on-shore refugee division of the department and then by the Refugee Review Tribunal—or, in certain circumstances, it might go to the Administrative Appeals Tribunal or the Federal Court.

The ones who we normally come across are people who have been granted refugee status in Australia already, and so they have what is called a protection visa. They then become permanent residents in the community. They may have committed some offence which has brought them within the terms of the deportation policy. Whether that is brought to the attention of the minister, I am not sure.

Senator McKIERNAN—The Administrative Appeals Tribunal cannot deal with that matter, though, can it?

Mr Howlett—The Administrative Appeals Tribunal deals with matters where permanent residents have been issued with a deportation order.

Senator McKIERNAN—If an individual seeks to avoid a criminal deportation by a claim of refugee status, that action cannot be tested in the Administrative Appeals Tribunal. I am putting that to you. Therefore I am picking up on a point I thought you made earlier, that Victoria Legal Aid provides legal assistance to people in front of the tribunal who are pressing their actions against criminal deportation by claiming they have a claim for refugee status.

Mr Howlett—Maybe I did not make myself clear. Say that a person comes within the terms of the criminal deportation policy, and the department has indicated they want submissions as to why a deportation order should not be issued: those people are entitled to make an application for legal aid. Normally, that application for legal aid will not be granted, because it comes outside the guidelines for the grant of assistance.

However, say that the person came to Australia under the refugee special humanitarian program and that is how they became a permanent resident, or else they came to Australia and were granted a protection visa in Australia—meaning they had refugee status in Australia and then, of course, they became permanent residents. If, subsequently, they came within the terms of the deportation provision because they have committed some offence whilst they are a permanent resident, that might be a factor that Legal Aid would take into account in deciding whether to grant legal assistance at the Administrative Appeals Tribunal.

The person at the Administrative Appeals Tribunal will bring to the attention of the tribunal member that they are a refugee and that we have non-refoulement provisions, or that they came here on a refugee special humanitarian program visa, and this is a factor that the Administrative Appeals Tribunal will take into account in deciding whether a deportation order should be set aside or not. It is not a separate claim that they can make which leads them to the Administrative Appeals Tribunal. It is one of the factors that the tribunal will take into account in considering whether to set aside or affirm the order.

Senator McKIERNAN—Perhaps you might take on it notice to see if there have been any instances where that series of actions has occurred. It was my understanding that there was ministerial intervention in the event of a claim for refugee status. As soon as that claim was made, the minister intervened—because the minister has to protect Australia's international obligations under various conventions.

Mr Howlett—I could not answer that question. It would actually be in the province of the immigration department as to whether once an application was made it was then flagged to the minister. But I do know of instances where deportation orders have been issued and not challenged, the person has subsequently made an application for refugee status and that has gone through the normal processes of consideration by the minister's delegate and then the consideration by the Refugee Review Tribunal. Certainly there are examples that I know of where that has happened. Just because a deportation order has been issued does not mean that, if a person puts in an application for protection visa, it will not get consideration. In practice it will, provided it does not come within the terms of section 48A of the act, which is repeat protection visa applications.

Senator McKIERNAN—I think I know now where our differences are. I was thinking of the case where a person was in Australia or had arrived here and was granted protection in Australia and then was going through the process. That is where the ministerial intervention happens pretty early in the piece. The instance you mentioned is where somebody has come in through a different course and later on claims refugee status after the deportation order or around the time of the deportation order.

Mr Howlett—I was actually speaking about both instances. The normal course is a person who comes here and is granted refugee status and they commit an offence which they get sentenced to more than 12 months imprisonment for. They come within the terms of the deportation policy and then they may apply for legal aid to help them with the review of the deportation order at the Administrative Appeals Tribunal.

Senator McKIERNAN—Yes, that is the one I have asked you to take on notice to see if you can get some more information as to what assistance has been supplied from your office to people in those circumstances.

Mr Howlett—From Legal Aid?

Senator McKIERNAN—Yes, if that is at all possible.

Mr Howlett—I can take that on notice.

Senator TROETH—I take it from what you have said in your submission that you think that the deportation order should be made as soon as possible after sentencing. Is that right?

Mr Howlett—For two reasons, yes, as set out there. There is a cost involved there to the Commonwealth as well. If you keep people in prison for a longer period of time it costs more money.

Senator TROETH—You have also referred to the effect of the decision on things like work release, rehabilitation and reclassification. What is the most common problem there do you think?

Mr Howlett—The most common problem is when you enter into the prison system—and I can only speak about Victoria—you become ineligible for a security classification lower than B. They give you what is called a B* which means you can only go to medium security and the asterisk denotes you have a deportation order against you.

Senator TROETH—Is A higher security than B?

Mr Howlett—I think it goes A1, A2, A3, B1, B2, B3, C1, et cetera.

Senator TROETH—With C being the lowest security.

Mr Howlett—C is the lowest, yes, and A is the highest. As a result of that B* classification you cannot go to a minimum security prison and you in practice are not eligible for the programs, for example the STOP program.

Senator TROETH—You would rather it was made known earlier rather than later?

Mr Howlett—Going back to the very first question of the chair, if there is an argument that a deportation order should be issued at a later period of time because that will allow a person to be rehabilitated, I do not think that happens in practice.

Senator TROETH—In your experience how often are deportees unable to be represented at their hearings?

Mr Howlett—At the Administrative Appeals Tribunal?

Senator TROETH—Yes.

Mr Howlett—It would be hard for me to say because I only go along to the ones where I actually appear. Certainly a lot of people make applications for legal aid for representation but are refused legal aid because they do not come within the terms of the guidelines or there are no special considerations that should be taken into account in granting them legal aid—for example, there is no refugee issue.

Senator TROETH—I think I understood you to say that there is no specific allocation of legal aid for refugees or deportees. Is that right?

Mr Howlett—There is no specific allocation. If you want some information about legal aid funding I could certainly provide that. There is a certain amount of money that is given by the Commonwealth and a certain amount by the state. My understanding now is that the Commonwealth money is expected to be expended on Commonwealth matters but no particular portion is allocated to refugee, deportation or immigration matters.

Senator TROETH—They are not accorded a higher priority than anything else?

Mr Howlett—It might be easier if I leave you a copy of the guidelines.

Senator TROETH—Yes, that would be useful.

Mr Howlett—They are not the whole guidelines, fortunately. They just set out how people qualify for legal assistance in terms of having merits to their application and passing a means test. It sets out the actual guidelines on various types of civil matters and the immigration guidelines are there. It also sets out some special considerations that may be taken into account where a person might not normally qualify for legal aid—for example, if they are under 18, they have a language or literacy problem, they have an intellectual or psychiatric disability or there is a public interest element in the case. Those sorts of circumstances can be applied to applications for aid. This is as of July 1997.

Senator McKIERNAN—Does it take into account the Commonwealth and state arrangements?

Mr Howlett—I can take that on notice as well.

Senator McKIERNAN—I have a little bit of involvement with a legal aid matter, as you may or may not be aware, from another committee.

Senator TROETH—I think that is all I want to ask. Thank you.

Senator McKIERNAN—On page 10 you talk about the tribunal being bound to take into account the ministerial policy and the views of the applicant. You go on to say it is appropriate that they be empowered to depart from that policy from time to time. Would you give the minister that same ability to depart from policy in the same way as

you give the tribunal the power to depart from the application of the policy in appropriate circumstances?

Mr Howlett—Firstly, it is the minister's policy that we are discussing there. Secondly, the minister delegates his powers under the act to officers of the department and they certainly should be able to depart from that ministerial policy in an appropriate case. Otherwise it is being applied inflexibly and individual circumstances are not being taken into account.

Senator McKIERNAN—Usually, it is a ministerial policy that is endorsed by the parliament, is it not?

Mr Howlett—As I understand it, that policy was endorsed by the parliament in December 1992.

Senator McKIERNAN—Coming back to the question: should there be a flexibility on behalf of the minister in the same way as there should be a flexibility on behalf of the tribunal?

Mr Howlett—I think the answer is yes and I think that flexibility already exists.

Senator McKIERNAN—That is fine.

CHAIR—Thank you very much, Mr Howlett, for appearing before us today and for the evidence you have given.

Mr Howlett—I have seven copies of the relevant portions of the Victoria Legal Aid handbook. It is dated July 1997 and sets out the qualifications to get legal assistance. In there are the civil guidelines and there is a separate guideline which applies to immigration matters.

CHAIR—We have tabled those.

[3.36 p.m.]

CLOTHIER, Mr Michael John, Solicitor, 343 William Street, West Melbourne, Victoria 3003

CHAIR—Welcome. Would you like to make some comments before we go to your submission and ask you questions on it, or are you happy to go straight to questions?

Mr Clothier—Perhaps I could make some quick comments. I was minded to write to this committee because I have been in this area for quite a long time—probably 20 years. I was probably one of the first people in Melbourne to discover the Administrative Appeals Tribunal. I was doing a lot of criminal law in those days with legal aid; and a lot of my New Zealand bikie clients, once they had completed their sentences for rape and murder and everything else, found themselves faced with deportation orders. I remember rejecting one fellow for legal aid and the Attorney-General at that time overruled us. This was when we had the national legal aid office, the Australian Legal Aid Office. Senator Durack said in parliament, I think in 1979, that if anything at all could be said for the permanent resident concerned then he ought to be granted legal aid. It is a very different situation these days. You have probably heard evidence of how different it is.

I got involved in this area very early. In those days virtually the only people on the Administrative Appeals Tribunal hearing these cases were Federal Court judges, and of course in those days we had the very best of the Federal Court judges. We had Mr Justice Brennan, and we had a very saint-like man, Mr Justice Reg Smithers, who is deceased now but who was probably one of the finest judges I have ever met. He was the one who, in a case involving a young Yugoslav boy who had committed a lot of offences after being a casualty of the migration experience, said that whilst Australia could deport that young man back to Yugoslavia away from his parents and family and so on, Australia as a free and confident nation did not need to do that. That ‘free and confident nation’ expression of Justice Reg Smithers certainly lives on in my mind 20 years later. If there is any reason why we should not be operating in the way we are operating now, it is because it is inconsistent with Australia being a free and confident nation.

In the last 20 years I have moved out of this area to some extent, although now that I am back in practice I seem to have quite a number of these clients again, and I am not seeing evidence of a free and confident nation.

An example of that is most clearly shown in the Lorenzo Ervin case. He was a man who had committed a very serious crime—a hijack to Cuba—about 30 years ago, and the acting minister, under the current laws, decided he was not of good character. Not only did she decide that; she also used very special powers which parliament gave the minister under section 500 to sign a certificate saying that that person would have no review rights. That was the part that shocked me the most. Certainly, I get lots of clients who tell lies coming into Australia. We get four million tourists a year, and not everybody wants to

tick that box about whether they have got criminal convictions or other things. It is quite right and proper that they be pulled up and a decision made, perhaps under section 116 of the act. If you tell lies you can have your visa cancelled. But if you have your visa cancelled, you have got some appeal rights. You have got merits review rights to the tribunal. You have got to appeal within two working days, I think, and the tribunal has got to deliver a decision pretty quickly.

That was not proceeded with with Mr Ervin, and I am minded to think that the reason it was not proceeded with was because Pauline Hanson had kicked up a fuss and said we had a terrorist in the country. It struck me that there is a danger in giving ministers—politicians—these sorts of powers. I do not think that that certificate was signed in the national interest, I think that certificate was signed for political reasons—for party political reasons. Mr Ervin is no different from literally hundreds of others who have not ticked that box correctly, who were dealt with under section 116 of the act. Certainly, his crime was perhaps a little more spectacular; but the idea of that bearded gentleman saying, ‘Take me to Cuba again,’ 30 years later, when he is here on an anti-racist lecture tour, just leaves me cold.

Certainly, I have no trouble with him being dealt with under section 116. If he did not tick the box and say he had criminal convictions, he faces the discretion as to whether his visa should be cancelled. But the idea of going all the way and signing a conclusive certificate which takes all the rights of this man away just staggered me. It showed me how far we had come from being the ‘free and confident nation’ that Justice Smithers talked about 20 years ago.

I think this current focus on the criminality of foreigners in our midst is a sign of a nation that has lost its way to some extent. We are contemplating giving the minister even more powers than he currently possesses, and putting even more constraints on applicants who are faced with these sorts of problems.

Indeed, just the other week I had a client come to see me who was quite distressed. He had come from overseas and had been accepted as a refugee. His experience in Australia was not positive, and certainly it was not positive for his wife. He went insane and stabbed her to death. He was found not guilty by reason of insanity, and he was held at the governor’s pleasure. He still is, and it was quite a few years ago. Whilst he was in his insane asylum he got a letter from the minister saying, ‘You have got 14 days to persuade me that you are a person of good character.’ I can assure you that his intake of pills went up dramatically when he got that letter.

The last I heard, insanity was not an issue of good character, but certainly the government seems to think so now. Virtually everyone is being dredged out of all sorts of situations and being faced with having to prove to the Australian government that they are now persons of good character.

I am quite distressed by the way events are moving. I think the fact that they are moving that way is a sign that we are losing our way as a nation, and I believe it is a sign of the effect of the Pauline Hanson phenomenon in this country. I am sorry, that was a very long opening statement. It was really a history of where I am at and why I am here, but I will shut up now and let you ask me questions.

CHAIR—Later on I would like to go back to what you have said, but first of all I want to question you about something in your submission. You say:

. . . perceived weaknesses in certain decisions of the AAT do not point to the need for a new system, but rather to the corruption of the selection process for membership of Federal Tribunals.

Would you like to expand on that?

Mr Clothier—I think the selection process over the last 20 years for the AAT and other federal tribunals has been corrupted by the political process. That is my opinion from observing from the inside and the outside over the last 20 years.

CHAIR—Is Mr Clothier under parliamentary privilege protection here? I would be interested if you could go into that a little more than just the general statement. I do not want you to name names, but I am very interested.

Mr Clothier—I do not want to name names either.

Senator McKIERNAN—With due respect, though, we have an inquiry into criminal deportation. That is the intent. I had the distinct pleasure of sitting with Mr Clothier for something like six hours a couple of years ago when this committee investigated review by appointment. I have no wish to go through that again but, if you want to do it, we could do it in a different area, but today we should be dealing with criminal deportation.

CHAIR—I think it is relevant in as much as we are talking about the minister being concerned that in three cases in the last year his decision has been overturned by the AAT. You said that this is an indication that you see this as a selection process. My question, which might be quite different from what you are looking at, is this: do you think that the AAT does not have the expertise?

Mr Clothier—No, I certainly think the AAT has the expertise.

CHAIR—With due deference to the Deputy Chair, avoid the word ‘corruption’, but what we are doing wrong with the selection process? What are we not selecting that we should be?

Mr Clothier—Personally I think that a lot of this could be avoided if we went

back to a system of saying that only presidential members who are Federal Court judges should hear these appeals. I think we would then have a situation where the minister really could not complain. I know he complains about the odd Federal Court judge from time to time, but I think both the public and the government could be assured that this was getting attention at the highest level.

CHAIR—Are you saying it is not a question of ability so much as starters?

Mr Clothier—All sorts of people get appointed to tribunals for all sorts of reasons. If you want to hear more of my opinions on that, I invite you to read the transcript of the six hours of evidence that I gave to a previous parliamentary migration committee and your own party's minority report in regard to that. That was published some three years ago. Mr Lomp was the Secretary of the committee at that time as well.

CHAIR—I have read neither of those. I am still rather curious as to how weaknesses in the decisions of the AAT could not have occurred had the selection process been different.

Mr Clothier—If you appoint a social worker, an accountant or a retired brigadier to the tribunal, these people bring skills in certain areas. But, if you want them to decide what I think is a very complex and important issue of the deportation of a permanent resident convicted of crimes in Australia, I think you are best off with a Federal Court judge. There are Federal Court judges who are appointed to the AAT. If you are going to get the sort of discipline, intellectual rigour and legal rigour that you want, that you apparently need in this highly political area, that is what you need to do: you insist, through legislation, that, if the AAT handles this matter, then it must be heard by a presidential member who is a Federal Court judge.

It used to be that way back in 1979. The act changed to allow less senior members of the tribunal to hear these cases. At the same time the appointment of presidential members, I believe, was somewhat diluted by the failure to continue to appoint Federal Court judges at that level. Retired politicians were appointed to those positions. I have nothing against retired politicians; there are some very able people.

CHAIR—I get your point, which took a while to get to, but you made it clear when you said it was the discipline and the intellectual rigour. So you are saying that some of the decisions of the AAT are lacking in as much as there is perhaps this lack of discipline and intellectual rigour, which I understand, which has clarified for me what you were getting at there.

Mr Clothier—I have read a lot of AAT decisions over the last 20 years and I know that many ministers, not just of this present government's complexion, have complained about the AAT at some stage or another, and about other tribunals. But the tribunal decisions which have come under scrutiny are, I think, the ones that have been

badly written. If you write a good decision, you are unlikely to face the sorts of problems that the tribunal member faced in that most recent outrageous decision that the minister announced in his press release. I read that decision and it was not well-written. It could have been much better phrased.

CHAIR—That was my next question. Could you widen that and tell us what your complaints are about the way that decision was written? I realise you do not have it in front of you now but if you could just generalise.

Mr Clothier—The general impression I got from that decision was that it was somewhat waffly. It went into irrelevancies and it did not stick with the main issues. It confused emotion with law, I thought, in the way in which it was written. I do not take issue, necessarily, with the decision because I know that the way in which you write a decision can often have a very great bearing on how it is accepted. There is a real skill in writing decisions. My experience teaches me that often we do not select tribunal members for those skills.

CHAIR—I think what you wrote in the rest of your submission goes back to what you said at the beginning about the ‘fortress Australia’ type of idea. You seem to feel that there is a feeling in the community now that we have to scrutinise closely people coming in because they might be of a bad character, people who commit crimes, as if the Australian community itself was somehow naturally purer than the people coming in.

Mr Clothier—It has got a taint of fascism about it to me. It does not smack of Australia as a free and confident nation that is for sure. These are impressions I get over the years. I do not say that things were wonderful 20 years ago. A short while before that we had a white Australia policy: we really knew how to be nasty to foreigners then. I certainly think taking the AAT system out of the area and trying, as far as possible, to take it away from the political arena was the right idea. I think that many ministers failed in their political courage in that they bought into a lot of these arguments.

I remember when the tribunal on which I served had this jurisdiction. One of our Sydney members decided that an ex-criminal who had committed a particularly nasty crime was now reformed and ought to be allowed in to live with his daughter in Australia. There was a great deal of publicity and, as a result of that, the minister felt that he had to take the jurisdiction away from the Immigration Review Tribunal, where he was not represented—he could not send a lawyer down because no-one is allowed to be represented—and give it to the Administrative Appeals Tribunal. I presume the focus of this committee is on deportation of permanent residents convicted of crimes.

CHAIR—It is.

Mr Clothier—But of course the AAT has been given that whole new jurisdiction of foreigners convicted of crimes who, say, apply for a spouse visa but they have got

criminal convictions back home and so on. I think it was a right move to give the AAT that jurisdiction, and I think it is important that we try to insulate it from the political arena as much as possible because ministers come under tremendous pressure.

If ministers can say, 'We are subject to the rule of law here. We have set the government's policy and this is the law. It is a fair law. The tribunal decides these issues and not me.' I think you do a disservice to a minister in this area, in this portfolio, by saying, 'We are going to give you the final discretion to overrule that tribunal.' I know this minister feels that he ought to have that power back again. The previous one did. I think Mick Young overruled the AAT eight times in a row before someone took him to the High Court.

CHAIR—At least it is common to both parties.

Mr Clothier—Yes.

CHAIR—You have said in your submission that you see the deportation rules as too tough. Is it that you feel that not enough importance is given to the families of those people being deported or do you think, as a human right itself, it is too tough a policy to deport someone who is not an Australian citizen who has committed a crime?

Mr Clothier—They are linked; they are both. The right to be with your family is a human right under article 23 of the ICCPR. I do not think you can come to any other conclusion than that the way in which we operate at the moment, the way in which we decide these matters, is too tough. Where you have got kids coming to Australia at nine years of age, learning criminal activity in Australia, and who are then being told, 'We are going to deport you back to your country of birth.' I mean, your parents are here, your siblings are here, everybody is here. We say to them, 'We are going to get rid of you not because we do not think you are an Aussie criminal but because we can get rid of you. Australia does not want to put up with you; you are an absolute nuisance and you are a danger to the community.'

CHAIR—And we cannot get rid of anybody else!

Mr Clothier—The most recent one I think was that British fellow, McCafferty. He came here when he was about 10 as well.

CHAIR—He was slightly different inasmuch as he was not even a permanent resident: he had no actual status here at all.

Mr Clothier—I was not aware of the full facts.

CHAIR—But the same principle applies.

Senator McKIERNAN—If our policy is too tough now—it has only resulted in 130-odd people being deported from Australia for criminal activity in the last six years—how much more lenient would you want it to be? I mean, would you accept that we ought to deport half that number in that period of time? Do you accept that there is a need for criminal deportation?

Mr Clothier—Yes, I do. I do not know how many came here when they were nine or 10. I only see the edges of it, and the edges are too far over. I cannot say that maybe we should only be deporting a hundred or something like that. But I do know that we are deporting people whom I do not think we should be deporting. They are our problem and we should not be deporting them, for a lot of reasons.

Senator McKIERNAN—The McCafferty case has been tested in the courts.

Mr Clothier—Yes, but the courts apply the rules of law. There is nothing in the policy—if you were brought here as a child and your parents decided not to get citizenship or forgot to get citizenship for you—that protects you from deportation.

Senator McKIERNAN—He was not deported because he was here as a child. The reason he was deported was because he was convicted of criminal offences as an adult. I mean, is that not the moot point with that particular individual?

Mr Clothier—Where did he learn his criminality? In Australia; did he not? If he was brought here as a 10-year-old, I would have thought that ought to have more play. Why are we deporting him? Is it because we can or is it because we think he is not part of the Australian community? We say, ‘You have forfeited your right to be a part of the Australian community.’ But how did he forfeit his right? He came here as a 10-year-old. Are we saying that he learnt his criminality in Britain or was it in his genes? I get back to the idea of a free and confident nation: we should not be deporting people in those circumstances.

I take your point about the complications associated with him coming here as a 10-year-old illegal immigrant. I presume that his parents brought him in and that, for 20-odd years, they simply did not bother to extend their tourist visas or something. If he was brought here as what the policy now calls an innocent illegal, he ought to have the same benefits as any other child that is brought here by their parents. As a matter of principle, I do not think we should visit the parents’ illegality on the kid. He grew up in this country. If he learnt his criminal behaviour, he learnt it here.

Senator McKIERNAN—I am not sure at all of the status of the individual in that particular instance, but the other one you referred us to is the Teoh High Court decision. There has been quite a deal of controversy about Teoh which resulted in the decision in the High Court. We have lived with that decision now for three or four years. Has it made any impact at all on who remains or who is deported from Australia?

Mr Clothier—It has probably had a marginal impact. The problem when you read the policy is that there are all these things that a decision maker has to take into account. It is everything but the kitchen sink. It is very hard for a decision maker to say, 'What is more important here? He has kids, but he has these crimes. And the government says, "They're crimes of violence, particularly against women. They're very serious, but he has this, this and this." Where do I put this on the scale?'

It is enormously difficult for a decision maker. What a lot of them are doing these days is simply saying, 'It's a hot topic in the papers at the moment. I don't dare say, "Let this guy stay." That would be a very courageous decision for me as a decision maker. I'd better say no.' That is the impression I am getting. That is why my client in that insane asylum got that letter saying, 'You've got 14 days to write to me to tell me why you're of good character.' I rang up the decision maker and he said, 'Look, the minister wants a general cleaning out. He wants everybody to be checked out because we've got a blitz on.' As a decision maker, you have this government policy and you have all these things that you have to take into account, but none of them are hierarchical. The more things you put in the policy the more difficult it is.

The reason I have given you these old 1989 regulations is because, at that time, the regulations had a slightly different focus. They said that you were deemed not to be of good character if you had been to gaol for more than two years—that is, had committed crimes and been sentenced to more than two years. We are not talking about permanent residents here; we are talking about the others. The good character requirement could be waived if the applicant had shown—this is on page 2 of the old regulation 143 of the 1989 regulations—by subsequent conduct, that he or she had reformed.

I know, as a decision maker when I was on the tribunal, that that was tremendously helpful as a focus. I knew what I had to look at then: is the person reformed? I know the current policy has in it somewhere that you have to look at current criminal conduct and current character to see whether it is good character. But I do not think the focus, legislatively, is anywhere near as tight now as it was, say, in the 1989 regulations for non-residents.

I do not want to confuse you with all these different terms such as 'residents' and 'non-residents', but I think that if you are going to make recommendations about what specific legislation is required for this area of permanent resident convicted of crime, you ought to be focusing not so much on the spectacular nature of the crime but whether the applicant has shown, by subsequent conduct, that he or she is reformed. That really, to my mind, helps the decision maker. You can really focus down. Of course you take into account the nature of the crime and the heinousness and so on, but it enables you to fit it all into a focal point and say, 'That's really what's important.' The further regulation is that 'the minister is satisfied undue harm will be unlikely to result to the Australian community if the visa was granted.'

You have those two foci. I found that most helpful. Most people did not miss the 1989 regulations when they were replaced by the 1993 regulations or the 1994 regulations. But the way in which it was expressed in the 1989 regulations—I think it followed over for a while in the 1993 regulations—as a decision maker I found that most helpful. My last suggestion to this committee is that if you are going to recommend legislative reform, the legislation should be focusing on reform because it does not really help to have a longer and longer list of policy.

When Mr Justice Brennan first looked at this area in 1979 he said, ‘I can’t really follow the government’s policy because I do not know what it is. It consists of two press releases and they are mutually contradictory.’ Things have changed a bit since 1979. It is still very political, but you get this long diatribe in the government’s policy—I am sure you have probably read it; it probably sent you to sleep. You have got all these lists of things that a poor old decision maker has to take into account, but you will go blind trying to fit it all in, saying, ‘I’ve got to give this more weight than this,’ and so on.

I think the focus ought to be on reform. I think the 1989 regulation, that old regulation 143, might well be the best way to go about it. That was my last submission to this committee. I am at your convenience if you want to ask me any more questions.

Senator McKIERNAN—With the policy we have at the moment and the implementation of the policy, I think if you get 130 or 140 people being deported over a six-year period, that is not a great many, it is not of great moment, it is not of great effect at all. Such are the checks and balances in the scheme that, after six years, 140 people have gone. That is just over 20 a year.

Mr Clothier—Well we let all sorts of rum characters in just after the war, didn’t we, Senator?

Senator McKIERNAN—Let us stick to this, though. You have got a 10-year limitation, so, as we are talking in 1997, we are talking about people who have come here since 1987, not 40 years ago. I am here only 30 years—less than 30 years actually.

Mr Clothier—I certainly was not referring to you, Senator, only to your age. I am thinking about some of the more notorious people we let in in the 1950s and perhaps the 1960s. There was certainly a fallout in the 1970s that I did a lot of work with, especially in some of the communities that had more difficulty in assimilating or integrating into Australian society, who faced more social difficulties. Perhaps we have less of that now because we have a very sharp economic focus on our migration. The character checks are much more careful these days, certainly over the last 10 years. I do not say that some families cannot have black sheep—certainly they do. But that may be the reason we are only getting 140 people coming up to be looked at.

Senator McKIERNAN—No, 140 people who are actually going. There are a lot

more people being looked at and being considered for deportation, like the case that you mentioned earlier who I guess has not gone yet. They are considered for deportation. Then the individual is given a chance to respond and other people are given a chance to respond. If the decision is then made to go ahead with the deportation, they have still got appeal rights to the AAT and, in some cases, appeal rights to the Federal Court.

Mr Clothier—Yes. I certainly would not want to see my client deported, because he was found not guilty on the grounds of insanity; it is not a character issue. If we are going to change the rules to drag these people into the net, I would be even more worried than I am now. I do not know what else I could do apart from coming and appearing before this committee again. I am concerned enough to have come here and wanted to have my say anyway.

Senator McKIERNAN—Can I refer you to the new draft policy which accompanied the department submission to the committee. We took a decision to publish that a couple of weeks ago. I do not have copies available but I would refer you to that.

Mr Clothier—Perhaps you could refer me to the salient points. I take it it is a long list of things that the decision makers have to take into account.

Senator McKIERNAN—It is not that big, but it slightly bigger than the current one. You made mention of the regulations to do with the 500, 501 and 502—

Mr Clothier—Yes, but it may have some—

Senator McKIERNAN—Yes, the Lorenzo Ervin decision. But can I also, perhaps in retaliation, refer you to regulations that were applicable at the same time which actually caught Teoh and led to the decision on his deportation, which would not happen nowadays. If a similar type of case for deportation came before the department, the same decision would not be made under the current guidelines. I put to you that the same decision would not be made under the current guidelines that was made back then on Mr Teoh.

Mr Clothier—That is interesting because I have certainly had clients post-Teoh, with children in Australia, who have been deported.

Senator McKIERNAN—That does not mean to say that they are not going to be deported, but the same decision on Teoh was not that he should not be deported. It was about the impact on the kids and he had not been advised. That is what it meant.

Mr Clothier—You are talking about the natural justice issue.

Senator McKIERNAN—That was the issue in the High Court.

Mr Clothier—Yes, indeed. I would hope it would not be. I ran Kioa's case to the High Court on the grounds of natural justice. I am not sure whether the department has really learnt its lesson. It is very difficult to know when you are granting a fair hearing and when you are not. I do not think you can say that we have solved the problem of natural justice because we now know what we would do in the Teoh case.

What keeps me in business is that the department continues to breach the rules of natural justice in various cases. They would certainly never mean to do it. It is often almost certainly negligent conduct rather than deliberate conduct. I do not think you could say that we would never make a decision like Teoh. We would always give a person the opportunity to be heard on these issues and we would take into account the international conventions that relate to the paramount welfare of the child. I would hope that you are right, that the department would not make a decision in the same way as it did before. I am a bit worried about those new privative clauses where it does not matter what the department does anymore—you cannot get to a court to challenge it. I am giving evidence tomorrow to the Senate Legal and Constitutional Committee on that issue.

CHAIR—Thank you, Mr Clothier, for appearing before us today. This inquiry is adjourned until 29 September.

Resolved (on motion by Senator McKiernan):

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

Committee adjourned at 4.12 p.m.