COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON MIGRATION

Reference: Criminal deportation

SYDNEY

Tuesday, 12 August 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

JOINT STANDING COMMITTEE ON MIGRATION

Criminal deportation

SYDNEY

Tuesday, 12 August 1997

Present

Mrs Gallus (Chair)

Senator McKiernan	Ms Gambaro
Senator Tierney	Mr Holding

The committee met at 9.21 a.m.

Mrs Gallus took the chair.

CHAIR—I am pleased to declare open the first public hearing of the inquiry into criminal deportation by the Joint Standing Committee on Migration. Australia's criminal deportation policies and practices have been the subject of recent public debate, with some cases attracting media and community interest. 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.

One of the key issues before the committee is whether the criminal deportation arrangements safeguard the interests of the Australian community. With over 300 people currently in Australian prisons who come within the criminal deportation provisions, the committee is eager to ensure that the laws and administrative arrangements for dealing with such people operate fairly, efficiently and effectively.

As part of its investigation, the committee will be examining the role which victims of crime and their families should play in deportation proceedings. This is one of the more contentious issues before the committee.

Over the next few months we will be hearing from many of those organisations and individuals who have made submissions to the inquiry, as we conduct the public hearings. Today in Sydney we will be hearing from bodies who have a major part to play in the deportation process, together with other groups and individuals who have a special interest in the issues that are raised. Our first witnesses have a particular important role to play in the deportation process: the Administrative Appeals Tribunal has responsibility for merits review of deportation decisions.

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

CHAPPELL, Dr Duncan, Deputy President, Administrative Appeals Tribunal, PO Box 9955, Sydney, New South Wales 2001

McDONALD, Mr Graham Lloyd, Deputy President, Administrative Appeals Tribunal, GPO Box 9955, Sydney, New South Wales 2001

RANSOME, Ms Kay, Acting Registrar, Administrative Appeals Tribunal, GPO Box 9955, Sydney, New South Wales 2001

CHAIR—I am pleased to call representatives of the Administrative Appeals Tribunal. Thank you for giving us your submission to the inquiry. I invite you to make a brief opening statement, if you would like to add to the submission you have already given us, before we proceed to questions.

Mr McDonald—Our submission is set out in the document of April 1997. Basically, we are happy to answer any questions that members may have. There are one or two things that I could perhaps help with. Firstly, there is an update. I refer to page 4 of the submission, the submission having been made in April. I am looking at the second lot of statistics on that page. For the rest of 1996—that was up to April—there were 17 criminal deportation matters disposed of throughout Australia. The total number for the year ending 30 June was 34. That just updates that figure of 17.

CHAIR—So the 17 goes to 34; it doubles?

Mr McDonald—It goes to 34 for the full year. I can give you a run-down of how those 34 were disposed of: 13 were either dismissed by consent, withdrawn or dismissed at the request of the applicant; two were dismissed for non-appearance by the applicant; one reinstatement request was dismissed, so the matter had been lodged, not proceeded with and a reinstatement application made; one was set aside by consent—obviously consent of the respondent, being the minister's delegate; in one there was no jurisdiction to determine the matter; twelve were affirmed, that is, the decision of the department was upheld; three were set aside; and one was remitted for further consideration. That makes a total of 34.

The second matter I would like to draw to the committee's attention is touched on at page 9 of the submission at the foot of the page where we are talking about the situation of refugees and stateless persons. There are quite a number of criminal deportation cases involving people who have come to Australia as refugees. I want to draw the committee's attention to the articles of the convention relating to the status of refugees, in particular articles 32 and 33. Article 32 deals with expulsion from a country of a person who has been accepted by that country as a refugee. There are two grounds for deporting a refugee: national security or public order. We are obviously concerned here with the public order provision.

Subclause 2 of that article provides that there is to be a right to appeal to and be represented for the purpose before a competent authority against a decision to exclude a refugee. The reasons for that would be fairly obvious to the committee. I am sure that a person who has fled their country fearing for their life and gone to another country and been accepted as a refugee, to then be excluded from that second country and to be returned is a fairly major decision. So I guess that is the reason for the provision there.

I draw to the attention of the committee article 13 of the International Covenant on Civil and Political Rights which also deals with the expulsion of aliens and basically says that people placed in that category should have the right to be heard and represented. That just expands on that provision of the submission. Otherwise, we stand by the submission. We are happy to answer any questions that we can.

CHAIR—I refer you to the table that you updated for us and the hearings when you set aside. Could you give us some indication, without necessarily mentioning specific cases, of the types of reasons that have been used for this sort of decision?

Mr McDonald—I can give you some examples of cases that I have handled. They are probably the best. There was one instance where a man had migrated with his family from the UK to Australia. He was aged nine when he arrived. At a very young age—I think it was 18 or 19, but prior to him having been in Australia for 10 years—he committed a murder. It was a murder of passion with a woman with whom he had been romantically involved. He was convicted of murder in the Supreme Court and a life sentence was imposed. At the age of 32 he was due for release and shortly before there was a deportation order served on him.

The question in that case was what ties did he have in Australia. All his immediate family were in Australia—his siblings and parents. He had family in Scotland, I think—a grandmother, who was then in her nineties, who was not really able to give him any support if he had been returned to his country of origin. There were arrangements for supervision on parole if he was returned to the UK, but he would have had no family or other support in those circumstances.

So the question there was weighing up his age at arrival in Australia and the sort of support he could expect from the Australian community, and there were some other minor factors that I need not go into. He did not really have a criminal record from any other crimes, and there was strong evidence to suggest that the time that he had spent in prison had led to him coming to a better understanding of the way to behave in those circumstances.

That is a very difficult decision to reach—given the family wanting him to stay, the family in fact now regarding themselves as part of the Australian community, and the fact that he did not have a generally bad criminal record. Although, the offence itself was obviously a very serious offence. One does not discount that. That was one instance.

CHAIR—That raises a lot of issues. In talking about those issues, we bear in mind that you deal with only those cases that come up for deportation. Part of this inquiry is the number of cases that never come to the attention of the minister. So we are dealing with the subset that actually do and which you get to review. Did the victim's family have any rights in that at all?

Mr McDonald—To make representations?

CHAIR—Yes.

Mr McDonald—They do have rights, but it is not usually exercised. That will be a matter for the department, the minister's representative, to—

CHAIR—But in this case there was not?

Mr McDonald—In this case I cannot recall there being any statement. Another case involved a man who was in Eritrea. At the time that Ethiopia and Eritrea were in conflict and the Eritreans were being badly treated by the Ethiopians, he stowed away on a ship. He worked in the port at Eritrea. He was even unsure which ship the goods that he was stowed away in were going to be placed. There was some danger connected with that—evidence to the tribunal was that, on occasions, some ships from some countries just dispose of stowaways overboard.

It was a Danish ship that he managed to get onto. It came to Fremantle. There was a dispute about whether Denmark or Australia was the appropriate country for him to be regarded as the refugee. Usually it is the country of first contact. So that issue was not properly resolved.

After a time in Australia he committed an attempted armed robbery and was sentenced to a term of imprisonment for two or three years. The circumstances of the robbery were that he did not have a real gun, although it obviously was frightening for the people who were confronted with this, not knowing that it was not a real gun.

There was evidence from an academic in Western Australia, who had a long interest in Ethiopia and recently had been in the country, to the effect that it was not unknown for then President Mengistu to conduct his own executions and that, if this man were returned to Addis Ababa, he would at the very least suffer a term of imprisonment of, from memory, 10 to 16 years and maybe more.

I might add that there was also evidence that the brother of this young man, and he was then only in his 20s, had been murdered and the body had been strung up outside the house for political reasons in Eritrea. In those circumstances, I felt that to return that man would be an injustice. So a decision was set aside in that case, for fairly obvious reasons. Again, there was no victim impact statement.

Obviously the tribunal has before it a transcript of the proceedings before the court. Those submissions were made on behalf of the crown in relation to sentence and the like. To that extent, therefore, we see those—where they are made. They are not made in every case, but we do have those before us. There would be nothing to stop the respondent from making submissions. For instance, in looking at other issues under the Migration Act to do with good character, often the department will lead evidence about particular concerns it may have in particular countries over the forging of documents or other things of that sort. So there is nothing to stop them from leading that evidence and we would certainly take it into account.

CHAIR—You have raised a lot of issues. I want to finish on that exclusions issue that you were talking about before I hand over to my colleagues. When the minister announced this inquiry, he said, 'Some recent review decisions have alarmed me because permanent residents with substantial convictions were able to successfully oppose or delay criminal deportation orders.' I was wondering what your response to such a statement was.

Mr McDonald—Delay is a difficult factor. It depends, and you will see this from the figures in the submission, on quite a number of factors, often external to the tribunal. Can I give you one or two examples of that?

CHAIR—Make them quick, because I know my colleagues are dying to ask questions and we have a limited time.

Mr McDonald—All right; I will make them quick. One, for instance, that was lodged with the tribunal last year is still pending and has been waiting for hearing in the High Court for an appeal against the conviction, which forms the basis of the criminal deportation order, since 1992. It seems a little silly for the department and the tribunal to put resources into hearing that case until the High Court has disposed of whether or not the appeal is going to be allowed. That is an issue of delay.

Another case that I heard earlier this year was that a man was released on parole on 5 March 1993. He was Romanian. He applied for a visa to return to Romania and was interviewed by the department on 5 July 1996. They granted him the visa and he departed on 8 July 1996. They then reached a decision to deport him on 5 August 1996. The original conviction relating to that matter arose in 1992. He returned to Australia in January of 1997, whereupon they took him into immigration custody. We arranged the hearing for 1 May and 2 May and gave a decision on 2 May.

CHAIR—Intervening variables.

Mr McDonald—There are intervening variables over which really we sometimes have no control. There are other aspects, such as people wanting adjournments because they are trying to arrange legal aid, there are those sorts of aspects, or they have witnesses that they are trying to contact. As we have said in the submission, we will often try to

assist people in getting in particular expert witnesses if they need it. But there are those sorts of variables and they do take time.

CHAIR—So you would, having given us those examples, feel that such a comment was not justified under the circumstances generally over all your examples?

Mr McDonald—I would say I find that difficult, yes.

Senator McKIERNAN—Just following up in part on the chair's questioning on that, it seems to me that in your submission you are asking for the parliament to more clearly define the grounds on which deportation orders can be made or the grounds on which appeals can be made. I am referring to page 8, where you talk about the criticism of the tribunal. You are asking for the guidelines to be made clearer. It seems a bit unusual coming from a body like the AAT. Normally bodies like yours want much broader guidelines where there is flexibility in decision making.

Mr McDonald—Ever since the case of Drake, which was one of the very early criminal deportation cases when Justice Brennan was the chairman of the tribunal, the tribunal has said that we would follow ministerial policy with two exceptions. The two exceptions are, one, if the policy were to conflict with, for instance, the provisions of an act. Obviously then the provisions of the act must take precedence. The second is in the rare case where to apply the policy would in an individual case result in an obvious and palpable injustice. Those are the two bases on which we would not follow it, and I cannot think of any cases in this area that we have not followed it.

But there are some cases in this area—for instance, major white collar crime is not nominated in the criminal deportation policy, and we are starting to see cases, and one that has reached some controversy that we probably cannot comment on because it is on appeal at the moment. But that is not an issue that is addressed specifically under the policy. The policy was devised in 1992 and maybe a little bit of an update might be worthwhile.

Senator McKIERNAN—Are you aware of the cases that led to the criticism being made?

Mr McDonald—I am. One of them is a white collar one, and my colleague was actually the decision maker in that case.

Senator McKIERNAN—The matter is still under appeal—

Mr McDonald—It is on appeal, so it makes it a bit difficult for us to comment further on that.

Senator McKIERNAN—It would not be appropriate to press it here.

Mr McDonald—No.

Dr Chappell—As the decision maker in that case, I might just make a brief observation. I have to say that this is the most devilishly difficult type of decision that I think the tribunal has to grapple with. I have personally found it the most anxiety provoking and stressful that I have encountered since I have been on the tribunal. In terms of dealing with people's lives, to banish them from the country is a profound consequence, and to banish them permanently, obviously there is an impact on their families and on their ties with the community; those things are all affected. Even though most of them have done very nasty things, they are clearly entitled to deep consideration.

In the case of those who have committed white collar offences, they are not, on the face of it, brought within the policy directly, but certainly their activity very often amounts to organised criminal activity and therefore is serious and warrants their consideration for deportation. But even in the particular case I think it is important to recognise that when the tribunal deals with these matters they usually have before them more information than the original decision maker did. They often also see the people themselves face to face, which the original decision maker might not have done. It means that, when the decision maker originally may have reached one conclusion, the person in the tribunal sitting in the decision maker's shoes obviously may take a different opinion. Even the original decision makers themselves find it a difficult task, and that is reflected in the observations you see in the paperwork they produce.

Senator McKIERNAN—Thank you. On the timing of deportation orders, I do not clearly understand what recommendations the tribunal is making to the committee on the matter of timing. You raise it in regard to the McCafferty decision. Are you suggesting that the decision be made early in a criminal's term of imprisonment or at the end of the term. Can you clarify that for me?

Mr McDonald—I think we are saying that probably towards the end, when the person is coming up for parole, is the most appropriate time because in considering one of the aspects that we have to look at, rehabilitation, the prison record is one of the things that we usually have information about, which includes such things as what courses, if any, the person has undertaken in prison and how they have generally behaved in prison. They have the opportunity in those circumstances to demonstrate some commitment to rehabilitation. So if it is done early in the term of course the person does not have that opportunity to demonstrate that to the original decision maker. They may do to us, depending on when it gets to hearing. So we would suggest towards the time that they are considered for parole is the most appropriate time, depending usually on the length of the sentence.

Dr Chappell—Could I also say that there seems to be a certain adhockery in terms of identifying when a person is eligible to be deported. Very often a case may not be identified until a person is almost at the end of their sentence, which can result in either

their having to remain in immigration detention at the completion of their actual term or obviously further delay in determining whether or not they should be deported. We have no control over that, and it would seem that there are no regularised procedures within the various correctional systems in the country to alert, I assume, the department of immigration and ethnic affairs as to whether or not a particular person in custody is a person who may be liable to deportation. I think that is something that may well be within the terms of reference of your committee.

CHAIR—It certainly is.

Mr McDonald—In the case that I cited to you earlier the man had been released for three years before the decision to deport him was made, so it does not necessarily even occur during the period in which the person is still a prisoner.

CHAIR—Are you going to follow up that line of questioning? Can I just ask a question here?

Senator McKIERNAN—Please.

CHAIR—You are saying that later in the prisoner's term when he is coming up for eligibility for parole you should be considering whether the deportation is appropriate or not. Your mean number of days to finalise a case is 281 days—obviously a lot are going to take longer—which is 40 weeks. A criminal may be given parole but then we could have this difficult situation of your deciding whether he is going to be deported once he has been returned to the community and yet one of your conditions of considering whether you are going to deport is whether or not he is a threat to the community. So there seems to be a total illogicalness about that sort of system.

Mr McDonald—I did say it depended rather on the length of the sentence. One year is the minimum. In the other case I cited to you the man had something like 14 years imprisonment. It would be inappropriate, I would have thought, to reach a decision about that 18- or 19-year-old that was convicted of murder immediately upon conviction, but the department might like to start thinking about that 10 or 11 years into the sentence but still some time before the parole arose. That was really the point I was trying to make.

CHAIR—I guess it hinges on how long it takes people to decide before parole, so you would have to get your timing right there.

Mr McDonald—And often there are difficulties with parole. If the person is the subject of a criminal deportation order, the parole board, who might otherwise be minded to release the prisoner, do not release the prisoner because of the existence of the deportation order. So it does interfere with that process as well.

CHAIR—But they are both reacting to one other. As you say, if you make the

decision that we are going to deport, that affects the parole. But, if the parole board makes the decision they are going to release a person into the community, they are in fact making one of your decisions, which is that that person will be no threat to the community. So you are both interacting. Whoever goes first is going to influence the role of the other board.

Mr McDonald—That is true.

CHAIR—Senator McKiernan, I am sorry I interrupted your questioning.

Senator McKIERNAN—That is fine. I was going to move on because of the delay I caused in being late. I apologise for that again. I had discovered on my way here that I had left my glasses behind in the hotel. My final question relates to your comments about legal representation for applicants in custody. You make the comment at page 7:

The Tribunal understands that current guidelines for the granting of legal aid . . .

That is made post the new arrangements, which came into effect on 1 July, which I understand are different now in most of the states and territories throughout Australia.

Mr McDonald—Yes, that would be different because this submission was prepared in April before the 1 July new arrangements. I regret to say that I am not able to say what the new arrangements are other than that it is obvious that more and more people are finding it difficult to get legal aid in these circumstances and more and more of them are unrepresented. We have, in some states, with the cooperation of some voluntary bodies and legal firms, managed to occasionally arrange representation, but that is on a de bono basis. But that is by no means a universal practice. Quite a few people are appearing unrepresented.

Senator McKIERNAN—On the matter of the person being unrepresented before the tribunal on something as serious as being deported from the country, you made the comment that most of the applicants before you are indeed unrepresented. Does that add to the costs of running the tribunal?

Mr McDonald—It usually means it takes a bit longer to hear the matter because the people are unfamiliar with what they can and cannot do and it usually means that more resources are put into the front end of preparing the matter to assist the person. Usually my associate would go with an interpreter, if that is necessary, to the prison to interview the person; talk to them; determine whether they want to call any witnesses; where the witnesses are; arrange with the witnesses to come in, et cetera; arrange, if there is a need, for instance, to obtain a psychiatric or psychological report, with the prison authorities—because often they have conducted that sort of investigation—for those documents and the people that prepared them to be present so that they can give evidence.

Senator McKIERNAN—Are you able to put a cost on that from the tribunal's point of view.

Mr McDonald—I am sorry, Senator, I am not.

CHAIR—Just on the point we were making before about this difficulty of who makes the decision first, the parole board or the AAT, if the emphasis is on lateral thinking, could you conceive of a situation where both the parole board and the AAT sat down together in these sorts of situations, looked at it in your own separate ways but before it came together discuss it as two different boards so that you are aware, before each decision is made, of each other's position and decisions could therefore be integrated in that way? Is that a possibility or do you see problems with it?

Mr McDonald—It sounds like a good idea, but I think it would be a little difficult. We have to hear from the person themselves. I am not sure what the parole board procedures are. We are really directing to the terms of the deportation policy itself, whereas the parole board is looking at other considerations including—

CHAIR—I am not suggesting that you would hear the cases together—I think you would do that separately—but, because of the interaction of the two decisions, that before either of you made your decisions you could come together in a meeting to see what the position of each other was and how that might effect the decision that you might be about to make.

Mr McDonald—Our processes are public, it would require the applicant to be at that meeting because he or she may have comments on it in terms of the determination, which makes it rather difficult. In the ideal world, the decision about criminal deportation should be made before the parole decision, because parole will happen almost inevitably because that is what the sentencing judge has ordered, whereas the criminal deportation may or may not happen depending on what the person's circumstances are at the time of hearing.

CHAIR—Thank you very much.

Senator TIERNEY—Senator McKiernan referred earlier to the guidelines. I was wondering whether you would like to comment on the adequacy of the guidelines in terms of the weighting of factors. I believe you have some concerns about that. Would you like to perhaps suggest how certain factors should be weighted and which factors?

Mr McDonald—The policy itself, it must be conceded, does give examples of what it considers to be serious offences in clause 12. They are matters that we take into account. It might be, though, that the policy could, for instance, nominate the length of a sentence, beyond the one year minimum period that qualifies the person, as an indicative guide—although difficulties arise out of that, because, as you know, sentencing is carried

out by state bodies on behalf of the federal government, and each state seems to have different sentencing policies.

So it would be a guide only and certainly could not be considered to be conclusive. You might get someone who gets six years in New South Wales and, for the same offence in the same circumstances, they might qualify for only four years in WA. So some care needs to be taken with respect to that. I think we have already mentioned the other issue: that is, that the white collar crime aspect needs to be addressed as part of the consideration.

Dr Chappell—There is some difficulty too with the weight to be given to the family and family interests—particularly those of children as a result of the Teoh decision, which I am sure we are all familiar with. That is an issue which is still being grappled with in particular decisions—how much weight one should give to the fact that a child may be an Australian citizen, as may one of the parents, and whether those are factors which should determine that a person be allowed to stay in the country rather than be deported. I have had one or two cases like that which have proven to be very difficult balancing tests.

Senator TIERNEY—You mentioned that presidential members sometimes sit alone in these cases, and there is need for specialist support. Could you expand on that and on the way that might operate to better assist the deliberations?

Dr Chappell—I can give you one example where I think it would have been extremely helpful to me sitting on a case if I had had with me a person with psychiatric or some psychological expertise. In that case the individual who was being considered for deportation was, in my view, clearly mentally unbalanced, if not mentally ill. It was hard to know what weight to give to that, in terms of that person's ability both to put their case to the tribunal and to prepare their application. On occasion I would find it helpful to be able to sit with someone with those sorts of qualifications.

Mr McDonald—That is the prime area, in my view—where you have someone who is psychiatrically disturbed.

Senator TIERNEY—Your submission notes that only a very small number of the decisions of the Department of Immigration and Multicultural Affairs are actually overturned. Do you feel that is because of the worthiness of the submissions, or is the appeal process used largely as a delaying tactic?

Mr McDonald—It is hard to say. There are a lot of cases where people genuinely want to remain in Australia, despite the offences they have committed, and they have family here. They are just difficult cases. It would be hard to classify them simply by saying, 'They are delaying.'

There is no doubt that there are some—but I would not put them in the major category—where, looking at it, the results are, one would have thought, fairly inevitable, and yet the person proceeds. Again, for an unrepresented person, they do not know where the yardstick is for the standards, and so they will proceed and take their chances.

I notice that in a number of appeals recently the Federal Court has not granted them stay. There has been a decision to deport, the person has lodged an appeal with the Federal Court, and the Federal Court has said, 'No, we will not grant you a stay pending the hearing of the appeal. You go back to the country of origin.' Presumably that creates its own difficulties in terms of the hearing of the appeal, but that is the view they seem to be taking.

Senator TIERNEY—Does that happen for everyone?

Mr McDonald—Appeals or—

Senator TIERNEY—That sort of decision where they are sent out of the country before it is—

Mr McDonald—No. Certainly not for us. Usually there is power for the AAT to grant a stay order. I cannot think of one case where the department has not agreed to a stay order, at least until the merits review end of it has been concluded.

Senator TIERNEY—I refer to people who do go to appeal from a Department of Immigration and Multicultural Affairs decision. You have said that the appeals are not often upheld. How long does that delay the whole process? I am just going back to that delaying tactic aspect. On average, how long would that delay the process of deportation?

Mr McDonald—That depends on when the decision was made and when the appeal is heard. Often, if the person's term has finished or the parole board has decided to grant them parole, the department has to reach a decision as to whether it will go along with the parole board decision or whether the department will take them into immigration custody. Quite a few of them go into immigration custody at that point and are kept until the matter is disposed of.

From the tribunal's point of view, we do give such matters priority, particularly where the person's sentence is coming to an end and there is consideration of parole or further immigration custody. Committee members might be aware that immigration custody does not come free to the person concerned. I understand that there is a $150 a day fee for staying at one of Her Majesty's institutions. I suspect that is not very often collected because the person probably does not have the means to pay.

Senator TIERNEY—I suppose I was after a rough average of how much longer the person manages to stay in the country by putting these sorts of procedures in place.

What are we talking about—six months, a year?

Mr McDonald—It would be rather hard to give you a generalised answer. If the person is still serving the term of imprisonment and the review process is continuing during that time, there is no delay as such because they have to serve the end of their full sentence before they are deported. It is only in those cases where the identification of the person as being eligible for deportation for some reason has been delayed or there is some other factor—for example, it is likely the person may be released into the community and I suppose is able to stay in the country for longer if a deportation decision is made. On the other hand, they may well be spending it still in custody.

Senator TIERNEY—Senator McKiernan asked a question about people who were unrepresented and the amount of work you have to put into that. Could you again give perhaps a rough indication of the proportion of cases of deportation that are like that—people who now do not have any representation at all?

Dr Chappell—Of the cases that I deal with in the Sydney registry—we have the largest number by far of all in the country—about half of those who come into the system are unrepresented. It represents for us as a tribunal a very significant commitment of resources to try to provide assistance. One of the difficulties we experience is simply dealing with the correctional authorities. We lack any compulsive powers to direct any of those authorities as to either the delivery of the defendant before us or delivery of reports and other matters.

Just this week I was informed in one matter. The department said it would take something like four to six months to get a report from the New South Wales correctional authorities about a particular person. We have absolutely no power to influence that.

We also find—this is work that my associate and personal assistants do on a regular basis—that when we try to make contact with people in different parts of the correctional system, they are very often moved and they cannot be found readily. We experience extreme frustration in identifying where they are. Even when we do find them, they may not be made available for, say, a telephone directions hearing. When we are dealing with people who not only are unrepresented but often are not English language speakers, we have to deal with interpreters. When we are dealing with people who are also often of low mental capacity or even perhaps mentally ill, it is a very difficult situation.

Senator TIERNEY—Could we focus on the language aspect of those who are not unrepresented? What proportion of them need assistance in terms of interpreters, to the extent that you have to actually employ an interpreter?

Dr Chappell—The tribunal employs interpreters. Again, in the Sydney registry, about one-third of the cases involve an interpreter.

Mr McDonald—Similarly, in Melbourne it would be about one-third. Sometimes the department very helpfully provides an interpreter. Sometimes the department interprets the reasons for the deportation into the person's first language and serves them with that document so that they at least have the basis of why they are being deported already translated.

Senator TIERNEY—In other areas of the tribunal's jurisdiction, do you give similar assistance to people in those circumstances?

Dr Chappell—Yes, but I think, at least in the course of the work that we do, this is the one area where I would suggest there is the greatest need for assistance. Because of the gravity of the consequences, to not have the opportunity to be represented by a lawyer is, I think, a grave deficiency. It is my personal view, although not that of the tribunal, that it should be mandated that people have some legal representation in these circumstances.

Senator TIERNEY—With limited legal aid money available, what sort of priority should be given to people in this class who are being deported? Do you think we should put a weighting or priority on granting legal aid money?

Dr Chappell—Again, I speak personally on this. Yes, I think it is something that should be given significant priority, even though, as I said earlier, these are people who have committed very nasty crimes and even though they are not citizens. Nonetheless, I think our international obligations under the conventions—as well as our responsibilities to ensure that people are fairly and justly able to put their case—suggest that this is an area where significant priority should be given in legal aid. I do not know whether my colleague agrees with that.

Mr McDonald—I would agree with that. If you are going to prioritise, obviously those people who are refugees and are the subject of a criminal deportation order should have a high priority. The second is those people who have children who are Australian citizens, even though they may not be, or children who are in Australia. Clearly the effect of the deportation with respect to the family is a matter that would require consideration.

Dr Chappell—I would agree with that.

Senator McKIERNAN—Is there any ability for the tribunal to stay a decision on a Dietrich type basis, on the grounds that an individual does not have legal representation?

Mr McDonald—No, it cannot do that.

CHAIR—You said that they should be represented by a lawyer, yet the Administrative Appeals Tribunal is somewhat different from a court where you have an adversarial system. If we always insist on a lawyer, do we get into the danger of only

having one side of the story and there is no equivalent of a prosecution on the other side?

Mr McDonald—The department is always represented by a departmental advocate who is usually a lawyer, or they brief.

CHAIR—So it is strong on the one side for deportation and on the other side you do need that countervailing—

Mr McDonald—Yes. I cannot think of a case where the department has not been represented by somebody who is legally qualified.

Ms GAMBARO—Senator Tierney was asking about the prison process and the cooperation within the correctional system. With the increase of private prisons, is the cooperation with private prisons more forthcoming than public prisons? You were talking about a report that took four to six months to prepare. The difference in goals and objectives of both is what I had in mind. Are they more forthcoming with evidence and assistance with prisoners? At the last tally of private prisons, we have one in Queensland and a few in Victoria. Is that right?

Dr Chappell—Yes and there is one in New South Wales. I cannot comment on that. I do not know of any differences that relate across jurisdictions. I am simply commenting on my personal experience here in New South Wales. I do not know what the situation is in Victoria.

Mr McDonald—It is slightly more cooperative in Victoria, apparently. I was talking to Duncan about this earlier. In Victoria, the prison authorities have, for instance, brought people from country prisons into the central city area to allow their representatives, where they are represented, to interview them and so forth, which I understand is highly unlikely to occur in New South Wales.

The most you can hope for in New South Wales is that they get to the city prison. One experience I had sitting in New South Wales was that they brought the prisoner from the country to the city, but they could not bring him from the city to the tribunal for some reason. It did not seem to make very much sense. I used to sit in WA. That was not a problem there either. It does depend on differences between the states in that respect. Some power in the tribunal to have the ability to cause the prisoner to be brought up would be helpful.

CHAIR—That seems to be one of the necessities of—

Mr McDonald—It is an Achilles heel, without doubt.

Ms GAMBARO—I have another question. Again, I do not know whether this has been asked; I apologise for my lateness. On page 15 you talk about a victim impact

statement. The tribunal recommends basically that that victim impact statement be used rather than direct evidence from victims or relatives. I note that you also speak about protecting the broader community. How do you get to that determination and the evidence that you collect?

Mr McDonald—It is a matter for the department to produce evidence with respect to that or for the tribunal to make its own inquiries. Sometimes we have directed the department to try to get evidence in particular areas—I cannot say that it was with respect to impact statements. The other thing, which I have already said to Mrs Gallus, was that we usually have the transcript of the proceedings before the court. In terms of sentencing, the prosecution will have led impact statements et cetera and the judge will comment on those normally in the sentencing process. So we certainly have that and there is certainly no restriction on the respondent producing further evidence, if that is what they think is necessary.

Dr Chappell—I certainly very much favour the use of victim impact statements. In the course of the cases that I have dealt with since I have been on the tribunal, I have not had any submitted. However, I have had one case where a victim actually joined as a third party and took the view that the person should be deported. That was obviously an opportunity for that person to be involved in the proceeding. That is unusual, but it was a very unusual case. I cannot comment further, since it is still in the system.

In the case of child sex offenders, I had a case where the department wished to call the parents of the children involved, and I would have allowed that to have taken place. But before that did in fact occur the offender decided voluntarily to be deported. So it did not arise. But I think in those circumstances it would have been appropriate to have had personal testimony. I am not sure that that would be something that all my colleagues would agree with, but that is certainly my personal view.

Mr McDonald—That reminds me: I did have an incest case—it was incest by the father—where the views of the mother were presented to me. Those views were that the father should be deported. So it has occurred.

CHAIR—Because one of your considerations is the impact on the Australian community, surely there are a lot of cases where this does impact, where a victim's perception is important—for instance, domestic violence cases, or stalking cases and similar cases like that where members of the Australian community feel threatened. Would you take that into consideration in taking victim evidence?

Dr Chappell—I certainly would. But the cases I have dealt with so far have not really been of that nature. The majority of the cases that we deal with, in the Sydney registry anyway, are people who have been convicted of drug related offences and where, in a sense, the victims are not immediately evident, other than society at large. It is clear that the policy recognises that drug offences are very serious offences and merit

deportation. But in those circumstances it is not very easy to call particular people. You simply have to take account of whatever the sentencing court has said or whatever other information may be submitted.

CHAIR—Mr McDonald, would you agree that in certain cases the victims themselves are relevant to your terms of reference?

Mr McDonald—Yes. I would prefer it rather than direct statements because there is a danger of the victim having to be called to be cross-examined if a direct statement is given by the victim. I dare say victims do not want to have to live through that again, or some of them may not want to do that. I prefer the system that has been set out in the submission—namely, the respondent prepares it, and then its officers are available for cross-examination if the need should arise.

CHAIR—The Law Society of New South Wales recommended a special category, to which you, Mr McDonald, referred to earlier in a specific case, for somebody who has been in Australia less than 10 years but came here as a child. They recommended that that be given special treatment. If somebody came here at nine and at the age of 18 commits a crime, it is difficult then to deport them to their home country, which they have absolutely no connection with at all. I take it that you would be sympathetic with that recommendation?

Dr Chappell—Yes, I personally would be.

Mr McDonald—Yes.

Mr HOLDING—By the time people in this category come before you, a criminal record possibly already has been established. In the case of young people who have sworn the oath of allegiance, is there an argument for intervening early on the basis that the mere fact that they have been charged with a criminal offence and are found guilty puts them in breach of their oath—that is, a second barrel which may be useful at an intermediate stage?

At immigration ceremonies people take the oath, which is to uphold the laws of Australia. In Melbourne obviously we have a large number of younger people who are immigrants. Some may not have taken out their citizenship, but they are openly peddling drugs. I assume that they are brought into the court and it tries to deal with them in a way which points out the seriousness of it.

I am wondering whether there is also an argument for saying, 'We will make a separate offence on the basis that you have broken your oath'—which is a serious matter—and where a tribunal such as you, or even a magistrate, can say, 'You are noticed that if you do it again you are likely to be deported.' Given the pressure within the courts, these things follow a sort of procedure because the courts are overloaded.

It seems to me you could have a breach of oath on the basis of a conviction. It might,

in the initial stages, be only a minor conviction. I am told by people on the street that they are picked up and charged but are often difficult to apprehend, and they are back on the street the next day. There seems to be an argument—I would like your view on it—for, in these cases, considering the breach of oath and exercising putting people on notice. So you do not wait until it gets to a stage where it is a really serious breach of the law.

I suppose there is a difference between importing massive drugs and selling packets on the street—although the latter is serious. Is there a case for pointing out to particularly younger people who are not citizens, or who have taken out the oath of citizenship, that they have in fact breached their undertaking and that any further breach would be viewed very seriously?

Mr McDonald—Of course, anybody that is a citizen is not subject to deportation because they have become a citizen. What you are suggesting is that they should get some sort of conditional citizenship?

Mr HOLDING—I put it higher than that. It seems to me that if you take an oath to uphold the laws of Australia and you are involved in continuous criminal activity, why shouldn't the breach of the oath be in itself a charge which, if established, changes the category so that people are on notice? There is the view that once you have taken citizenship you can virtually live a criminal and antisocial life so long as you are not apprehended.

When someone is apprehended for something, particularly in the case of younger people, after they have taken an oath to uphold our laws and then virtually involved themselves in continuous serious breaches, why should we say to them, 'We are going to keep warning you or putting you in jail, but we will ignore the fact that you have broken your oath'? Why shouldn't the breach of oath in itself be a specific charge which the courts can deal with on the basis that it might give them another chance? If they come before you again, the recommendation of the court to the minister would be that you cancel their citizenship. Then they would be in a serious position.

Mr McDonald—That would be a fairly radical change, Mr Holding, as you would no doubt appreciate, from the current situation which provides that once a person becomes a citizen, as you say, they are citizens for life, subject to one or two things that are not relevant to what you are putting. That would be a very radical change. That is a policy matter that I do not really feel that we could properly comment on. Our jurisdiction at the moment is only for people that are permanent residents, not for citizens in this area. That would be a completely different issue.

CHAIR—It is an interesting one, though, because we have got leeway in that if somebody obtains citizenship by false declarations we can cancel the citizenship.

Mr HOLDING—We have a social situation which we have to look at. I agree it is a radical proposal, but I suppose I have been involved in radical proposals for—

CHAIR—You could not miss, could you? You sat there and wondered what radical proposal you could come up with.

Dr Chappell—As a criminologist in a past life I have to point out that our migrant population is certainly far more law abiding in general than the native-born population. It is a matter of assimilation very often that the rate of criminality amongst the migrants becomes that of the native born when they have been here for a certain amount of time.

CHAIR—I am not sure of the implications there exactly.

Mr HOLDING—I do not want to take up your time but it does seem to me that where you have, in particular, a group of young people who are involved in continuous levels of crime, and getting more serious, it might be stiff luck that they are not native born—and we have our problems with our native born. But I cannot see why we should take the view that when you take the oath to be a citizen of Australia, which specifically includes the upholding of our laws, that you are not entitled to charge them with failure to maintain their oath of office and put them on notice. You do not immediately say, 'All right, you are off overseas.' But what you do say is, 'Any more serious breaches of this kind and we will recommend to the minister that you should be looked at, in order to cancel your citizenship.' That might be radical, but it might be one answer to some of the problems we are dealing with.

CHAIR—I think McDonald said that is a policy consideration that is perhaps not his area. When you ask that question today of the human rights commission it might be interesting to see their answer to that.

Mr McDonald—If you were to propose it, all I suggest is that the person—the child—does have the right of some form of appeal, and I think you are saying that.

Mr HOLDING—At every point you process, you would know from your own experience, there are basically people who become citizens who may not be any worse than some of our full-blown, home-grown products, but the fact is that they have to take their role as citizens seriously.

Senator McKIERNAN—You talk in your conclusions about the policy statement in the guidelines which, you suggest, should specifically refer to Australia's international obligations and to the effect of the High Court's Teoh decision. Is it better to put that in guidelines rather than what the government proposed to do, to legislate to overcome the difficulties which the government sees in the High Court's Teoh decision?

Mr McDonald—I suppose the legislation would provide the answer to the terms on which we should approach it but, in the absence of that, we are saying that the deportation policy should specifically mention how we are to deal with that.

Senator McKIERNAN—Are you aware there is legislation currently in the parliament?

Mr McDonald—That has been there for some time, as I understand, yes.

Senator McKIERNAN—I understand it is scheduled for debate in the Senate this coming session.

Mr McDonald—That may well resolve that problem.

Senator McKIERNAN—Are you saying that it would be better by legislative means rather than through guidelines?

Mr McDonald—Presumably, legislative means would resolve it for a number of different areas, including criminal deportation. It is obviously going to involve its own family law and so it will provide a complete legislative coverage, whereas here we are dealing with one specific aspect of it.

CHAIR—The committee is concerned by your references to the reluctance sometimes of the Department of Correctional Services, particularly in New South Wales, to deliver prisoners to the hearing. We have talked mostly about New South Wales. We have heard that it is not as bad in Victoria. I believe you said Perth is quite good. Are other states—South Australia?

Ms Ransome—The only difficulty that we really do have is New South Wales.

CHAIR—What is this reluctance on some occasions to deliver the person to the tribunal, which I would have though was quite necessary, put down to?

Dr Chappell—It is a concern, I suspect, of several things. One is the question of who provides security. At the present time, the tribunal has to pay the full costs of transporting prisoners to the tribunal and providing the security at that location. That may be one reason why there is some reluctance. The other reason may simply be that, on the totem pole, the tribunal is not a court and is not, therefore, seen by the authorities as having the same compulsion or compellability—it does not have it, that is the reality.

CHAIR—If you said to the Department of Correctional Services, 'We want this person here. We are prepared to pay for the transport and the security,' can they still refuse to deliver that person? Is that likely?

Mr McDonald—It causes delay more than they refuse ultimately to bring the person.

CHAIR—So if you press the point, you will eventually get that person before you?

Mr McDonald—It is a bit difficult when the department has flown a solicitor from Canberra, which happens quite often in these matters, and the witnesses are all lined up but you do not have an applicant. You cannot really proceed until the applicant is there, but the

corrections department has not brought that person up that day.

CHAIR—So you actually have the situation where you are expecting this person to arrive and the Department of Correctional Services simply does not turn up with the person?

Mr McDonald—Yes.

CHAIR—And you ring them and they say, 'Sorry, we had something else on.'

Dr Chappell—Or, 'We don't know where he is.' It is frustrating.

Mr McDonald—I do not think we should over-emphasise that point. It does not happen in every case, but it is a matter of concern.

CHAIR—Obviously, it should not happen at all. You made reference to the amalgamation of the administrative appeals review bodies into a single body. How do you see that affecting your work?

Mr McDonald—That depends on what structure—

CHAIR—On how it is. It is a difficult one. What is your major concern? What do you not want to see happen? What would cause you problems in this area?

Mr McDonald—Part of the problem relates to the structure of the tribunal and at the moment in this particular area only presidential members can hear criminal deportation cases. If the structure of the tribunal is to be flattened and, for instance, senior members or members are to constitute the tribunal, the question is: would the person hearing the criminal deportation have the seniority that such a person currently has?

CHAIR—And do you see that as a problem of expertise—not having the seniority? Or—

Mr McDonald—I am thinking of the sensitivity of the issues.

CHAIR—You think this issue is so important that it should have some very senior representatives on the review tribunal?

Mr McDonald—That is the general view that the ministers take and the parliament has taken, and I think that is probably correct.

CHAIR—Have you made a submission to this effect to the minister?

Dr Chappell—At the present time, I do not think consultation is going beyond the interdepartmental committee that is considering the matter. We certainly have not been

approached on that.

Mr McDonald—Mrs Gallus, there is one matter I omitted to draw to your attention that perhaps I should have. It is in the update to the submission. You will not have these figures, but I would like to give them to you, just to draw the numbers to the committee's attention. For the period we are looking at, from 1993 onwards, there have been a total of 84 cases determined by the tribunal. Of those, 37 came from New South Wales, 20 from Western Australia, 14 from Victoria, 12 from Queensland and one from South Australia.

CHAIR—It just shows you that South Australia has always remained the law-abiding state.

Mr McDonald—Absolutely. The fact that perhaps you do not have any migrants over there might have something to do with it.

CHAIR—Below the belt!

Mr McDonald—The point I am trying to make out of this is that it is often asked—and there is no immediate answer—why Western Australia has had 20 and Victoria 14. Given the populations of the two states and the very high migrant intake into Victoria, it seems funny that there are—

CHAIR—Yes.

Mr McDonald—One reason may be that Fremantle is a port of entry. An example is the case I cited of the man from Eritrea. He arrived at Fremantle, I suppose. But I cannot imagine that such a large number arrive in that category as to account for the difference between Victoria and Western Australia.

CHAIR—Thank you for that. That is something we will have a look at as it progresses.

Mr McDonald—Also the numbers have increased, which is something that you might wish to have notice of. During the period in which we have shown figures, the numbers of applications lodged—since 1993—have almost trebled, particularly in the last two years.

CHAIR—Would you like to have this update to your submission accepted as a further submission?

Mr McDonald—Yes.

CHAIR—Thank you very much for appearing before us today. If you have any more information you would like the hearing to have, we would be pleased to receive it from you and, if we have any more questions, we will get back to you.

[10.49 a.m.]

KESSELS, Mr Ronald, Member, Law Society NSW, 170 Phillip Street, Sydney, New South Wales

CHAIR—Welcome. The committee has received your submission and has authorised its publication. Do you wish to make a short opening statement to add to that submission, before we start with the questions?

Mr Kessels—No. I would just like to thank the committee for the opportunity to comment and to come along. I prepared most of the submission that is here, so there is not much that I could add to what is there except to point out that I am a member of the migration task force at the Law Society.

CHAIR—If we could start off with one of the concerns you raised which is that, if somebody had been brought here as a child and was still a permanent resident and committed a crime towards the end of that 10-year period, they would be liable for deportation. You feel, under the circumstances, that there should be an exception made for people who came here at a fairly young age, because most of their life experience has been in Australia. Would you comment on that. Also, in commenting on that, would you like to comment on the fact that this law applies to those people who have not taken out citizenship—you can escape this sort of liability for deportation by taking out citizenship.

Mr Kessels—That is true. I will start with the citizenship question. When you are a child, you are dependent upon your parents' choices as to whether or not they take out citizenship, because you are joined to any parent application. There are situations where children are here in circumstances other than with parents, and there are problems about how they go about obtaining citizenship before they turn 18. So, whilst what you say is true, it is also a question of whether a child has the ability to take citizenship and whether the child is dependent on the parents. But, yes: assuming that the child takes citizenship before turning 18—or even after turning 18—that child will escape the liability for deportation. There is no doubt about that.

In respect of the general comment, the Law Society believes that there could be situations where people who arrived as children might be liable to deportation in circumstances where you might not think that a nation such as Australia would actually take steps to deport them. Internationally there is an accepted position—at least in lots of countries in Europe—that once children arrive as children to your country, the country takes on some responsibility for their development and the way that they are brought up. So, to some extent, the Law Society feels that there should be some exceptions made in children's cases.

CHAIR—Are you aware of any cases where people brought here as children have committed a crime within that 10-year period and have been deported from Australia?

Mr Kessels—I am not aware of any case where they have been deported. I am aware

of cases where questions of liability for deportation have arisen, and I have had to make submissions on behalf of clients where those arose. It did not eventuate in deportation in that particular case. I am not aware of other cases. I do not follow them all.

CHAIR—So it may be that, through a combination of the minister's discretion and the AAT, we are not deporting those people who have come here as children?

Mr Kessels—The Law Society does not suggest for one minute that deportation of these people is happening or has happened on a regular basis. It is just that the possibility is there. It is allowed for in policy, and in the deportation policy it is pretty clearly stated that there should be strong consideration given to not deporting people who arrive as children. Generally the delegates of the minister exercise discretion in a very fair way.

CHAIR—Given that deportation only applies to those people who have not taken out citizenship—and can avoid it simply by taking out that citizenship early on, thus placing themselves in a citizenship category—Mr Holding has suggested that we ought also to be looking at those people, if they are perennial offenders. He suggests that, on the basis that they have broken their citizenship oath, perhaps that should also make them liable for deportation. Going a little beyond your submission, would you like to comment on that from a legal point of view and from your society's point of view with knowledge in this area.

Mr Kessels—I would not like to speak for the Law Society because we normally put matters to the committee, and the migration committee or the task force would normally approve what I might say before I said it. But I will comment personally and as a lawyer.

I was listening to the AAT representatives earlier and, as they say, it would make a marked departure from the current situation. From a legal perspective I suppose anything is possible, if you make the law such that citizenship is subject to your not providing criminal offences as breaches of your citizenship oath and if you then place provisions in the citizenship act which would allow you to then take away citizenship for such breaches. The problem is that once the person becomes a citizen they are no longer a permanent resident and they are no longer subject to the migration powers. They are no longer subject to migration as such.

I do not know what you would actually be doing legally. If you removed their citizenship, they would become a non-citizen. I suppose they would then become someone who had no status; they would be an illegal in Australia under the current law. I would have to give it some further thought. If the committee would like me to, I could give it some thought, run it past the law society and put something in writing that is a little more formal. But, just off the top of my head, it would seem that if you cancelled a person's citizenship the current situation would mean that they would become an unlawful non-citizen or a person without a visa. They would be liable to removal, automatically.

It would not become a question of deportation. Criminal deportation arises only when a person still has their permanent residency. In fact, under the act as it currently stands, the

minister does not even need to proceed to criminal deportation. As we have seen in a couple of cases that have just happened, the minister can actually cancel the person's permanent residency under section 501 in respect of character. That would be a different way to proceed. But, with citizenship, if you removed it, a person would become unlawful and they would be subject to removal because they would have no way of staying, unless they made a subsequent application.

Mr HOLDING—There are clearly cases where people have come to Australia and have taken their oath—that is, to uphold the laws of Australia. Once they have got their citizenship, they can embark on a serious and continuous life of crime, and come before the courts and be subject to sentencing. It seems to me that, if we take citizenship as a serious responsibility, if somebody takes an oath to uphold our laws—I am not talking about traffic fines; I am talking about felonies—and continuously breaks the law in a way that can do damage to other Australian citizens, why shouldn't they be charged with breaking their oath? That would be serious. It would then be a matter of discretion, I suppose, for the minister as to whether a conviction of that would necessarily carry with it the cancellation of citizenship. It may well be that in the first instance you have a substantial fine. But, if there is a continuum of criminal activity and a series of convictions, why isn't it open to the minister, if the Commonwealth gave him powers, to say, 'This person never intended to maintain his oath. He continually involves himself in serious breaches of the law. Out.'?

CHAIR—Would you like to respond any further than what you have?

Mr Kessels—Not really. They are matters of policy. They are questions for the government of the day. It would strike me as extremely unusual. You are talking about virtually going back to a situation of exile of your citizens. I understand that you are suggesting it would be a situation where someone deliberately set out to obtain citizenship for the purpose of then engaging in criminal activities without the liability of deportation, but I imagine it would be extremely difficult to prove that the person had the initial intention—that, in taking citizenship, they did it solely for that purpose.

Mr HOLDING—There were gang leaders in America who continually flouted the law. Ultimately, the only way the American government could deal with that was to deport them.

Mr Kessels—Yes, but they were not talking about American citizens at that time.

Mr HOLDING—I am not saying that the immigrant community is any worse than some of our homegrown products. Clearly after the war there were many people who came here who had been involved in criminal activities, because there are real problems in every community. I cannot see why, if in fact you take the oath to uphold the laws of Australia when you become a citizen, that should not be treated as a serious and important commitment—not just something you say and then say, 'I've got that over with.' It carries with it responsibilities and clearly you undertake to uphold the laws of the country. We are talking about serious and continual breaches. We are not talking about the person who is involved in an accident or goes

through a red light—traffic offences. We are talking about continuous involvement in felonies.

CHAIR—Did you want to comment any further on this, or are you reluctant and feel that this time you do not want to comment further on this?

Mr Kessels—They are matters of policy, but all I can say again—and I am speaking now just as a solicitor, not for the Law Society—is that it strikes me that you are stepping into the area where there would be very little distinction between citizens and permanent residents. In order to get citizenship at the moment, you do have to satisfy the minister that you are a person of good character and they do rigorously apply that before they grant citizenship to start with. So you are talking about people who have become Australian citizens and then become involved in criminal activities. It would be difficult to see why those Australian citizens should be placed in a different situation to Australian citizens who obtain their citizenship by birth. Otherwise, you would basically be allowing for exile of your citizens, and that is a situation which most countries have abolished a long time ago.

Senator McKIERNAN—I just want clarification of what you were saying in your opening comments, 1.3 to 1.5. Are you arguing here that a resident has got lesser rights than a person who is making application for residency in Australia?

Mr Kessels—That is the way I read the law, and that is the way it is working at the moment, yes.

Senator McKIERNAN—Are you then saying that it would be possible for someone, for example, in France, which is a case you instance here—

Mr Kessels—As an example, that was.

Senator McKIERNAN—Who is guilty of kidnapping could be legally admitted into Australia and granted a visa?

Mr Kessels—It is possible, if they were able to satisfy the minister that they satisfied the character requirements as they currently stand under section 501 of the act.

Senator McKIERNAN—Have you got any instances of this actually happening?

Mr Kessels—Yes, people apply all the time. I act—not for people from France who have committed armed robberies, but there are people with criminal records who apply for—

Senator McKIERNAN—Not only criminal records but very serious criminal records, though, isn't it?

Mr Kessels—They are matters for judgment—

Senator McKIERNAN—With all due respect, they are not matters for judgment. One cannot be deported from Australia just because one has got a criminal record. It has to be a very serious—

Mr Kessels—That is right. More than one year.

Senator McKIERNAN—And people can come into Australia with a criminal record which is declared. It is not automatic that a person with a criminal record who is a resident of Australia will be deported.

Mr Kessels—No.

Senator McKIERNAN—How do you then draw the distinctions that you are putting forward in your argument here in the dot points I have mentioned before?

Mr Kessels—What I am suggesting is that a person who is actually deported is then unable to return by virtue of the fact that there is what they call the schedule 5 criteria, which are the re-entry criteria. When you apply for permanent residency from overseas, or apply for any sort of temporary visa even, you must satisfy the schedule 5 criteria. One of those, 5001, is that you are not a person who has been previously deported from Australia. So what happens in effect is that any person who is in fact deported automatically falls foul of that provision every single time simply because they are a person who has once been deported.

If you are a person who has never been deported—in other words, you have never been to Australia before—and you have committed exactly the same criminal offence and received exactly the same penalty but in another country, you are not caught by schedule 5001; you do not have to satisfy that. You still have to satisfy the criteria but 5001 does not apply to you because you have not previously been deported. That is why there is a substantial difference.

If you have been deported you are effectively exiled for life. There is really no way that you can get back in—I will clarify that. There is one way, which is this. You would have to make an application for a visa. That would have to be refused. You would then have to appeal to a tribunal. That would have to be rejected. You would then have to go to the minister under the minister's personal discretion and the minister could waive the schedule 5 criteria. That is the only potential way that you can ever come back in.

Senator McKIERNAN—Wouldn't it have to be through sponsorship as well?

Mr Kessels—Depending on how you are applying. You might be applying as an independent. You might have skills and you might come back. You might come back as a business person.

Senator McKIERNAN—Do you have any specific suggestions about how the guidelines might be amended to cater for your concerns in this one area? I do note that you

say the guidelines as they exist are adequate for other than that one point.

Mr Kessels—The problem is that this goes beyond the policy in the guidelines because this is actually in the regulations. As I see it, the problem with 5001 is that there is no discretion. That is the real problem. You cannot have a situation in effect where a person who has been deported can ever convince the Australian government that they should be allowed to come back, which means that you do not allow for the chance of rehabilitation or the fact that the person in 20 years time may then be of good character.

What happens when a person is deported is they have committed a crime, they have gone to gaol, the minister has decided they are going to be deported, they have been to the AAT and lost and then they leave. But that person may have been married to an Australian citizen. They may have Australian citizen children. In five or 10 years time they may well not re-offend. They may be completely rehabilitated and wish to come back. At the moment there is no way for that person to come back to Australia.

Senator McKIERNAN—How serious a concern is it, bearing in mind that only 130 or 140 in the last six years have actually been deported?

Mr Kessels—For those people who wanted to come back, it would be serious. I do not want the committee to feel that we are trying to say that this happens every day of the week. The figures speak for themselves. There are very few deportations. Generally speaking, the minister's delegates exercise their power in a very fair way, I have found generally. I represent a lot of clients—this is one of the areas that I do regularly—where we are served with deportation notices and, after appropriate submissions to the delegate, they decide not to deport. It is not the situation that every person who commits on offence like this is deported. Again, once you are in the AAT, there is some chance—although I would have to say it is a very remote one—that you will win. But you are talking about very small numbers of people who are actually deported. I do not know about the figures. Were they figures of AAT cases or actual deportations? Not everyone appeals, which of course is the other situation. Some people are served with a deportation notice and actually depart the country. I would not know what the figures are, to tell you the truth.

There are a fair number of people, I would imagine, who either do not want to appeal or just simply cannot appeal. Going through an appeal in the AAT is very expensive business. There was historically a provision for a grant of legal aid to some people if they passed the merits test, but that was extremely difficult because in a lot of cases it was pretty obvious on the face of the offences that the person was not going to be successful, in which case they would not be eligible for any funding. So, by and large, a lot of people before the AAT are actually unrepresented. It is certainly not a growth area for lawyers.

Senator McKIERNAN—It is 139 in six years. I think they are departmental figures, but I will get a clarification on that. That is the actual number.

Mr Kessels—So it is not a large number.

Senator McKIERNAN—I have experience in seeking to represent people in deportation cases from a different perspective. It seems to me that we are really seeing only the very real nasties actually being deported. What I was trying to get from you was an argument as to why consideration should be given to those people who have been deported to give them a window of opportunity to come back into Australia. It seems to me they have been through ministerial consideration, representation, possibly appeals and possibly appeals through the judicial process as well. Why, then, should they be allowed to come back into Australia? The guidelines are there to protect the Australian community. Only 139 in six years have actually been deported and there is over a million non-citizens permanently resident in this country.

Mr Kessels—The reason why I see it as a problem is this: any of these sorts of character type issues such as deportation are fixed at the time that you make the decision in the sense that you have a person who comes before you at that point in time, you look at their history and you look to the potential future risk—you look at all those factors. To say that a person can never come back to your country regardless of how they rehabilitate themselves or regardless of future circumstances means in effect that what you say to that person is, 'We have decided that you at this time are bad enough that for life you should not come back.' Fair enough, if that is the policy, that is the policy.

But what it does not allow for, as I said, is the difference between that and a person who commits an equally serious crime overseas, serves their time and then, through circumstances, ends up rehabilitating themselves. For example, you might have a situation where a person commits a very serious crime at a young age in an overseas country. They serve a lengthy sentence in jail. After some time—10 years or 15 years—they meet an Australian citizen who happens to be travelling overseas or whatever. They form a relationship. They end up getting married and they have a child. This is not completely hypothetical I have to say, but I do not want to give any more details. That person would then be able to make an application to come to Australia because they had never been here before and never been deported; they committed the crime overseas.

They may not get in. They would have to satisfy the minister that at the time they made the application they were a person who was not of bad character but of good character, in essence. That is a whole separate inquiry which involves a lot of evidence being taken. People get a chance, at least, to present their case and say, 'Minister, I have spent 15 years overseas since I have committed a crime. I now have a business. I am now in a stable relationship. I have a child. I have not re-offended. I am a model citizen. I have 50 references from all these different people.' It may be that the minister says to that person, and it has happened, 'Yes, we accept it. You should be able to come to Australia.'

There is no reason to suggest that that person would not make a decent citizen or permanent resident because there is that one time they committed a serious offence. The

difference is that if you had committed that offence in Australia in exactly the same circumstances, were deported and 15 years later you were in exactly the same relationship with the same child in exactly the same circumstances, you could make an application but it could not be successful. That is what I am saying is the difference.

Senator McKIERNAN—I will not labour that point. I want to go on to a different aspect of your submission where you suggest that the interest and views of the victim are already taken into account, or are taken into account at the point of sentencing. I suppose that is an argument: that their views need not be considered when the minister or the delegate is making a decision on whether or not to deport a person?

Mr Kessels—I do not mean to suggest that, if that is the way it reads. I think they are matters that are properly relevant to the inquiry. It is just that it has been my experience that most of the departmental representatives on behalf of the minister tend not to lead much evidence about that during the inquiry. It is obviously representing the deportee. I am not about to lead the evidence about the victim and about the victim impact. But it is certainly open to the minister's representatives.

The minister is always represented, unlike the deportees who are often unrepresented. They are staffed with good lawyers who work with lots of resources. I have found over the years that it is just a difference in approach. I will lead lots of evidence that will end up being uncontradicted, not because it cannot be contradicted, but because there is a different approach from the office by the lawyers who choose to run the case. It is a matter of instructions. I do not mean to suggest there that they should not be relevant matters. I think they are rightly relevant matters.

There is one example in there of a victim who actually took the minister to the AAT, challenging a decision not to deport a particular person. I actually acted for her in respect of that matter so I do not mean to suggest—and I do not think that society would ever suggest—that victims' opinions should not properly be put before the tribunal.

Senator McKIERNAN—But before the minister as well as before the tribunal, as the minister formulates the decision?

Mr Kessels—Any matters that go before the minister, similarly.

Senator McKIERNAN—Do you think that enough account is taken of the victim's views now or, in terms of that instance you have given in your submission, were you satisfied there that enough account was taken?

Mr Kessels—In that instance it was because I made sure they knew about them. I suppose I have a skewed view of it because I act for deportees, generally speaking. If I had a practice in which I acted for a lot of victims I suppose I would have a different view—I think, to be fair, probably not. I have rarely seen circumstances in which the victim or anyone else is

actually interviewed by delegates. I stand to be corrected—I have only acted in so many cases. It may happen more often. You might want to ask the department about that.

Generally speaking, there is not a lot of evidence. I think part of the reason is that they know that, if they make a decision to deport and the matter goes before the AAT, lawyers or the deportee will then have the opportunity to call and cross-examine the victim, and it may not be an appropriate forum for that sort of thing.

Senator McKIERNAN—Moving on to the area of refugees: are you confident that the guidelines that are now in place would not allow for the deportation of a former refugee? Australia could be breaching its international obligations by sending back a person who was admitted as a refugee at one time or another who is not now a refugee.

Mr Kessels—It can go two different ways. The policy guidelines for refugees are quite clear. They basically suggest that the proper procedure is as we have laid it out there. The law has become a bit unclear; there were a couple of cases in respect of refugees that ran through the AAT and were glossed over somewhat—if I can put it that way without being rude. It has become a bit unclear about what steps should actually be taken. I find that in cases involving refugees there is a move towards deportation proceedings before proper consideration has been given to the refugee issue.

The convention provides quite clearly that, while you are a refugee, you should not be refouled. Before you consider any questions of criminal deportation of refugees, I think that as an initial step you must consider the question of whether they still are a refugee. You may decide—as in the couple of cases that I did before the tribunal—that the factual circumstances at home for this person had changed such that they were no longer a refugee. That is an initial step that you should take before you consider deportation. Otherwise, I think you will find that you are falling foul of the international obligations, and you may well refuse someone who is still a refugee.

Senator McKIERNAN—Is it possible for you to reference those AAT cases for us so that we might be able to ask questions directly of the department at a later time?

Mr Kessels—Yes, Senator. One case was Todea. Perhaps I will take it on notice.

Senator McKIERNAN—Take it on notice.

Senator TIERNEY—The Administrative Appeals Tribunal was discussing the guidelines earlier this morning. Do you have a view on perhaps the lack of guidance for the weighting for particular matters in those guidelines?

Mr Kessels—In acting for clients I find the guidelines very clear. I personally have no trouble reading the guidelines and having a set of facts and really knowing pretty much before I even get to the AAT or to the minister, if I am acting at that level, what the results are going

to be because, by and large, I have found the guidelines are applied pretty much to the letter.

Again, the law society's position is a legal type proposition. You have a very broad discretion in the act—'The minister may deport'; that really is all it says. The guidelines are basically there to give guidance and not much more. I think that, once you start stepping over the line and you lay out too clearly, 'You will have account of this,' 'You must then account for this,' and 'This will be given this much weight,' you then fetter the broad discretion that the minister has and that is then given to the AAT.

To be frank, I find that the AAT and the minister exercise their discretion in a very proper and fair manner. Basically, I think the more discretion they have the better because it allows them to take everything into account—put it all into a big basket and come up with the right result.

A lot of these cases basically are about looking at the whole situation: how the person arrived in the country; how long they have been here; what they have done; what their connections are; and what crimes they have committed and how serious they were. All these things go into a big basket. It is very hard in any one case to say, 'That is the determining fact.' There will be cases where the offence is that serious that nearly nothing you can throw at it will outweigh the fact that it was that serious. It is very clear from the policy guidelines that in those cases the person has to go.

I think the committee would have the wrong impression if they believed that in these cases, regardless of how serious the offence is, if you just throw enough evidence at it—enough psychological evidence and enough connections—you will somehow magically stop the person from being deported. By and large that is not the case. If it is that serious, they will go—regardless of connections, regardless of rehabilitation.

Senator TIERNEY—The person concerned has other problems too, haven't they? The AAT told us this morning that about half the people do not have any legal representation, because of cost. A third of them have language problems, where they need interpreters. You indicated earlier that they are up against qualified lawyers on the other side. Does the Law Society have a view on that situation or any suggestions on ways we could improve that?

Mr Kessels—No. The situation is going to get worse, unfortunately, because the New South Wales Legal Aid Commission's new policy guidelines that are being tossed around at the moment will not allow for criminal deportation people to be represented. There may be some availability for representation for people actually in detention by a group within the Law Society called the Prisoners Legal Service, which is a section within it. But, once you are out, the way it is going to be in the next six months or so is that you probably will not be able to get any funding, other than maybe an application under the old section 69 of the AAT Act, which is an application direct to the Attorney-General basically asking for funding. Other than that, you will not get any. So I think the situation will become worse.

Senator TIERNEY—The New South Wales government's position is rather curious on this. The AAT were saying this morning that, in terms of legal aid representation, they felt that this group perhaps should get preference, certainly over other groups that appear before the AAT. What is your view on that compared to the New South Wales decision?

Mr Kessels—Again, I am a bit caught because I have not run this by the committee. I will answer as a lawyer again; I will take my other hat off. As you rightly point out, the seriousness of being deported is that you cannot come back, as I indicated before. I am sure the Law Society would say the same thing. The preference would be for people to have representation in these types of cases. You do not get a more serious case than being deported from a country. So, yes, the preference would be that there would be representation. But, again, I do not want to mislead the committee. The Legal Aid Commission before had very stringent tests in respect of merits and means. If you earned too much money or you had too much money in the bank, you were not eligible for legal aid, and your case had to have a reasonable prospect of success before they would fund it. So you would still end up with unrepresented people however you did it, even if the Legal Aid Commission funding were continued in this area.

Senator TIERNEY—You have rightly pointed to the seriousness of the situation, obviously if people are going to be deported. It seems as though all the processes are geared very much to the rights of the potential deportee and their family. What about the victim's rights in this situation? The AAT seemed to be indicating this morning that a lot of them would not want to be dragged through all of this again.

Mr Kessels—I do not know whether that would be true or not. I know that I have acted for that one person in respect of taking proceedings against the minister against a deportation. But I have a feeling that it is not generally known that you can do it. What we did was the first time. We had to seek leave and it was a bit of a test case in itself as to whether it was actually allowed to be done. I think it is partly because people just do not know. As Senator McKiernan rightly points out, we are not talking about huge numbers of people going through the tribunals.

CHAIR—I hate to do this to you again. Clyde wants to make a very, very short comment on that.

Mr HOLDING—Isn't the point here that ultimately the decision is one of ministerial discretion? One of the benefits of that is that the minister has open to him, apart from the evidence produced by the department, any other inquiries that he wants to make personally. He may want to speak to the local federal member. He may receive representations by a lawyer or someone else on behalf of the person facing those proceedings. I think the fact that most ministers are not confined in the same way as a judicial body is confined means that they can look at the thing in the broadest possible context. I think that is really a great protection for the person who is charged. It is probably in some cases more beneficial than the legal process. Can I get you to comment on that?

Mr Kessels—It may be true but I would not say that we would throw the legal process out in favour of solely having the minister as the final determiner.

Mr HOLDING—But he is the final determiner; that's the point.

Mr Kessels—The AAT can substitute a decision.

Mr HOLDING—I don't know whether the minister can overrule that.

Mr Kessels—It has happened.

Ms GAMBARO—You have acted on many cases of people leaving. You quoted the case where people commit a crime overseas, they meet in Australia, have a child and want to come back in. Do you act on many of those incoming cases?

Mr Kessels—Yes.

Ms GAMBARO—How many of those would you have acted on?

Mr Kessels—I don't know the exact figure. I have probably advised on or assisted between 20 to 25.

Ms GAMBARO—We have heard about the procedures on this side in Australia. Is it more difficult for you to deal with those cases overseas? What impediments come your way?

Mr Kessels—It depends a lot on the post making the decision and who the deciding officer is. It is pretty much the same. I prefer to do those cases than the deports because you actually have a much greater scope to provide a lot more material at the initial stages because you are the one making the application. In a deportation, it is the minister's delegate coming along and interviewing the person and extracting information for, on the one hand, the purposes of seeing whether or not they should be deported, whereas in the other one, you are making an application.

The process is that you prepare your application and you put together as much supporting material as you possibly can with respect to why the person is of good character. There is a separate provision as to how they come in. You have to satisfy the minister that the person is of good character. You put the material there. Normally the process is that you will get a letter back saying, 'Okay, now we want you to go off and get some more information, like the trial transcripts and we want detailed information about the offence, et cetera.'

I find that the posts overseas tend to do a fair bit of investigation into the person. They often get them in for an interview to discuss with them what their situation is and put questions to them. Then they make a decision. Again, you have an appeal right to the AAT if the answer is no.

Ms GAMBARO—So certain posts are much more cooperative?

Mr Kessels—It is not a matter of cooperation. Where you have 100 decision makers, it is just like 100 judges—you will find some that are easier and some that are harder.

Ms GAMBARO—I would like to ask another question about the heavy reliance on the person coming into a country to provide information to officials. Do you think there needs to be some improvements there? It is an honour system, after all, and we are relying on people to provide that information, even though they may be potential deportees themselves. Is there anything that we can do to shore up that system?

Mr Kessels—For anything that is longer than a visit, in effect, already now under the requirements, you are required to provide a character certificate from the local police from your country. Any permanent residents or any long-term temporary residents coming in are already heavily character checked. It is not purely an honour system; they do actually have to get police clearances from their country. It is only visitors visas potentially.

Ms GAMBARO—That is what I was referring to more specifically.

Mr Kessels—That is a very hard one because I imagine the tourist industry would not be too impressed if they had to get clearances. It is a long, time consuming process—in some countries it might take me five to six months—to obtain a police clearance. If you wanted to come for a visit for a week and one of the prerequisites was that you must provide this police clearance, I would not imagine that you would be bothered coming. My personal view is that it would almost be impossible to actually character check every single person who comes into the country. We would probably be the only country in the world who would do it.

Ms GAMBARO—So we would lose out on the tourist side of things. Having worked in the industry, I understand that side of it. I have one other question. I refer to paragraph 4.3, where you speak about rehabilitation. Could you expand on that? You stated:

Where the Minister believes that a deportation order might not be made if the prisoner could demonstrate rehabilitation by the time of the release . . .

Again, how is that determined and, basically, how does the classification system with low classification prisoners work at the moment?

Mr Kessels—There have been some actual changes to that which I have not really caught up on. If I can take it on notice, I could let the committee know. The problem with deportees is that once you are served with a deportation notice you are basically in a limbo situation while you are in Corrective Services' hands. They will probably be able to explain it much better than I can when they come this afternoon, but in effect the way it did work was that you could not get a low classification while you were subject to a deport notice, not surprisingly, because they were scared you might run away or whatever you were going to do.

CHAIR—Sure. That is understandable.

Mr Kessels—So you then had real problems about having work release or weekend release or any of the normal things that go towards rehabilitation. So, if you think that imprisonment for offences is partly about rehabilitation and trying to change the person, then in effect by serving the deport order what happened was that that person was shut out of any of the rehabilitation processes of gaol. They just served their time and then at the end they were either removed or not removed.

The point I was making was more about was when you serve the deportation notice and when you move to deportation. Do you do it at the very beginning of a person's sentence or do you do it at the very end? You can imagine a person who has been here for eight years and they are then sentenced to three years in gaol for a serious offence. If you served the notice on them in the first week and you made a decision at that point, should this person be deported, yes or no, it would be very heavily in favour of a finding that he or she should be deported. If you weighed it all up, they have just committed the offence, they are just in gaol, it is very serious.

If you took it at the end of the three years, they may be able to present real evidence that, 'Hey, this was a one-off. I had 25 years where I did not commit an offence. I then committed this very serious offence, but I realise there are all these factors that went to why I committed this offence and now I have engaged in all these rehabilitation programs and I actually have reformed.' If you then looked at him or her at the end of that three years, you might come to a completely different conclusion about whether or not that person should be deported.

So that is the point I was trying to make about when is it that you look. It really goes back to that question of, if you still decide that the person should be deported, is it for life or do you have some provision that will allow them to make another application in 10 or 15 years time.

CHAIR—There has been a lot of concentration on the rights of the deportees. Does it concern you that at present we are reliant on the potential deportees to put up their hands and say, 'I am eligible for deportation' and that we do not know how many people in our gaols should be liable for deportation but, because there is no way of actually checking up, do not come before the minister's notice at all?

Mr Kessels—I am not aware of that.

CHAIR—At the moment the system is self-referral, if you like. You arrive at the gaol and you fill out a form which says, 'Are you an Australian citizen? Were you born in Australia?' For example, if someone is a permanent resident and they actually put that they are an Australian citizen, there is no way of double-checking their word on that and there is no cross-reference. So we have a potential for a large number of people—and we do not know

how many—to be potential deportees that are not coming to the attention of the department. Are you concerned that this might be posing a threat to the Australian community?

Mr Kessels—To be honest, I was not aware that that is how the system worked. I am always involved in it at a point where the deportation notice has already been served, so I am not even aware of how the department of immigration goes about collecting its data about who might be eligible for deportation. I have not run it past the task force and I would not really like to proffer a view on whether personally I think it is a worry.

Just as a practical solution, I would have thought it was quite a simple matter for Corrective Services to notify the department of immigration when a person is put in because there is a list. It is very easy to know whether a person is a citizen or not because there is a list kept of all citizens. I can check tomorrow if I want to find out whether a client is actually a citizen.

CHAIR—You would think it was that simple, but at present that actually does not work. I think there is some restriction or they just do not cross-check at all the two lists. Is there a legal restriction on cross-checking the two lists or is it simply that they do not do it? Do you know, Andres?

Secretary—No.

Mr Kessels—I am not aware of that.

CHAIR—But the lists are not matched, so we really are relying on the written assurance of the person themselves that they do not actually fall into that category. If there are no more questions from the committee—

Senator TIERNEY—I have just one more question. I wish to get clarification of one of the points that you made about people in prisons who might be subject to being deported and about rehabilitation programs. Are you indicating they were not eligible at all for rehabilitation programs even though the decision may not have been made to deport them?

Mr Kessels—No. Sorry, I do not want to mislead the committee.

Senator TIERNEY—Could you just clarify that?

Mr Kessels—The way it was was that you could not receive a low classification. I think it has changed within the last couple of months and I am not aware whether this is still the case, but you could not receive a low classification once you had a deportation notice and being a high classification prisoner automatically precluded you from certain things such as work release, so there are certain programs. But you can certainly still avail yourself of things like work within gaol or anger management courses and drug rehabilitation courses. Those things are available to all prisoners, as I understand it.

Senator TIERNEY—Literacy courses and those sorts of—

Mr Kessels—As I understand it.

CHAIR—Thank you very much, Mr Kessels, for appearing before us today. If we have any more information we would like from you, the secretary will be in contact with you. Also, if you have anything you think you would like us to know, we would be happy to receive a further submission from you.

Mr Kessels—Thank you, and I thank the committee for their time.

Resolved (on motion by Senator McKiernan):

That the committee authorises publication of the additional AAT submissions.

[11.48 a.m.]

ANDERSON, Ms Margaret, Executive Officer and Registrar, Serious Offenders Review Council, New South Wales Department of Corrective Services, Roden Cutler House, 24 Campbell Street, Haymarket, New South Wales 2000

GUY, Mr Neil Richard, Manager, Sentence Administration Unit, New South Wales Department of Corrective Services, 24 Campbell Street, Haymarket, New South Wales 2000

NASH, Mr Paul Douglas, Director, Legal Services, New South Wales Department of Corrective Services, Roden Cutler House, 24 Campbell Street, Haymarket, New South Wales 2000

CHAIR—The committee has received your submission and has authorised its publication. Do you wish to make a short opening statement or make any amendments to the submission?

Mr Nash—No.

CHAIR—Are you happy for us to go straight into questions?

Mr Nash—Yes.

CHAIR—Were you here for the AAT?

Mr Nash—No.

CHAIR—The AAT raised with us its concern that in New South Wales there were instances where it had a great deal of trouble getting the correctional services to actually bring the prisoners before the AAT. Actually getting them to agree sometimes took months. On other occasions the whole of the AAT would be set up with lawyers and the correctional services would never bring forth the person in question. Do you have any comment on that?

Mr Nash—I can say it is news to me, and I would be most concerned if that were the case. I am aware of only one occasion in recent times where one of our people has been before the AAT and I am not aware of any difficulties in that case. In fact, he may have chosen not to appear. My understanding is it was the matter of McCafferty.

CHAIR—Perhaps you would like to have a look at the transcript later.

Mr Nash—I am happy to look into that and come back to it.

CHAIR—The AAT expressed considerable concern. You might like to comment on

that in a submission later.

Mr Nash—Sure.

CHAIR—I want to raise with you the area of major concern and get your comment on it. We seem to be reliant on the information supplied by the criminal him or herself as to whether they are liable for deportation if they are permanent residents or Australian citizens. It is my understanding that, in correctional services in New South Wales, when a prisoner is admitted they fill out a form where they are simply asked: Are you an Australian citizen? Were you born in Australia? If they say, 'Yes, I am' and 'Yes, I was,' there are no actual checks on that information. Can you confirm that that is in fact the procedure?

Mr Guy—We do seek certain information from people on reception into our custody. It is certainly the case that we ask them what their place of birth is, and we basically have to rely on the information they give us. But, with people who were born outside Australia, we provide a list of all those people, whether they tell us they are naturalised or not, to the immigration people on a quarterly basis. They run their own checks against the people concerned.

CHAIR—But for that to happen you have actually got to have someone say, 'I was born in Ireland' or some other country?

Mr Guy—That is right.

CHAIR—If they put down that they were born in Australia, there are no further checks?

Mr Guy—That is certainly so.

CHAIR—What would happen in a situation where someone quite obviously does not speak very good English—not because of any difficulty other than a linguistic difficulty because their native language is some other—and they write down 'Australian—born in Australia'? Would anybody actually question that?

Ms Anderson—In relation to the first issue you raised—if the inmate him or herself were to write that down—the way the system works is that the inmate is not given a form and asked to fill that form in. A person or a group of people conduct an interview. If the people conducting that interview feel that there is a linguistic problem, then they would arrange for the Telephone Interpreter Service or an officer within the department accredited in that language to be present, and conduct the interview there.

CHAIR—Would they raise that with them? They would not just take down the statement that they were born in Australia, would they? They would actually question the prisoner? When they ask the prisoner if he was born in Australia and he says, 'Yes,' despite the fact that he obviously has troubles with English, they would actually question that he was

really born in Australia, presumably?

Ms Anderson—I think that they would certainly, at the interview stage, be reinforcing that answer and checking that information. Certainly at the interview stage, yes, they would.

CHAIR—If they have any doubts after the interview, do they have any facilities to check it? Are you aware whether or not the interviewing panel has ever checked on this information?

Mr Guy—I am not aware if it has ever happened. It quite possibly has. As to facilities, I guess we do not have any, really.

Senator McKIERNAN—Could you walk us through the procedures? It concerns me that you say in your statement that the information is not verified. When your corrective services is given a prisoner to look after, you are charged with holding that person because a court has convicted the person. The court would provide you with some record of who that person is, would they not?

Mr Guy—They provide us with a warrant which contains only the person's name and date of birth and the offence and sentence details or, if it is an unconvicted person, the offence and further appearance details.

Senator McKIERNAN—So you would have something in writing that identifies the individual who is being interviewed. Then the person—the detainee?

Ms Anderson—Convicted person.

Senator McKIERNAN—Then the convicted person would give you the required information like name and age. You check it against the court record and you know whether you are getting accurate information or not?

Mr Guy—Yes. We do get a certain amount of information from the police, as well. They provide us with a lodgment form. From their inquiries they have certain information as well.

Senator McKIERNAN—There is a specific question about Australian citizenship, because that is on your submission here.

Mr Guy—That is part of our induction procedures, yes.

Senator McKIERNAN—If the person is not an Australian citizen, the department of immigration is automatically notified of that?

Mr Guy—Yes, in a quarterly return.

Senator McKIERNAN—Is there a possibility that somebody could slip through the net? A person who might be liable for deportation because of the seriousness of the offence could maintain that they are an Australian citizen and escape.

Mr Guy—There would have to be a possibility, yes.

Senator McKIERNAN—Has any thought been given by corrective services in New South Wales as to how you might overcome that gap in the system? It may not be a problem to you as such from your responsibility.

Mr Guy—I guess we have to be honest and say no.

Mr Nash—Short of providing all of those details to Immigration. There are many instances where people give false names and have numerous aliases that they use, so even just giving those names to Immigration may not totally overcome the difficulty.

Mr HOLDING—When filling in the form, you are asked for your place of birth. I suppose they could also falsify that.

Mr Nash—Yes.

Senator McKIERNAN—But the convicted person has also been through the police system and the court system, been convicted and now sentenced. You would be in charge of a person who may be acting under some alias or something?

Mr Nash—Yes, that is not an uncommon occurrence. The police have their own system of identification—what they refer to as CNI. Our system is not linked directly to that. There is a interdepartmental committee that is working to establish one computer system throughout the whole criminal justice system, but that is some years off being finalised. We establish our own system based on the information that is provided to our people.

CHAIR—You have got two different systems and you are not linking up. Taking up Senator McKiernan's point, so even though the police may know all the aliases, you may not.

Mr Nash—It sometimes works the other way too.

CHAIR—I bet it does.

Mr Nash—But our people work with them and we establish our MIN system, which is how it is referred to. Perhaps Neil could explain it better than I can.

Mr Guy—We also have access to the police system in our area. If there is doubt as to the identity of a person, we can use the police system as a backup to crosscheck the two identities. We have the capability in our system to put their reference numbers in, and vice

versa. It is not that they are running totally in isolation. There is the capability of people in both organisations to do crosschecks from one system to another to ensure that we are not running the same person under different identities and things like that.

CHAIR—You said you have the capability, under what circumstances would you use that capability?

Mr Guy—The capability to access the police system?

CHAIR—Yes.

Mr Guy—If we are unsure as to the identity of a person, we use it for like things like checking escape records and those sorts of things. Certainly, if we are unsure as to their identity, we would use the police system to look at their personal details, their criminal history and those sorts of things and match that against our system to verify that the person is whom we think they are.

Senator McKIERNAN—You identified during that exchange two sets of initials—CNI for the police system and MIN for the corrective services. Could you explain what those initials mean?

Mr Guy—CNI is a criminal names index. That is just a system allocated number in the police system. Our MIN number, as we call it, is a master index number. Again, that is a system allocated number that is given to each new person who comes in. They get allocated a number. We just use that as a reference point in the system.

Senator McKIERNAN—Is the CNI system a national system? Is that interchanged with other police forces?

Mr Guy—That is a state number, but whether it is interchangeable with other states, I could not tell you, I am sorry.

Senator McKIERNAN—You do not know?

Mr Guy—No.

Senator McKIERNAN—You have got to a situation where you have an individual in your custody who you know, because of what he or she has told you, is not an Australian citizen. Within a period of three months, you notify the immigration department that that person is in your possession. Have you got anything to say about the timing of when a deportation order should be made or issued? Should it be at the beginning of the serving of a very heavy sentence or should it be closer to the parole point? Have you got a view on that?

Mr Guy—Not so much a view. The system that they use at the moment seems to work

quite well. If they have an interest in a person they will usually notify us of that interest in writing and we can put what we call an 'alert' in our system that there is an interest registered from the immigration people. If they ultimately make a decision to deport the person they will notify us of that fact and give us an order to detain the person beyond their date of release if need be. We have not had any problems with that arrangement actually. As long as we have an awareness that there is an interest in the person, I think that is sufficient.

Senator McKIERNAN—What about a person who embarks on the appeal processes after the expiry of dissent and who has to be maintained to be confined in prisons? Does that cause any difficulty for corrective services here in New South Wales—people held in immigration detention as opposed to criminal detention?

Mr Guy—I guess so because once the sentence expires they are essentially an unconvicted person. We would obviously want the person to be in our custody for as short a period as possible because they are no longer being held in relation to any criminal matters so it is certainly undesirable that they be detained in a prison.

Senator McKIERNAN—Do you have any recall or records to show the length of time a person would be held in care in immigration and detention.

Mr Guy—I have done some checking on that in the last day or two. It is not a consistent figure. In the main, they are taken out of our system either the day the sentence expires, the next day or within a week. But there have been isolated cases where they have been held for three and four weeks after the expiration of the sentence.

Senator TIERNEY—I chaired an inquiry into education in correctional facilities last year. One of the things we discovered was the desperate nature of the prison system between the different states. How much of a problem is this for procedure and process in terms of the deportation of people, the interface between the various state systems and the federal authorities who want to deport? Are there any procedural problems there?

Mr Nash—I am not aware that it would be an issue.

Mr Guy—As I said earlier, the arrangements we have at the moment with the immigration people seem to work quite well. We have quite a good relationship with the people at the local level here in Sydney. I think we seem to get on quite well, the arrangements are satisfactory from both sides.

Senator TIERNEY—We were given an example by the AAT this morning from a private prison where someone was in a country private prison and they had been moved to a city state prison—I am not too sure whether it was Sydney, maybe it was Melbourne—but then the person, because there was some procedural problem, did not actually get to the review. Do you see that sort of interface problem? Would that be just an isolated example?

Mr Nash—You would hope so. That should not occur. As I mentioned earlier, we have only one private prison in New South Wales. There are three in Victoria.

Senator TIERNEY—I am not too sure whether it was New South Wales or Victoria.

Mr Nash—But that should not make any difference. They operate under the same procedures as we do in that regard. I do not understand why there would have been any difficulty in that particular case. But we could certainly look into that and come back to you to give you the details of it.

Senator TIERNEY—The submission sets out the procedures and liaison arrangements in place with respect to inmates who may be subject to deportation. How long do these processes take on average?

Mr Guy—What part of the process?

Senator TIERNEY—I assume you would get some notification of when someone is about to be deported.

Mr Guy—It is not a consistent thing. In some cases we get deportation orders a year or two before the sentence expires. In others it may only be months.

Senator TIERNEY—One of the things that has perhaps surprised some of us is how few actually are subject to deportation. We were given figures across seven years for the whole country. What does that come down to for New South Wales on average?

Mr Guy—I am not sure.

Senator TIERNEY—We have more than our fair share of deportees in New South Wales.

Mr Guy—I know at the moment we are holding 41 people that have deportation orders signed against them.

Senator TIERNEY—How long would that take to work through the system?

Mr Nash—It would depend how long they were in custody.

Mr Guy—I am not in a position to tell you at the moment. I could certainly check that out.

Senator TIERNEY—It brings me to the point: what do you think is the most appropriate time of those people being given those deportation orders? Is that set at an appropriate time in your view now or does that need any sort of revision?

Mr Guy—There does not appear to be a problem. But I guess it would certainly be advantageous to us if it was several months before the sentence expired so that if they were going to go through the appeal process that could all be dealt with and finalised before the sentence expires so that it would not necessarily delay or cause them to be held for too long beyond the expiry date of the sentence.

Senator TIERNEY—Is that reasonably predictable? I know with the general court system there are all sorts of delays for years sometimes. You are dealing with the AAT. Is that a bit more predictable?

Mr Guy—I am not aware, actually, of what the delays are with the AAT.

Senator TIERNEY—Do you often get cases of people who do go beyond the time of the sentence because they are subject to a—

Mr Guy—Not that I am aware of. I did some checking in the last day or two. The unusual cases are people who are held for a month or several weeks. In the main, people who are deported are only held for a day or two or up to a week beyond the expiry of their sentence. As I say, they are unusual if they are held longer than that.

Ms GAMBARO—Ms Anderson, I do not know if you are the person I should ask this question of. The people who are awaiting deportation, do they engage in normal activities in the prison? Say they have served a sentence and are waiting to be deported, is the management of prisoners much more difficult at that stage? Do they engage in any other behaviour issues?

Ms Anderson—If you are talking about when the person has finished serving the criminal sentence and is then in immigration detention, I think, as Mr Guy said, that is often a period of maybe only a few days and certainly usually no longer than about four weeks until they are deported.

Ms GAMBARO—I think you said four weeks at the very most.

Ms Anderson—Usually during that period they would be returned to maximum security. They may not have been in maximum security by the time they had finished serving their sentence. Maximum security is, by its very nature, restricted in the programs it can offer and is restricted in the liberties that are available. Certainly, I would believe that someone in immigration detention being accommodated by the Department of Corrective Services would be in fairly tight, fairly restrained, circumstances because they would be held in maximum security.

Ms GAMBARO—So they may have been in the prison system for a fairly lengthy time. They may have become a medium—I do not know the classification instruments—classified prisoner. But when their sentence is finished they automatically go to the maximum security section. Is that what you are saying to me?

Ms Anderson—That is my understanding of it, yes.

Ms GAMBARO—Is that, again, because you worry that they might try and break out or—

Mr Guy—It is more because of their status. They become unconvicted at the expiry of their sentence and the unconvicted area is largely a maximum security environment.

Ms Anderson—So they are treated, in effect, the same as any inmate on remand. Any remand inmate is also in maximum security.

Ms GAMBARO—That is definitely no longer than four weeks. The minimum would be two days.

Mr Guy—There may be the very odd case of someone who was held longer than four weeks. In the main, as I said, it would be a couple of days up to a week.

Ms GAMBARO—Have you had many cases of people in such a situation escaping from prison that you are aware of that you can tell the committee about?

Ms Anderson—I will have to ask Mr Guy.

Mr Guy—None that I am aware of.

Ms Anderson—I am not aware of any immigration detainee escaping from custody.

Ms GAMBARO—They would then immediately go back to maximum security and have certain liberties taken from them and would be in maximum security pending a decision. Is that correct?

Mr Guy—It is normally maximum security pending their removal, not so much pending a decision.

Mr Nash—I think it should be emphasised that while they are in a maximum security facility they are treated as a remand inmate. It is not as if they are in a maximum security area for convicted inmates. While it is still maximum from a security point of view, it is not as tight as it would be for a convicted inmate in maximum security.

Ms GAMBARO—They would go into the remand section?

Mr Nash—Yes.

CHAIR—Taking up Ms Gambaro's point, are you aware of any long-term situation where a prisoner has been eligible to go out on parole but, because the AAT has not made a

decision, there has been a long remand period?

Mr Guy—No.

Senator McKIERNAN—When would the New South Wales Department of Corrective Services want to be informed by Immigration that a person was liable for deportation? What time period?

Mr Nash—As soon as possible but, as Mr Guy said, if we were advised three months before the expiry of their sentence, that would presumably be sufficient time for any appeal processes to be finalised so that they could be deported at the time their sentence expires and obviate the need to hold them in immigration detention beyond that period.

Senator McKIERNAN—The committee has received a fairly strong submission from the Western Australian government asking that it be informed as early as possible that a person is liable for deportation because they are then held in a different level of security. It makes the point that 'from a cost perspective, minimum security prisoners are cheaper to maintain than medium security prisoners and that persons liable for deportation go into the medium security category'. Does that have any impact in New South Wales?

Mr Guy—Probably not. There were some changes made to the Migration Act in September 1994 specifically to allow people who have had deportation orders signed against them to not be restricted by that factor alone. So, if the corrective services authorities consider it appropriate, they can still progress to things like work release and participation in external programs.

Senator McKIERNAN—That is at the end of the sentence. The WA government is saying that they would prefer for that to happen 'preferably within three months of the date of sentence'.

Mr Guy—Are they suggesting that so that they would be more restrictive in their detention?

Senator McKIERNAN—That is my impression from reading the submission.

Mr Nash—That would not be our position.

Senator McKIERNAN—It would not have any impact on New South Wales at all?

Mr Nash—No. It is a fact that we would have regard to, but there is no policy that restricts deportees to participate in pre-release programs. It is only once their sentences have expired that they would be moved out of a minimum security environment if they had progressed to that level, and be placed back into that remand facility that you mentioned earlier.

Senator McKIERNAN—The level of security would not be impacted at all whether they were liable for deportation or not liable for deportation in New South Wales?

Mr Nash—No.

Senator McKIERNAN—That is all from me. Thank you very much.

CHAIR—Getting back to the question we were talking about before, that you have potential deportees in the system that we do not know about: where do you see the problem in cross-referencing with Migration so that there is a cross-check of your records of who is actually in gaol and Migration's records of who are permanent residents and not citizens?

Mr Nash—There would be no difficulty, from a policy point of view, in allowing them access to all those records if they want to cross-check them.

CHAIR—Have you any idea why it does not happen?

Mr Nash—They have probably never asked us.

CHAIR—We will certainly put that question to Migration when we see them. Is there a technical problem?

Mr Guy—There is certainly no technical problem. At the moment, we provide them with a list of people who are born outside Australia. We could just as easily provide them with a list of all new receptions and names and dates of birth.

CHAIR—And they could put it through their computer and come up with a match. From your point of view, do you see any technical reasons why this should not be done?

Mr Nash—No.

CHAIR—It is probably not the right question to put to you, but have you any concerns about privacy on this issue?

Mr Nash—That should not be an issue either. We have provisions in our legislation which enable us to provide information about inmates. There is a general exclusion, and this is subject to a number of exceptions. One of those exceptions is to provide it to a law enforcement agency. I would think Immigration would fit that definition.

CHAIR—So the only question in fact is why Immigration has not asked you for these lists; would you agree with that?

Mr Nash—Yes.

Senator McKIERNAN—I would like some additional information. The chair asked you questions earlier about the evidence we had got from the AAT about the appearance of prisoners at hearings, and I took your answer as you gave it. Is there the ability for the tribunal to have hearings at the prison if there was any difficulty in the release of a prisoner to attend an AAT hearing?

Mr Nash—The main difficulty would be if they are required to conduct their hearings in public. A prison is not normally open to the public, so I think that would probably constrain them. As I have said, provided there are adequate security arrangements at the AAT premises, there should be no difficulty in escorting an inmate in our custody to a hearing.

CHAIR—Mr Nash, the committee would appreciate it if you could go back and contact the AAT to ask them when this has occurred, and provide us with that information, seeing as they have suggested that this is a problem. We can then have a look at the number of times that it has occurred.

Mr Nash—Is there a contact person at the AAT?

CHAIR—Yes. If you talk to the secretary later, we can provide you with that information. The secretary has drawn my attention to a potential question for you, although I am not sure that you would particularly want to answer it. What has been the impact of the Victims Rights Act in respect of criminal deportation matters? Do you have any opinion on that at all?

Mr Nash—We have addressed that in our submission. The New South Wales Victims Rights Act—I am sorry, I am confusing it. You are talking about the Criminal Rights Act. Is that Commonwealth legislation?

CHAIR—The Victims Rights Act.

Mr Nash—The New South Wales legislation?

CHAIR—Yes.

Mr Nash—We apply that in relation to our inmates. We have suggested in our submission that perhaps that ought to be extended to persons in immigration detention. We think the victims would want to be informed if the inmate is being deported. Currently, as far as I am aware, they are not provided with that information. We would support them being given that information if they so desire.

The procedure in New South Wales is that there is a victims register so that the victims can register their interest with us. That entitles them to be provided with certain information, including when the inmate is released from our custody. So we would currently provide them with that. But they would be much more reassured to know that the person has left the country

rather than simply released into the community.

CHAIR—There are no more questions from the committee. Thank you for appearing before us today. We would appreciate it if you would get back to us with the additional information or any other information you think we should have.

Luncheon adjournment

[2.02 p.m.]

FITZPATRICK, Mr Kieren, Senior Adviser, Human Rights and Equal Opportunity Commission, GPO Box 5218, Sydney, New South Wales 2001

SIDOTI, Mr Chris, Human Rights Commissioner, Human Rights and Equal Opportunity Commission, GPO Box 5218, Sydney, New South Wales 2001

CHAIR—The committee has received your submission. Do you wish to make an opening statement to accompany that submission today before the questions?

Mr Sidoti—Yes. The submission itself was a very short one that basically indicated the human rights instruments to which we are referring. It may be useful for me to briefly describe the particular issues as the commission sees them and the particular human rights principles that we would argue need to be taken into account.

In discussing the committee's inquiry into criminal deportation, we would first like to affirm what we see as the two fundamental principles of immigration law and policy. The first is that Australia has the sovereign right to decide issues concerning immigration and deportation from Australia, certainly in all cases other than those dealing with refugees where there are broader questions of international obligation. Secondly, in exercising that sovereign right in deciding and implementing immigration policies and procedures, it is necessary for the human rights obligations that Australia has entered, particularly those that are reflected in Australian law, to be taken into account and to be used as guides to decision making where there is a discretion and as guides to policy development in setting out the basis on which discretion should be exercised.

Because of these fundamental principles, certainly the commission has no objection at all to the concept of criminal deportation as long as it is undertaken in a manner consistent with Australia's human rights commitments. In determining whether criminal deportation is so consistent, there are two factors that we consider need to be taken into account, and these are the matters I would like to discuss. The first is the basis on which the decision to deport is taken. The second is the issue of how that decision is implemented.

If I may deal first with the basis of the decision. A decision to deport a person convicted of a crime is not a decision that involves the application of a penalty and so it should not be used as a penalty. Only courts can punish a criminal offender on behalf of the state, and, in terms of the particular individual, the court has imposed its punishment by imposing a period of imprisonment or such other penalty as the court sees fit.

There is a fundamental principle that individuals should not be subjected to double punishment for any particular offence. Criminal deportation then cannot be seen as a matter of penalty or indeed of double punishment but rather must be seen as an administrative decision taken by Australia pursuant to its sovereign right to decide who is permitted to enter and

remain within this jurisdiction. It has to be based then on an objective assessment of the character and fitness of the individual in relation to the fundamental responsibility of the state to care for the safety and welfare of ordinary members of the community.

In arriving at its assessment of the character of criminal deportation, the commission is conscious of Australia's human rights obligations under the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the convention against torture and other forms of cruel, inhuman and degrading treatment or punishment.

The International Covenant on Civil and Political Rights, which was ratified by Australia in 1980, imposes upon us obligations that are binding at international law, and those obligations must be guaranteed without discrimination. It prescribes the obligation to ensure non-discrimination; equality before the law; to ensure that people are not arbitrarily detained; that the treatment of prisoners is consistent with the essential aim of reformation and social rehabilitation; and that the preservation of the family unit and the rights of children deserve special consideration by the state.

The right to non-discrimination is contained within article two, and the right to liberty and security of the person, particularly the right against arbitrary detention, is contained in article nine. Article 10 requires that those deprived of liberty are treated with humanity in respect for their inherent dignity. Article 23 affirms the family as the natural and fundamental group unit of society. Article 24 deals with the right of children to measures of protection that are required according to their status as minors, and article 26 provides for equality before the law.

In applying these provisions in the International Covenant on Civil and Political Rights, it is necessary also to take account of the standard minimum rules for the treatment of prisoners and the body of principles for the protection of all persons under any form of detention of imprisonment. They require that states take into consideration a person's future after release from imprisonment, and the best interests of the prisoner's family and social rehabilitation.

The Convention on the Rights of the Child contains important provisions for the protection of children. It requires that, in any decisions made relating to children, the best interests of the child shall be a primary consideration. That principle applies in relation to any decisions affecting children, not just decisions that are taken in relation to the child himself or herself.

There are also rights that are guaranteed under that convention for the child to remain, as far as possible, under the care and protection of both parents and not be separated from either or both parents against the will of the parents, except where there are competent decisions by authorities and it is necessary for the child to do so.

There are also obligations under the Convention on the Rights of the Child to enable

people to enter or leave territories and, by implication, to remain in territories for the purposes of ensuring and promoting family reunification and family union as a whole.

The convention against torture places a particular responsibility on states—such as Australia—that have ratified it to avoid expelling, returning or extraditing a person to another state when there are substantial grounds for believing that the individual would be in danger of being subjected to torture in that other state.

In our view, these international instruments guide the principles on which criminal deportation should be exercised. I repeat: it should not be seen as another measure of punishment. The decision for or against criminal deportation should be seen, at its basic core, as a decision that is taken on the basis of the safety and wellbeing of Australians, but taking into account those broader principles of social rehabilitation and, in particular, the rights of children.

The ways in which a decision to deport is implemented give rise to other human rights considerations. Firstly, there needs to be a process to enable a decision to deport to be reviewed and effectively challenged if necessary. Individuals should be able to mount a review or a challenge to a decision to deport. They need to be given sufficient time to prepare a defence—to seek legal advice and or representation. For that reason, it is necessary that any decision to deport be taken at a time that enables this kind of review process to occur.

Early advice from the Department of Immigration and Multicultural Affairs concerning a deportation decision is therefore desirable and, in some cases, obligatory or the right to successfully mount a challenge, whether or not the challenge in the end succeeds, is effectively nullified.

The second issue concerning implementation goes to the question of prolonged deportation after the completion of sentence. As I have indicated, deportation should not be seen as an additional punishment and certainly the possibility of continued detention after the completion of a criminal sentence imposed by the court should be avoided in all cases unless there is no alternative. Individuals, therefore, need to be advised as early as possible as to whether or not they are going to be deported so that not only the decision is taken before the head sentence is served but also any review processes are completed during that time.

It certainly becomes a measure of additional punishment if the sentence imposed by the court is completed and the criminal then finds himself or herself detained for a further period of time. Clearly, this can give rise to serious human rights considerations, including a breach of the obligation under the International Covenant on Civil and Political Rights not to arbitrarily detain a person.

Parole boards, too, should not have regard to the immigration status of a person in determining the length of a custodial sentence. Equality of all offenders requires that they be treated equally and that criminal deportation decisions be taken in ways that are removed from

the process of determination of parole.

Implementation of the decision also requires that all attempts be made to rehabilitate the offender. Whether or not the offender will live after release within Australia or elsewhere, the obligation to seek rehabilitation and social reintegration is a continuing obligation. It is necessary, therefore, for those who face deportation to continue to have rights to work release and to be involved in education and training unless there is some particular concern related to the particular individual of that individual absconding or otherwise not being available for deportation when required.

The issue of absconding, though, is an issue that will be addressed in relation to any particular prisoner who is being considered for work release or other forms of education or training activity outside the prison. The argument here is simply that the person who may be liable to criminal deportation be treated no differently to any other prisoner who is in prison.

Any restriction applying after a deportation order has been granted, therefore, should be demonstrably necessary for security reasons and should not be related arbitrarily to a blanket decision that affects everybody, regardless of the individual circumstances of the individual offender. As a rule, individuals should not be excluded from rehabilitation programs unless that can be justified as necessary because of the circumstances of that individual.

My reference earlier to the prohibition on deporting people to a country where they may be tortured gives rise to a further issue of concern to the commission and one which should be taken into account by the department. The obligation is not to deport a person who may be tortured to a country where the torture may occur. It is not an blanket obligation not to deport. Under those circumstances, the issue in criminal deportation is not simply the matter that the prisoner must remain in Australia after release but rather whether there is a third country in which the prisoner may be safe to which the prisoner may be deported.

That additional factor is something that needs to be taken into account and involves certainly a much greater degree of discretion on the part of the department than simply having to make a yes-no decision as to the deportation in itself. It also involves a much more active attempt by the department and by the government as a whole to ensure that there is a safe third country to which persons in this category can be removed.

The Privacy Commissioner—another commissioner with our commission—has also made comments to the committee in relation to particular privacy considerations that arise in criminal deportation. I do not know whether I will be able to answer all of your questions in that area since it is not my area of responsibility, but I am certainly happy to assist where I can. Other questions I can take on notice and refer to the Privacy Commissioner for written follow-up.

Certainly, in summarising her views, the particular concern that she has relates to the transmission of personal information between the Commonwealth and the states and that

transmission being properly authorised by law and only taking place to the extent which is necessary for the carrying out of a lawful purpose.

CHAIR—Thank you very much, Mr Sidoti. In your submission you referred to equality of treatment. Does it concern you that, when we are looking at the people who are liable for criminal deportation, they are actually a subset of the whole group who should be liable? If I can explain myself better on that. The fact that some people tell the truth when they are interviewed by gaol authorities and say that they were born in another country puts them in the firing line, whereas under the present circumstances somebody who can convincingly say that they were born in Australia tends not to come under anybody's scrutiny and gets away with it. That is an example of people just avoiding that.

If you take that wider, if you have been here for nine years and six months, then you are liable, but if you have been here for 10 years and six months, you are not. Similarly, the very fact that some people have not taken out their citizenship makes them liable; whereas, if they had taken out their citizenship, they would not be. Does that whole issue concern you at all?

Mr Sidoti—It certainly does concern me because it goes to the question of arbitrariness. If there are accidents or artifice, that means that one person may be considered for criminal deportation in circumstances in which another person in the same circumstances would not be so considered. It gives rise to issues about equality before the law and also gives rise to questions about the arbitrariness of the actual decision.

The 10-year requirement is certainly a matter of some difficulty and concern, but it also has a particular advantage. It provides some degree of certainty for people. They know, if they are within the 10-year period, that they may be deported, but after the 10-year period, they will not. There is a need to recognise the fact that people do put down roots in this country, particularly that they may have children in this country. The rights of children is one of the primary concerns that the commission has in making our representations today.

On balance, it is a useful way to provide a degree of certainty and a recognition of the fact that the person may be well established within the country and have children in the country who need to be taken into account. That should not preclude the need for individual assessment of those who have not been here for 10 years. The particular concern we have is that there does need to be individual determination of these matters, taking into account all the factors in the life of the individual and the safety to the Australian community that may be put at risk on the one hand, and the damage that may be caused to children of that individual who are resident in Australia and are often Australian citizens on the other hand. Up to the 10-year period I think there is a great need for appropriate decision making that takes into account the actual circumstances of each individual.

CHAIR—This can all be avoided simply by taking out citizenship. People leave themselves liable by not taking out citizenship.

Mr Sidoti—It can certainly be avoided. For some people there are very good reasons why they do not take out citizenship. Many people do not take out citizenship simply because of laziness, but there are some who have good reasons which relate to the citizenship of the country from which they come. It may relate to family ties and property that they own within that country or other kinds of responsibilities and rights they have within that country.

Before we decide that there will be a blanket rule of deportationable citizens, it is necessary to look behind the reasons that any individual may have for not taking out citizenship. I think that should be one of the factors, along with others that I have outlined such as the position of children, that need to be taken into account in the individual assessment of those who have not been here for the 10-year period.

CHAIR—It seems to be a matter of luck, a lot of this, whether you are liable for deportation or not, depending on what previous actions you have taken which have nothing to do with criminal activity itself.

Senator McKIERNAN—When a person is liable for deportation and ought to be informed that they are being considered, you put an argument here that it ought to happen early in the process, Mr Sidoti. We heard argument earlier this morning that it ought to happen later in the process, perhaps at the time when the person is being considered for parole, so that other factors can be taken into account at that time which may influence the decision. Have you given much consideration to the timing of letting the individual know that they are being considered for deportation?

Mr Sidoti—Yes, we have given quite some thought to that. The answer, I think, lies in addressing the question of what happens to the individual once the head sentence has been served. Certainly the later the decision is taken, the more informed that decision can be about the success of rehabilitation and the particular likelihood of the individual posing a continuing threat to the safety of the community. Our greatest concern, though, is that the decision should not be so delayed that the individual winds up remaining in detention after the sentence has been completed, and not delayed so that that occurs even because the individual is exercising a right of review. If there is a right of review under Australian law, the individual should not be subjected to detention simply because that right is being exercised.

So the balance to me lies in determining how late it can be left while still ensuring that all the processes have been completed before the individual then moves into a period of administrative detention—because that is what it is—after the completion of the judicially imposed sentence for the criminal offence.

Senator McKIERNAN—The Western Australian government, in their submission to the committee, suggested that the authorities ought to be informed by immigration within three months of sentencing that the person is being considered for deportation. Would you agree or disagree with that?

Mr Sidoti—I would disagree with that unless it is a very short sentence. If it is a very short sentence, like a sentence of one year or two years, early advice—that is, within three months—may well be necessary. But if we are talking about a sentence that extends for in excess of five years, it is bringing the individual to attention for no good reason at that particular time.

The exchange of information between governmental authorities should occur for a particular purpose and at the time when that purpose requires the exchange of information, not simply on the basis of letting each other know what the status of the individual is without there being a lawful purpose associated with it.

Senator McKIERNAN—We were told this morning by the New South Wales government that they inform the Commonwealth immigration department about three months after a person has been taken into custody by them. Would the exchange of that type of information be in accordance with what you are saying? Would you see that as being in breach of any international conventions or covenants that we have? It could be argued that what they are doing is lawful.

Mr Sidoti—I think the issues that it would raise are issues of privacy, so I would defer to the Privacy Commissioner for a specific response to that. It certainly does raise questions about the article 17 right to privacy under the International Covenant on Civil and Political Rights. There may be issues about whether it complies with the information privacy principles contained in the Privacy Act. If I may, I would like to take the specific answer to the question on notice for the Privacy Commissioner.

Senator McKIERNAN—I would be pleased if you would. Perhaps the secretary could provide you with a copy of the New South Wales government's submission so you can see—

Mr Sidoti—What their argument is.

Senator McKIERNAN—You can see what information they collect and what is passed over. If you can ask the Privacy Commissioner to give it to us, that would be helpful. I refer to your argument about a safe third country. Does that have unforeseen consequences for Australia were we to—in a hypothetical case—deport a drug dealer to a hypothetical country, but a country that is not willing to accept him? We want the individual out of Australia so we send him to a mythical fourth country. Could we be opening ourselves up to, in turn, providing Australia as a safe third country for other nations wanting to deport convicted criminals out of their country? Have you fully explored that concept that you put to the committee now?

Mr Sidoti—It would not open us up to that unless Australia agreed in an individual case or cases to accept that kind of reciprocal arrangement. It may be in Australia's interests to actually have that kind of exchange on a case by case basis with particular countries for the sake of breaking, for example, some criminal connections that an individual may have in this country—an individual who may well have a good prospect of rehabilitation, so long as the

individual is taken away from the social networks here in which he or she lives. The same may apply the other way around.

But certainly, I am not proposing by any means any kind of blanket obligation to give away our right to decide who may come and live here under these kinds of proposals. I am saying that there is an obligation not to deport to a country where there is a risk of torture. If we do not want the person to remain here, there is the opportunity of looking at safe third countries for those individuals. If we are so determined and so convinced that it is not appropriate for the individual to remain here and that we are determined to find somewhere to place that person, it may be that we will be prepared to accept a person from that country in exchange. That is the kind of decision that is made on a case by case basis.

It may be for, example, that you have an individual who is a citizen of two different countries, in which case we cannot deport to a country where the individual would be at risk of torture. The obligation then would be to deport to the other country of citizenship.

Senator McKIERNAN—Portugal or Timor, for example.

Mr Sidoti—That may be a possibility.

Senator McKIERNAN—It raises problems. It reminds me of what I was doing last week in Hong Kong where there are a number of people still in detention who are deemed to be refugees but because of health problems, criminal convictions for drugs and the use of drugs they have nowhere to go now. Their own country will not take them back and they are somewhat of a problem for the Hong Kong government. Australia has been asked to assist and has assisted to some measure, but we cannot breach our own immigration laws in doing so. I was wondering, in that context, whether what you are putting forward here may not be something that might cause bigger problems down the line.

Mr Sidoti—That is the reason why I think to do it on a blanket basis would be undesirable. It would need to be done on a case by case basis. It is not a situation, to my knowledge, that arises as an everyday occurrence. I do not know how often it does arise as an issue, and the immigration department could perhaps assist in that. But it is an issue for some people.

Senator McKIERNAN—Do the people who are liable to criminal deportation out of Australia have the ability to make complaints to the Human Rights and Equal Opportunity Commission if they feel their cases are not being handled properly? If so, do you have any numbers of complaints that have been made to the commission?

Mr Sidoti—They certainly have the same right as anyone else within the Australian jurisdiction to lodge a complaint, but they have to bring themselves under a human rights ground contained within the legislation. I can check and let you know how many complaints of this kind we have had. I certainly recall a small number coming through.

In most cases where we have actually taken up the complaint and made representations to the government, it has been in relation to deportees who have children who are in Australia. So the deportation involves a break-up of the family unit. Most other cases, from my recollection, have not been able to bring themselves successfully underneath the human rights protections.

Mr Fitzpatrick—In relation to the safe third country discussion we had earlier, I think it was a Mr Vasquez in 1992 who refused to be returned to Cuba. Cuba would not provide the travel documents. He was deported from Australia and then spent a number of around the world journeys on an airplane at the expense of the Department of Immigration and Multicultural Affairs. That case came to us and we were trying to resolve that with the department of immigration in finding a safe third country that would accept Mr Vasquez. I think the criminal matter was that he assaulted his wife and was in jail for a period of two to three years.

Senator McKIERNAN—And spent some time at Singapore Airport?

Mr Fitzpatrick—Yes, and Singapore threatened to impound Qantas planes as and when they arrived unless this man was removed from the airport. He nearly made it through the immigration facilities in Singapore but was stopped at the last minute, as I understand.

CHAIR—And the resolution?

Senator TIERNEY—Where did he end up?

Mr Fitzpatrick—I am sorry. The rest of the story is very clear.

Mr Sidoti—From memory, it was not in Australia. It was a case that achieved quite a bit of publicity at the time.

CHAIR—But we do not know where he ended up?

Mr Sidoti—No.

Senator TIERNEY—My question relates indirectly to that sort of thing—and Senator McKiernan touched on it as well. The prisoners deported to third party countries, why would countries take people who are unwanted in our country and not return them to their own country but to another country. Are there many examples of that? Why would countries take such people given the criminal records and the problems they could create?

Mr Sidoti—Certainly there are not a large number of examples that have come to my attention and more specific information I could not provide. The department would have to do that I am afraid. Why could be because of the citizenship obligation of people who do have dual citizenship rights. There may also be circumstances where there is significant family

presence in the third country. Therefore, for those reasons, that the family members can induce the country to accept the deportee rather than have the deportee potentially go back to the country where there is a risk.

Senator TIERNEY—The example was given to us this morning by the Administrative Appeals Tribunal where the decision to deport to the original home country could mean a great danger of possible torture and perhaps even execution. The decision was made not to deport, but there was no mention at all of any other possible third country option. I assume it is just, as you are indicating, in very isolated circumstances that this ever happens.

The other thing the Administrative Appeals Tribunal mentioned this morning was the situation where people come before the Administrative Appeals Tribunal on deportation cases and, because of administrative expense, are not represented at all. They said half are in that category and one-third of the people do not have a sufficient command of the English language to the point where they need interpreter assistance. Does this issue concern the human rights commission? Have you made recommendations or suggestions on this matter?

Mr Sidoti—I was not aware of it, to be honest. I have not heard of people who have been unrepresented and having an inadequate command of English. If the AAT says that it is their experience, I would say, yes, it is concerning. Criminal deportation is a serious matter. As I said, it cannot be used as an additional penalty, but that is not to say that it does not have very serious consequences for the individual concerned, particularly in the kinds of cases that Mrs Gallus has referred to—where someone who has been here for a very long period, for eight or nine years, falls just within the category of being liable for criminal deportation. It is a very serious step. Those who have been here for that period, I would assume, have some command of English. Nonetheless, the Administrative Appeals Tribunal is a quasi-judicial body. It does have a significant degree of formality associated with it. If these decisions are being taken without the tribunal being assisted by proper legal argument, I think it does become worrying.

Senator TIERNEY—They said half the cases and one-third having difficulty with the language to the point they needed an interpreter to assist in the case. They also mentioned that the legal people on the other side were quite well qualified. I am just curious that it has not actually come before the commission as an issue. Perhaps you might be able to check whether there is any cases being brought up and get back to the committee. What is your view on the Administrative Appeals Tribunal's role in the review of decisions? Are you satisfied with the processes and how they operate?

Mr Sidoti—Certainly there has to be a review process. The Administrative Appeals Tribunal or the Immigration Review Tribunal would be equally acceptable under the current arrangement with the proposal to establish a single federal appeals body. Clearly that becomes appropriate and, again, I would think the immigration review panel or division of that body would be the most appropriate place in which to locate these kinds of reviews. I think it is better seen within the context of immigration, and therefore having the immigration specialists

involved in the decision making would be preferable rather than having those who are more generalist in their approach to administration.

That issue aside, I think that the review process is an appropriate process. It could be continued. This should not just become a matter of decision making of a bureaucratic nature that is not subject to review. Again, I say that because of the seriousness of the consequences of the decision.

Senator TIERNEY—Finally, they also mentioned that in certain circumstances presidential members of the tribunal sit alone on cases. They are a little concerned about that in certain cases where they think they need more specialist assistance. They gave the example this morning of cases involving people with mental illnesses. Has that issue come before you at all—the rights of people, particularly in the light of lack of representation, who have a mental illness possibly not being looked after if there is inadequate expertise on the tribunal to listen to the case?

Mr Sidoti—The issue has not come before us in the context of criminal deportation but it has as a very general issue. The commission has done a lot of work dealing with human rights and mental illness, and the question of representation of people with mental illness before all manner of courts and tribunals is a serious issue. If those people are not represented, then their capacity to present their case convincingly, even to muster the available evidence, is severely limited. It can result in decisions being made on the basis of only some of the facts and sometimes on the basis of legal arguments that may not be properly put or may not be put at all.

People with mental illness are people who, in law, suffer from a legal disability. The function of the law is to ensure that those with legal disabilities have the capacity, through representatives, to place the best case that they can before the courts in any arguments affecting them. Certainly, that applies as much to people who are subject to deportation proceedings and who have mental illness as it does to people with mental illness in any other procedure.

Senator TIERNEY—Has the commission made any recommendations on improving the situation for people with mental illness?

Mr Sidoti—It has in its report on human rights and mental illness, yes. It crosses the whole jurisdiction of courts and tribunals.

Mr Fitzpatrick—We have had complaints in the past, from people who have been subject to deportation proceedings and have been detained and have had a mental illness, about the type of facilities that were provided to them during that period of detention. In particular, the complaints we have had were about prison detention in those instances, and the inappropriateness of certain facilities or the lack of facilities for people with mental illness, particularly serious mental illness, in those instances.

Ms GAMBARO—Leading on from Senator Tierney's questioning on the facilities in prison, we heard from the New South Wales government correction services that, after a prisoner has served a sentence and they are awaiting deportation, they go into maximum security until the review process has occurred, and that can be anything from two days to a month, and that was the absolute maximum time we were given. Are you satisfied with that particular process of the prisoner being put in maximum security? I would like your thoughts on that.

Mr Sidoti—No, I am not satisfied with the process. As I indicated earlier, anything that arbitrarily decides that a whole category of people will be singled out for harsher treatment—whether it is by detention after the head sentence is served, by the refusal of work release or educational opportunities or, in this case, by maximum security or even solitary confinement—is unacceptable because it is not making decisions that have serious punishing consequences on the basis of an assessment of the particular circumstances of the individual. There may be some for whom that is entirely appropriate but, equally, there may be many for whom it is totally inappropriate—or even one for whom it is totally inappropriate. The establishment of a general rule that this is how all these people are going to be treated denies individual assessment of the risk to the community or even to the prison environment, and therefore inflicts a harsher form of treatment upon the individual than is warranted by the individual circumstances.

Ms GAMBARO—They then pointed out that the prisoner was kept in the remand section and not in the maximum security area with other prisoners. I would like your insights on any personal representations that may have been made to the commission. Is this the case, or have you had complaints that other things are occurring pending the decision process?

Mr Sidoti—I do not have any information on that. I know of complaints about the ways in which people have been treated within detention, but I do not know about the issue of moving or not moving to remand centres.

Mr Fitzpatrick—Or the security classification.

Ms GAMBARO—Can you expand on some of those complaints that you have had when people have been in detention?

Mr Sidoti—They mainly related to the fact of continuing detention after the sentence was served. Certainly, it is perceived by the individuals who are involved that this is unjust. They have served the sentence to which the court has committed them as a result of their conviction, yet they find themselves still in prison, having done their time. I think they are justified in thinking that that is unjust. It does constitute additional punishment, even if in law we categorise it differently.

Ms GAMBARO—Another question I would like to raise with you is the exclusion for life, and the impact that it clearly has on families. You spoke about children. What are your

views on that particular ruling?

Mr Sidoti—Where there are children involved, it is necessary to consider what is in the best interests of the children. That does not become the only basis on which a decision has been taken. It may well be that it is in the best interests of children for someone to remain in Australia. Yet we find, with good reason, that the person should still be deported. But again, blanket rules that provide for deportation for life or deportation in all circumstances, without full consideration of the nature of the threat to the community that the individual poses, means that these children are being arbitrarily deprived of the care and protection of a parent. Particularly where the children are Australian citizens, I think the concern is even greater.

I am here distinguishing between citizens and non-citizens, principally because the children are citizens of this country and have particular rights to continue to reside here. The deportation of a parent means, under those circumstances, that Australian citizen children, who have the full rights of residence within Australia, are being deprived of the care and protection of a parent. So again, any decision that does not take into account all the circumstances of the individual parent and family and children is a decision that can cause grave injustice.

Senator McKIERNAN—To follow up on that, should there be any distinction at all between a resident of Australia and a citizen of Australia?

Mr Sidoti—There is only a small number of distinctions that can be justified, and one clearly justifiable distinction is the right to vote. But another justifiable distinction is the right to residence, unless the person is accepted as a refugee—and clearly refugees are in a different category because of legal obligations under domestic and international law. But otherwise, the state has the right to decide which non-citizens can enter and remain within the state, and so that is an acceptable legal entitlement and one that is recognised in human rights law. But, in exercising that discretion, there are a number of considerations that have to be taken into account. My argument is that the position of children is one primary consideration, a consideration of great importance that needs special attention.

Senator McKIERNAN—I am not arguing with you. You mentioned in answer to a number of questions this matter of arbitrary distinction and—as I heard you—discrimination by virtue of the fact that an individual has not taken citizenship, because it could be seen that they are being discriminated against because they are liable for deportation, whereas a citizen of Australia is not liable for deportation. Is that not stretching the bounds of discrimination a little way?

Mr Sidoti—I accept that, Senator. Sorry: if that was the implication I gave, I did not mean to do so. I certainly think that a non-citizen should not be detained for a longer period of time than a citizen would be. That goes to the question of equality before the law in terms of punishment for a criminal offence. But the distinction that is made between liability to deportation and not is a distinction that is a justifiable one.

Senator McKIERNAN—Thank you for that clarification. On the matter of who is liable for deportation and who is not, I was actually quite surprised when I did find out the numbers that are actually deported out of Australia: it is relatively small, considering the amount of crime that we have in our society. Nonetheless, it is still important for those individuals that are deported. But not all non-citizens or not all residents who are convicted are deported. It is only after there has been some quite serious consideration given to the offences they have committed and how they have performed in their life.

Some of the policy guidelines state that they may be deported in appropriate circumstances: where, for example, they constitute a threat because there is a risk that he or she will further commit offences. The second circumstance, which is very important, is where a person has committed a crime so offensive to Australian community standards that the community rebels against having within it a person who has committed such an offence. The third one is where the person has not established sufficient ties with Australia to have become a full member of the community.

The government has got some obligations, particularly in the second circumstance, to exclude those people from Australia, even if they have been here 10 years and they have decided not to take out their citizenship. The community has a right to say, 'We do not accept you in our society and we call on our legislators to remove you from our society.' Would you disagree with the guidelines as established there? I accept what you are saying about the protection of children and the citizen rights of the children, if there are any involved. With that one on its own, would you have any problems?

Mr Sidoti—No, I have no problems with those guidelines at all. Certainly, they need to be expanded by some of the considerations I have urged today—considerations relating to, for example, the risk of exposure to torture and the best interests of children. But, in terms of factors that should be taken into account, all three of those factors are entirely appropriate.

Senator McKIERNAN—The 10-year guidelines is arbitrary in itself: there is no magic about the 10 years.

Mr Sidoti—No.

Senator McKIERNAN—Have you got any suggestions that it might be increased, or perhaps even reduced more? It is only a figure.

Mr Sidoti—As I indicated earlier, I accept that it is an arbitrary figure. I certainly think that there is desirability in providing some degree of certainty. It does that; and so for that reason it may be acceptable as a figure that, to a certain extent, is plucked out of the air.

But equally, weighed against competing considerations, there is good reason to assume that, if someone has been in Australia for 10 years, that person has made this place a permanent home and has had good connections with the Australian community. There is a high

likelihood that, particularly if the person arrived as a young man or woman—as large numbers of immigrants do—that person would have established a family here and would have children here who are—or may be—Australian citizens. So those factors are more likely to have arisen by the end of a 10-year period.

As to whether the period should be longer or shorter, I do not think it should be longer. There are some arguments that it should be shorter but, in the circumstances where there are discretions to take into account—a broad variety of factors, including the factor of whether there is good reason for not having taken out citizenship—I would think that 10 years would be an appropriate benchmark to guide decision makers in these kinds of matters.

Senator McKIERNAN—That 10 years must also be a lawful 10 years. For instance, the 10-year rule had no impact on the recent case where the individual was sent back to Britain—to Scotland, more precisely.

Mr Sidoti—That is my understanding.

CHAIR—Mr Holding, are you comfortable enough to start asking some questions?

Mr HOLDING—I think I should leave it to my colleagues, seeing that I have only just come in.

CHAIR—We have all had a chance. I am just giving you this opportunity now.

Mr HOLDING—No. I am happy to rest.

CHAIR—Perhaps I could raise a matter that Mr Holding raised earlier in this morning's proceedings. This is certainly outside the terms of reference, but I think it is interesting in terms of the Human Rights Commissioner—

Mr HOLDING—I am prepared to argue that.

CHAIR—Perhaps we can argue later about whether it is outside the terms of reference or not.

Mr Holding raised the issue of somebody who has taken out citizenship but has knowingly committed criminal activities in total contradiction of his oath to obey the laws of Australia. We should take this in context: we could have two such people, one who has not taken out citizenship and one who has. The former might have committed lesser crimes with no real intent—a crime of passion or something like that—but, because of the fact that he or she has failed to take out citizenship, that person is liable for deportation. Because the latter took out citizenship by the time the 10 years were up—even though that person did so knowingly and with criminal intent, never intending to fulfil those oaths of citizenship—he or she is not liable for deportation. Would you like to address that issue?

Mr Sidoti—There are already provisions in the law for the deportation of those who are convicted of fraud in relation to the taking out of citizenship, so fraudulent declarations—

CHAIR—Yes, we understand that. This is not about whether they lied in obtaining that citizenship but about the oath not being taken in good faith—because, immediately after taking it, they engaged in criminal activities such as drug smuggling.

Mr Sidoti—I would think that a very difficult thing to prove.

Mr HOLDING—Let us assume that it can be proved. For example, if I enter into a contract with you and I quite deliberately break the contract, you have all sorts of civil remedies. I am not talking about crimes of passion or the obvious act of fury that produces a breach of the law but about something like drug smuggling. If someone comes to Australia and says, 'This looks like a really great place to smuggle drugs. They haven't got all the techniques, so I am perfectly happy to set myself up and act as a drug importer and do well, thank you very much. I might get a couple of minor convictions, but I can continue with that,' you are able to say, looking at this situation, that there is a reasonable presumption that at the time this person took his oath he was not serious. Basically he has lived a life which is not only doing damage to other citizens but is abusing the structures that have been provided. He has been in continual breach of the law.

In contrast, if someone had not taken out his citizenship within 10 years and had done something stupid—murdered somebody, or, being unemployed, tried to rob a bank and made a mess of it—we would say, 'He hasn't taken out citizenship. We will deal with him.' Now, you might well argue that there is something sacred, although we know that all the evidence indicated that there was never a serious intent to comply with the laws. Why should there not be a process by which, first of all, he would be charged with failing to comply with his oath—and that is a decision of the court—and on the basis of that decision, it would then be open to the Crown to take proceedings to say that he is no longer worthy of citizenship, because he has denied its very basis by his own continual actions and therefore he should be deported. Why is that not the second case—something which can exceed, as a result of deliberate actions, lesser actions by someone who just has not got around to taking out their citizenship?

Mr Sidoti—Effectively what we would be arguing here would be a stripping of citizenship.

Mr HOLDING—That is right.

Mr Sidoti—First I have no difficulty with the concept of stripping of citizenship where the citizenship acquisition is itself infected by fraud, and this is the kind of case we were referring to earlier. Where it is less than that, or where it is different from that, I have to say that there are some human rights issues that would need to be taken into account.

One is the question of statelessness. It would be unacceptable under human rights law

to strip someone of citizenship in such a way that the person were rendered stateless. There is a human right to have a nationality, and some people, when they acquire Australian citizenship, forfeit the citizenship of the state from which they have come, so that if they were stripped of Australian citizenship they could well be left as stateless persons. So that would be one issue that would need to be taken into account.

But that aside, if, for example, the earlier citizenship were revived or continued and the person were to be left with it, I do not think—off the top of my head; I might need to think about this a bit more—that there are particular human rights issues that I could draw on to argue against your proposition. The only thing that I would suggest, practically speaking, is that if people are liable for the loss of citizenship under those circumstances, does that in any way compromise the message that we seek to give as a nation—that those who come to Australia as permanent residents are encouraged to take on all the attributes of commitment to Australia, including taking out citizenship; so that we in this country are, by having only a two year residential period, for example, very much saying to people that we want them to make a permanent commitment to this country. Increasing the grounds upon which citizenship can be stripped may well be compromising that message as a practical issue. I am not saying this is a human rights issue.

But there is also a question about how broadly you take it. Do you then go to the extent of arguing that someone who takes the oath of allegiance, even though they are a republican, has thereby breached the oath and should be stripped of citizenship?

Mr HOLDING—No. I think with great respect that is bit of a glib point.

Mr Sidoti—The point I am trying to make, Mr Holding, is that it is a very difficult issue—to look at what you are saying—that is, the basis upon which people take oaths and what they mean by it.

Mr HOLDING—Well perhaps if you make it clear—because I am not suggesting that you suddenly create a law that does this—that there is great value to, and we put great store on citizenship; that it is not something to be taken lightly. I have gone to I suppose it must be a 1,000 citizenship ceremonies and I do not mind the fact that people have not got the language right and cannot quite pronounce it. What is important is their commitment to Australia. But what is even more important is the very express commitment that they will uphold the laws of Australia.

Now, I am not talking about the crime of passion where a bloke comes home and his wife is going crook at him so he grabs the nearest thing to hand and gives her a biff over the head and kills her. I am not talking about that. I am talking about people who say, ‘Well this is not a bad place and the coppers are mugs, so I can do very well for myself, thank you very much, by drug smuggling.’ That is a problem in my electorate and in many other electorates. They deliberately set out on a course to enrich themselves and put at peril the lives of other Australians, although that is an extreme case.

I cannot see why we cannot say, 'If you are discovered, the first thing we will do is charge you.' If they make an oath and a commitment to this country and breach that, first of all you charge them for the breach. You go through the judicial process and the evidence that you put to the court is, 'The oath and the commitment were never serious. There is a pattern of continuous crime that is so offensive to our community. This was never a serious commitment.' That being the case, 'See you later.' If you are stateless, that is your problem. Most of the laws we pass are designed to deter criminal behaviour and are done for the purposes of making it clear that they carry a penalty. It is a nice argument: would you rather spend a lifetime in gaol, or would you rather have people put you on a boat and say, 'See you later'?

CHAIR—I do not want to get into a discussion with members of the committee, but you have a problem there. If they are stateless, you cannot actually deport them anywhere.

Mr HOLDING—You give them an aeroplane ticket and say, 'Goodbye.'

CHAIR—You cannot; the airlines are forbidden by law to take them. Mr Sidoti, would you like to comment generally, perhaps not on the detail but on the principle?

Mr Sidoti—One comment I was going to make was precisely that: if somebody has become stateless, it is not only the individual's problem but also our problem. We then have somebody that we cannot get rid of, because nobody will take them. I think, Mr Holding, what you are basically suggesting is an extension of the provisions for the stripping of citizenship that would apply to habitual offenders of some kind.

Mr HOLDING—Not habitual offenders; serious habitual offenders and people who act in a way which puts the community, which has been prepared to let them be a part of it, at a continual and serious risk. It is just another penalty.

Mr Sidoti—I would need to think about it. It certainly represents a fundamental change from the concept of citizenship that we have had to date. To date we have accepted that someone who becomes a citizen becomes, to all intents and purposes, fully a citizen of Australia. There are certainly mutual obligations, but there is the fact that the country is saying, 'We accept you no matter what happens and we are responsible for you in the same way as you are responsible for your conduct.'

Mr HOLDING—If we say, 'We want you to undertake to comply with the laws of the country,' and they say, 'Sure,' and they take an oath that they will—

Mr Sidoti—Let us go back to Senator McKiernan's question earlier about distinctions and discrimination. If the person were a citizen, then there could well be issues of discrimination, unless the same rules were applied to all citizens and not just those who acquired citizenship.

CHAIR—Isn't it true that we do discriminate? It was my understanding that, in things like the National Basketball League, somebody who takes on Australian citizenship does not have a right to immediately be included as an Australian for the purposes of playing in the Australian league. I have had those cases before me in my own office.

Mr Sidoti—So have we.

CHAIR—And I think I have referred them to you.

Mr Sidoti—I am not sure what the Race Discrimination Commissioner or the Racial Discrimination Act finally decided in those cases, to be frank. I can check up and let you know.

CHAIR—Is there a sort of precedent that it does happen, that we do make some sort of discrimination in some cases?

Mr Sidoti—Certainly in that case there was discrimination. Whether it was permitted or not was another matter. I do not know what the final answer was. But it was certainly raised in relation to the National Basketball League and a couple of cases that I am aware of came to the commission. I do not know what the resolution was.

Senator McKIERNAN—I was listening to that earlier discussion, but decided not to intervene. I think it might be useful as the subject of a separate inquiry. I have been looking at a different submission than the one we are dealing with now from HREOC. It relates to a question I asked earlier about the collection of information. This particular submission attaches to it details of prisoners in the various prisons throughout Australia. It also details the offences on the basis of country of birth rather than what we were examining this morning with the New South Wales authorities. We were talking about nationality. This actually goes to country of birth and offers some arguments about certain nationalities perhaps being more of a criminal risk than others. But it does not talk about the nationality. They might be born in Ireland but now be Australian citizens, and that would be their nationality.

What do you say about the collection of that type of information, where the information, it appears, is collected merely on their country of birth rather than on their nationality? It would seem to me that, in the context of the inquiry that we are addressing—that is, criminal deportation—it does not impact at all on Australian citizens, and therefore we should be collecting information on nationality.

Mr Sidoti—Certainly for this inquiry, information on nationality is a relevant issue, not information on country of birth. As you rightly point out, many of those people can be Australian citizens, regardless of where they happen to have been born.

Senator McKIERNAN—That is all, thank you.

CHAIR—Thank you very much, Mr Sidoti and Mr Fitzpatrick, for appearing before the committee today. If there is something you would like to get back to us with today, you can do that—I think there are certain questions in regard to the Privacy Commissioner. If we have any more questions, we shall get back to you. Thank you very much for your time here today.

[3.06 p.m.]

HADDON, Mr Bruce Alexander, Director, Haddon/Perceptions Pty Ltd, Level 7, 275 Alfred Street, North Sydney, New South Wales 2060

CHAIR—Could you state the capacity in which you appear before the committee today?

Mr Haddon—I am director of Haddon/Perceptions Pty Ltd. We are a marketing strategy company with somewhat of a trend watcher bias. My interest in this matter is personal.

CHAIR—The committee has received your submission and has authorised its publication. Do you wish to make an opening statement to accompany that submission?

Mr Haddon—I do, Madam Chair. Young Bruce Haddon in the street enjoys his fish and chips, screws up the wrapper and throws it in the street. 'Bruce, why did you throw your wrapper in the street?' 'Well, it is only one bit of paper.' 'Yes, Bruce, but what if everyone did that?' 'Gee, four million people. I guess if everyone did that, we would have a lot of paper in the street. But everyone is not doing that, so mine doesn't matter.' 'No, to the contrary. Everyone is not doing it for you and you are not doing it for them.' And so was the lesson dictated to young Bruce Haddon as it was dictated to everyone else in this room. We learn this complex system of reciprocity that has made the democracies the most bearable of all societies on earth, and we learn it very young.

You probably know, members of the committee, that there are moisture detectors on the floors of elevators in modern buildings in Shanghai and Beijing. Why do they have moisture detectors? To stop people urinating in the lift of course. Why would you urinate in the lift? The answer is that it relieves your bladder. But why would you not be concerned that maybe that is rather harsh treatment for a lift? The answer is this complex system of reciprocity which stops young Bruce throwing his papers in the streets is fundamental to the fabric of democracy, but it is not human nature. It is not, as we sometimes lull ourselves into believing, the natural order of things.

Somehow or other, our regulators believe that countries such as the one I just described make a good source country for new citizens for Australia. Somehow we believe that and we probably justify it by saying we have screening procedures to make sure we get the fairest and the best and the most talented. You would have heard the ABC article last week on the authorities in Beijing who said the screening process is a joke. Whatever you ask for, you will get. You want evidence of the equivalent of half a million dollars in the bank, it will be there the next day. As the spokesman said, 'You could get an alligator from the Peking zoo.' So what we consider to be evidence is not really evidence at all, and the screening is meaningless.

But let us be naive. Let us imagine that kind of society was the best source country for

new democratic citizens and let us just pretend the screening system worked. What happens when such new residents arrive in Australia? This is not their country. I am going to table *The Asian Mind Game*, to be read by those with no familial history of heart complaints. It is written by a world authority on doing business with Asia. I am going to table *The Case Against Immigration* and I am going to table an article from last Saturday's *Herald-Sun* from Professor Basham of Sydney University.

Well documented in this book is the Asian system of in groups and out groups. Where you have societies where there is, frankly, not enough for everybody, then you have a complex system of who are the people to whom you show reciprocity to and whom you do not. It is most apparent in Korean society: No. 1 is father, No. 2 is teacher and all the way to about No. 30 who is—you guessed it—foreigner. I do not think that any of us understands that lack of loyalty in the in groups and out groups, but we are starting to see the consequences.

Let us be naive and forget all of that and just imagine it is going to work out dandy. Enclaving gives us local rules. Encouraging enclaving, which by the way is illegal in Singapore even though the entire population are Asians, allows Australian children to wear the grotesque Muslim hejab or the egregious amputation of the clitoris. Why? Because in a local enclave you, your relatives and your friends are doing it so it is okay.

There are benefits to being different in Australia as the minorities industry has shown again and again. The last thing you want to be is the great unsung mainstream. When all of that produces the inevitable rise in crime or behaviour which Australians would call antisocial, there are linguistic barriers to detection. Must our law authorities speak all languages? Clearly, that is impossible. Even if they could, they would not understand all cultures. Even if they did, those ethnic communities are very protective of each other.

So you wonder if a non-resident is ever caught. When they are, we now have the problem confronting this committee. Their deportation becomes a separate debate. Rather than be automatic, like the cancelling of your licence when you have committed too many offences, it is a separate debate. The Commonwealth has the burden of proof. There are vested interest groups, such as the legal representatives who can earn valuable income from the process being as protracted as possible, which simply keep the process alive.

The procedure becomes the real issue. The Commonwealth case can fall down because it failed to lodge this document or that document within the requisite time, and truth goes out the window. Vitally, a person convicted of a gangland slaying in Australia still gets legal aid to defend the deportation hearing. It is a remarkable procedure when you think that a coalminer from Kalgoorlie who is separated from his wife—his wife wants to live in Queensland—and may never get to see his kids again, will not get legal aid.

It is little wonder that the John Clemenger advertising survey recently on what gripes Australia published in last Saturday's *Sydney Morning Herald* had the fundamental objection to the way society was organised and the inherent unfairness. Australia is not what the dream

was—we are not multicultural; we are very uni-cultural in clumps. Somehow there is a loss of meaning to be an Australian and a lack of that complex system of give and take that made our society once so free, so fair and so loyal to each other.

Our overtaxed and resentful middle class are getting thoroughly sick of it. The country itself is selling assets that have been in the family dowry for generations in order to make it pay. In just 30 years, I watched my much loved country become a crime ridden, welfare abusing, immigration abusing, drug dealing and tribal society. We sit back with our arms folded and say, 'That is just how Western societies are.' But alas that is not so, my elected representative. Thus you have made it.

Senator McKIERNAN—In part of your submission you state that the criminal element there is in Australia is at least English speaking and cannot escape detection because of that by English speaking law enforcement officers. Do you want to elaborate on that?

Mr Haddon—We know that different languages present a barrier to communication, which is why we have to have special rules for people of non-English speaking background to make sure they are not discriminated against. Those of non-English speaking background are, if you like, the subject of affirmative action legislation because of the inherent difficulty of communicating across language.

In the same way it becomes very difficult—valuable material is in Beck's book, *The Case Against Immigration*—for law enforcement authorities to get their tip-offs: firstly, because they do not speak the language; secondly, because they do not speak the culture; third, certain foreign crime gangs are very protective of each other; and fourthly, they have their own very sweet ways of dealing with people who tell. It is not adequate to just say that crime gangs who speak a foreign language are insulated from detection. It is really a combination of the four things I said that makes it very difficult. I do believe that foreign crime gangs in Australia are under-reported, but none of us can prove that.

Senator McKIERNAN—You made the comment, 'none of us can prove that.'

Mr Haddon—I am not sure. I cannot prove that.

Senator McKIERNAN—No, you have just said it, so there is not much point in me labouring it any further. In your opening executive comment you said the immigration system has failed Australia by admitting foreign criminals. What is your argument and your proof on that?

Mr Haddon—The over-representation of non-citizens in our gaols. Dr Crane will elaborate on that after me. I will leave that to him.

Senator McKIERNAN—Are those people not in gaol because of crimes they have committed in Australia, rather than crimes they have committed before they were admitted to

Australia?

Mr Haddon—That is what I am referring to: people in gaol for crimes they have committed in Australia.

Senator McKIERNAN—But how can the immigration department restrict the entry of people into Australia on the grounds that they may, in the future, upon admission, commit crimes?

Mr Haddon—Now that is a powerfully good question because what you are effectively saying is, 'Are there any predictors of behaviour?', and I say there certainly are. Fundamental to Dr Crane's submission is that certain cultures represent—

Senator McKIERNAN—Please, do not speak to Dr Crane's submission. Answer the question that I have put to you.

Mr Haddon—There are predictors of behaviour. For example, the Chinese disregard for public property translates into a disregard for public property when Chinese come to Australia. I do not mean a Chinese, but I mean when viewed as a group. The thriving drug trade in South-East Asia has meant that Cabramatta's heroin trade is dominated by Vietnamese.

Senator McKIERNAN—That was not the case in Dublin last week when I was there. There was a thriving drug trade in Dublin; it was not dominated by the Chinese. I daresay it is not dominated by the Chinese in New York or in London.

Mr Haddon—Your original question is one I would like to address, which is, are there predictors of a likely outcome of success.

Senator McKIERNAN—No, that was not my question. You have stated here in your submission that we have admitted foreign criminals. You then referred to the number of people who were in gaol in Australia, and I am not disputing that on terms of nationality at this point, but then I am saying how can the immigration department have failed in their job to control the immigration into this country by allowing criminals into this country if at the time that they were admitted into the country they were not criminals?

Mr Haddon—For a start they could select a migrant intake from countries where the records were reliable. What meaning could it possibly have selecting people on criminality if inadequate records are kept by the donor country? There needs to be recognition that countries where there is little or no rule of law are obviously not going to be able to refine out the criminals and therefore represent a relatively poor source of new citizens for a fragile democracy like our own.

Mr HOLDING—Do you say, for example, that in China there is no enforcement of the law? I thought the criticisms of the Chinese were that they much too harsh. I was recently in

China; we have had this argument with the Chinese authorities. If you are guilty of a serious crime such as rape—and they had gangs of young men raping women—you were tried at a People's Court. They had a notice hung around their neck. They were marched through the streets. They were made to kneel down and they got a bullet in the head.

To a delegation of which I was a member which took this up with the Chinese Minister for Foreign Affairs on humanitarian grounds, he said, 'We lost a lot of people in the war. We lost a lot of people in the revolution. We simply do not have time to do as you people in the West do, reform criminals. If these people act in an antisocial way they know what is going to happen.' We might say that that is not a view that we agree with, but I do not see that you can say that that is not a fairly strict enforcement of the law. Certainly, it is much stricter than we apply in our own country,

What worries me is that while I think it is true that certain sectors in our immigrant intake are involved in criminal activity, I think that is probably a small percentage of the number that come. I would hope to think that if Australia were a country from which people were wanting to go, for whatever reason, we would be judged on our status as individuals and not on the basis that there is within our own country a significant number of criminals. I have a significant number of criminals in my electorate, but they are a small minority.

If it is not good enough to judge the Australian people on the basis of the criminal behaviour amongst us, why is it any more legitimate to judge an Asian or a European country on the same basis? Do you say, whether they like it or not, parts of Italy are the home of Mafia? It is a continuous problem. Do we say that we judge all potential Italian immigrants on that basis? My friend and I are of Irish descent. That is the home of the IRA and they are pretty good bomb throwers. Do we judge all potential Irish immigrants on the basis that they may be members or supporters of the IRA? I suspect my father was. What you might say about criminal behaviour in Australia may have some legitimacy, but I do not see how that can form a basis upon which you generalise about a whole society, because all those societies are complex.

Mr Haddon—I will respond briefly to that Mr Holding. The fact that the law enforcement authorities in places like China are inhumane is quite a separate issue from how effective they are. The German organisation, Transparency International, voted China the most corrupt nation on earth.

Mr HOLDING—That does not make it the most corrupt nation on earth. It is a viewpoint of one nation against another. What makes that evidence overwhelming?

Mr Haddon—I will not respond to that.

Mr HOLDING—There is evidence that British MPs were paid money to ask questions in the House of Commons. Do we say that that is the behaviour of all British MPs? You cannot say that.

Mr Haddon—What is probably fundamental is that I do not want to respond too specifically to that because, obviously, every bit of evidence would then have to be proved and that is not possible today. I think that what would probably be fairer is for me to look at the underlying issue that I think we are driving at.

Professor Basham, from Sydney University, is an academic anthropologist whose non-racist credentials, by the way, are beyond dispute. He speaks fluent Thai. He is married to a Thai girl. Obviously, their kiddie is of part-Thai ancestry. What is fundamental to his case is that he believes what we are seeing is the development of parallel moral universes. He simply says that in a democracy it is not right to cheat the welfare system, rort the immigration system, collect welfare, work for cash, pay no tax on the job you get, get the welfare cheque because you said you were earning no money. Whereas in Asian culture, he maintains authoritatively, those things are not crimes at all, and that just telling Asian society that they should be a crime does not change what they actually believe. I have tabled the article 'Crime and Culture' which goes into that far better than I could do.

Now I think the real problem here is this parallel moral universe, simply where we are going to get people making use of whatever system there is because in their country you take it when you can get it. A democracy is much too fragile, relying as it does on voluntary participation to some degree in this complex of'love thy neighbour' and 'do unto others' which is fundamental to our society.

CHAIR—Ms Gambaro.

Ms GAMBARO—Mr Haddon, you mentioned the word 'enclave' and it is a word that is mentioned quite considerably. I would just like to ask you for an observation. My sister has just returned from London—I do not know if you have travelled to London but most Australians who go to London go to Australia House; they live in close proximity in the city; and they regularly meet. It is quite interesting to hear you speak about Cabramatta and those places as enclaves. What would your observations be on what Australians do when they travel overseas where they congregate in groups, they go to the same bars in Dublin, London and all those places, and they meet regularly at Australia House. What are your observations of that?

Mr Haddon—My observation is that Australian do have enclaves, but you are not dealing with the different moral universe between an Australian and a Brit. The moral universe is the same. They would have fundamentally the same idea as to what is right and what is wrong. We could debate the nuances but there is no fundamental difference.

I think I could demonstrate the difference between multiculturalism, as we dreamt it might be, and enclaving here in Sydney. I was with a close friend, Joseph Deeb, and we stopped at Lakemba to see an investment property that he considered I might be interested in buying. The Doberman was determined that it was going to eat me. Joseph removed his briefcase from his car, even though the car was locked and had an alarm system. We looked for a Lebanese restaurant to eat at, and he said, 'Listen, we can't stay here. They're mad

bastards.' Now Joseph is an Arab and he describes the people in Lakemba as 'mad bastards'.

We went to Leichhardt which is indeed multicultural. What is the difference? Leichhardt was heavily settled by Italians. All we knew at first in the 1960s is that they were dark, they spoke another language and they spoke English with an accent. But they came from a democracy and it has been a Christian society for nearly two millennia. As a consequence, there was no shift in the value system between Italians and Australians who had a British heritage; there was no fundamental change in value system.

An enclave becomes dangerous when it introduces a different set of values and this is what has basically happened. You cannot tell me, Ms Gambaro, that mainstream Australia woke up one day and said, 'What a great idea. Let's take a razor blade and cut the clitoris off our teenage daughters.' It is just impossible with our value system for all but a criminal to justify that sort of behaviour; yet it goes on in Australia now in a dangerous enclave. We have not got multiculturalism like is evident in Leichhardt. Any one of us is welcome in Leichhardt. It is a very friendly place.

Mr HOLDING—What about Chinatown in Sydney?

Mr Haddon—I think Chinatown is coming close to being multicultural, as we would celebrate multiculturalism.

Mr HOLDING—It is certainly true in Melbourne in Little Bourke Street.

Mr Haddon—But you see Chinatown is not a residential area, Mr Holding. If you were to go to Cabramatta—

Mr HOLDING—But the people who run Chinatown live in suburbia. With this kind of generalisation: let us take the great democracy of the United States of America, what would you say its moral universe is, Anglo-Saxon or—

CHAIR—Perhaps we should just conclude now. Mr Haddon, I would just like to say on my own behalf that I have found some of your remarks quite offensive today. I have found that you have made observations made not on the basis of fact but on the basis of prejudice. I thank you for appearing before the committee today.

Mr Haddon—I thank you too.

[3.32 p.m.]

CRANE, Dr Richard, 14 Ferguson Road, Springwood, New South Wales

CHAIR—Welcome. In what capacity are you appearing before the committee?

Dr Crane—As a private citizen.

CHAIR—The committee has received your submission and has authorised its publication. Do you wish to make a short opening statement or make any amendments to the submission?

Dr Crane—Yes. Firstly, my apologies again for having given you corrupted documents, although I believe they have now been sorted out the way they should be. My initial submission was some time in 1996. I have prepared a short update to try to explain a bit more about the basis for my original submission. The original submission largely contained data I obtained from various sources, all documented, in 1993. I wanted to see if I could get a trend from examining documents in a five-year run, and that is what I have basically done from 1991 to 1995. I approached the Australian Bureau of Statistics to try to get some more assistance.

One point that I think Senator McKiernan has already made is that the statistical data from the Institute of Criminology that I have collected largely relates to countries of birth. That is a real problem for the Australian Bureau of Statistics—it is not happy with this at all. I fully support the concern there that, if you are looking for true data, it should be nationalities, not countries of birth. They are very loath to release the later data. In fact, they have not published the last two years. They did release it to me, but on the basis that I had to make the point to you that I did not get the data from the Institute of Criminology with the blessing of the Australian Bureau of Statistics because they feel it is not absolutely accurate.

I understand that this committee is inquiring into criminal deportation. I made it clear in my initial submission that, after having gone into the research data that I had collected, I was worried and concerned about criminal importation—and I still am. There are factors I have mentioned for consideration in this particular update submission. I meant to include a copy of the paper, but I forgot to do so. There has been a significant increase in Australia wide crime, as referred to in the *Sydney Morning Herald* headline of 25 July this year.

To try to establish the basis upon which I am expressing concern, I have developed what I have called a criminal representation ratio by country of birth. I have to use country of birth because that is all the data that is available—nationality is not available. If you could refer to table 1 in the documents I have submitted to you on this occasion—

Senator McKIERNAN—On a point of clarification: where are you getting your information from?

Dr Crane—In the original submission I have put down all the sources.

Senator McKIERNAN—You said that you have referred to country of birth rather than nationality because—

Dr Crane—Yes, that has come from the Australian Institute of Criminology. The photocopies of the relevant tables are included with the initial submission.

Senator McKIERNAN—Thank you.

Dr Crane—I refer now to table 1, which I made out myself. I have called it a criminal representation ratio. All this does is try to identify prisoners by country of birth with the Australian born criminals. It has to be country of birth, as I said, because there are no nationality statistics available.

I have just observed here that the criminality rate is shown on table 1. The latest year I could gather data for was 1995. I just looked into all these countries. I had no preconceived ideas. I put down all the main countries that are noted on the statistical data that I have received. People born in Vietnam and in Lebanon come out at over twice as likely to become criminals than people born in Australia—people born in Australia, regardless of their ethnic origin.

The other point I would like to draw to your attention is that since 1992 the criminal representation ratio for people born in Vietnam has more than doubled, which is shown on table 1. I have gone on to say—and I am pleased that I have heard this mentioned here today—that drug trafficking is perhaps the most heinous of all crimes. That is on table 2 of the documents I presented to you today. This table was made up with difficulty because the years 1994 and 1995 I had to work out myself. The Australian Bureau of Statistics would not release information to me, and I had to do the best I could with other data that I had received from the Institute of Criminology.

The worrying factor here is that for the years 1991 to 1995 once again the countries of birth that came out badly were Vietnam and Lebanon. From 1992 to 1995 there has been a six-fold increase in the criminal representation ratio of people born in Vietnam—2.74 to 18.1—and Lebanon—9.99 to 15.71. This means that in 1995 people born in Vietnam are approximately 18 times more likely to be involved in drug trafficking than people born in Australia, and the ratio with Lebanese born people is 15. Turkey is six, and all the other countries which are identified in the data I have looked at and recorded accordingly are significantly less, although only Papua New Guinea and Oceania are less than the Australian ratio, at less than one. All the others seem to be more but not as much as those first three countries.

There is substantial anecdotal evidence that other countries may also have a very high criminal representation ratio. These figures are not available. I cannot get them from any source, although I have tried.

At the end of my submission on this occasion I have come up with what I call key recommendations, although perhaps in political terms I should be referring to them in the vernacular of core recommendations. I initially gave 11 recommendations in my submission. I certainly agree with the Bureau of Statistics that the information gathering is completely inadequate. I think it is important to establish and verify the citizenship status of all prisoners and the immigration category of all foreign-born prisoners.

There are six or seven different categories under which people are accepted as immigrants into Australia. I think this is important because I do not think that across any national group there is an equal distribution of eventual criminality, but I do believe it is most likely that a particular category of immigrants within a national immigrant group may well be identified as producing the great majority of criminals from a country, and that information is not in any way available.

I also believe it is very important to establish how long after people arrive in this country they become criminals. This is to get some idea as to whether they were really of criminal bent before they arrived in Australia or whether something happened to them after they arrived in Australia. That information is not gathered. I believe it is very important to increase the qualifying period for Australian citizenship from two to five years, as it is in most other countries in the Western world. The UK and the United States I believe have a five-year qualification level. This I think is important because it really is very difficult to deport people once they have taken up Australian citizenship, although there are ways of removing that citizenship under the Citizenship Act of 1948, but it is very difficult.

I believe that if one could identify a group, a category of immigrant, within a particular nationality that we invite into our country as providing the great majority of criminals from that particular nationality group, then serious consideration should be given to restricting that particular category intake from that particular country if that can be established. I do not know if it can or cannot, but I think it needs to be tried.

In conclusion, I would like to make the point that I am simply an enthusiastic amateur. I have no qualifications for collecting data or carrying out analysis. I am just using what I consider to be commonsense. I have been communicating for just under two years with the minister for immigration about my concerns. He and I have been exchanging letters. I have been sending him more and more statistics that I have been gathering. I believe he has been made aware of some aspects of the immigration program of which he was not particularly aware. I believe that that is important.

But I hope this committee will perhaps agree that some of my factors are relevant and should be put in the hands of professional researchers who can look into some of the aspects which I consider worrying. Is it okay for me to mention a few points made by Mr Sidoti? I just took a few notes as he went through.

CHAIR—Perhaps we could move into questions and if time permits perhaps we could

work those in afterwards.

Senator McKIERNAN—You have provided a large amount of information. What is the purpose of collecting and compiling all of this information?

Dr Crane—I have an inquiring mind. I have been very concerned about crime—in particular, with the effects of drug trafficking. As a doctor, I have seen people die from an overdose of heroin; I have attempted to save them in the past. I feel that we have an enormous problem with drug trafficking in Australia.

In my initial submission I did make mention of the fact that I was initially drawn into this matter because of two television programs I saw—both current affairs programs—one of which indicated a group of people in Melbourne openly trading drugs in broad daylight who were caught on video cameras. I thought it was absolutely appalling that this could be going on.

Then I saw a couple of refugees from Romania openly taunting the interviewer when he was asking whether drug trading was an appropriate response to being offered the refuge of our country for them as refugees. They openly taunted the interviewer saying, 'What do you want to do to us, deport us?' They could not be deported. I thought this was fairly appalling. That was some years ago and it started me thinking about where the problems really lie. I just started inquiring with the department of immigration and writing to Mr Ruddock. That is how it started, Senator.

Senator McKIERNAN—Of the 130 or 140 criminal deportations that have happened over the past seven years, how many of those have been related to drug offences?

Dr Crane—I do not know. I cannot get that information. I found it hard to get information about deportations. That is all I came up with I am afraid. I could not get any more.

Senator McKIERNAN—In the main, is it people dealing with drugs that is your motivation?

Dr Crane—I think criminality is my overall fear. Five hundred young Australians died last year of accidental overdoses from heroin. It is not just that 500 whose lives have been wrecked but all their families' lives are wrecked and ruined also. Drug trafficking is a horrible crime. That is my major concern.

Senator McKIERNAN—In the terms of this inquiry the committee is doing on criminal deportation, do you think our deportation guidelines are sufficient? I am not talking about immigration guidelines, which to a certain extent you have addressed in some detail here. I am not going to question you on that because we are not inquiring into immigration; we are inquiring into criminal deportation.

Dr Crane—I realise that.

Senator McKIERNAN—I wondered if you did.

Dr Crane—I stated at the outset of my submission that I knew this was an inquiry about deportation. I stated quite openly and honestly that my major concern was criminal importation. I have been quite up-front about that. I know it is not quite within your terms of reference. However, that is what I stated. I am sorry, what is your question?

Senator McKIERNAN—Are our guidelines on criminal deportation sufficient and effective enough?

Dr Crane—There is a 10-year limitation on deporting criminals, and I think that that should be absolutely removed. I do not think—

Senator McKIERNAN—Lawful residence for 10 years, not 10 years.

Dr Crane—Yes, that is right.

Senator McKIERNAN—There is quite a distinction. One particular individual who had gained notoriety in recent times had actually been in the country for 42 years.

Dr Crane—But not lawfully?

Senator McKIERNAN—No.

Dr Crane—I think that if someone has been here 10 years lawfully thinks that if they last 10 years they can get away with whatever they want to do is not good enough. I do not think any criminal should ever have peace of mind that, after any particular set period of time, he is exempt from deportation. I do not like that aspect of the deportation law.

I do not suppose the Australian Citizenship Act comes into that particularly—although, in a way it does because I believe that after 10 years there is a limitation under the 1948 act on deprivation of citizenship. I think that that also is not particularly desirable as it gives people the peace of mind that, after they have been here 10 years as a citizen, they cannot be deprived of it.

Senator McKIERNAN—It is not strictly accurate again, but we are not inquiring into citizenship, either. We are inquiring into criminal deportation. Not all non-citizen residents who are lawfully in Australia and are convicted of serious crimes which result in a prison sentence of 12 months or more are subject to deportation. Do you believe that they should be?

Dr Crane—One of my recommendations in fact was that, if a person is convicted of an offence carrying a penalty of more than two years, they should be largely subjected to serious

consideration for deportation. A two-year sentence, to my mind, would be for a very serious matter. The numbers you have seen, as I have said, in the last seven years are very small numbers compared to the number of criminals.

Once again, one failing in the system is that I cannot get out of a system—from the corrective services departments—any details about the numbers of people convicted in any one year. That does not seem to be collected. They have ongoing data of the number of people in prisons, but they cannot give me an annual flow chart of people coming into the prison year by year. I find it quite strange that they cannot give that to me. It is not achievable. That is another problem. We would then have some idea as to what proportion of people being convicted each year of particularly serious crimes who are not citizens are being deported. I think it is a very small number, but I do not know, because it is not available.

Senator McKIERNAN—Within our guidelines on deportation, there are provisions to take into account the fact that the individual may have reformed, may not offend again—there is not a risk of the individual offending again.

Dr Crane—Yes.

Senator McKIERNAN—Indeed, that happens with some criminals, even Australian-born criminals—they will commit one serious offence and never again. Would you have it a mandatory deportation for a two-year conviction?

Dr Crane—I do not think I would be able to say 'mandatory'; no, in my opinion. But I think it should be given serious consideration. I do not think it is at present. Two years is just an arbitrary figure. I am just taking it because I believe, looking at the types of crimes for which a sentence of two years or more is imposed, they are all fairly serious crimes and I think they should be given much more consideration. Once again, I would like to see the annual flow chart of people being admitted to our prison system and then see how many of those people have been deported in the past. There are very, very few.

Senator McKIERNAN—Crimes that are deemed to be so offensive to the Australian community to render the person liable to deportation—there are about eight or 10 of them—

Dr Crane—I am not familiar with what they are.

Senator McKIERNAN—They are the production, importation and distribution of drugs; organised criminal activity; serious sexual assault; armed robbery; violence against a person; terrorist activities or assassination; kidnapping; blackmail; extortion; and crimes against children. You are not familiar with them?

Dr Crane—No; but I would think they are the sorts of crimes. Looking through the statistics, as I have done, they are the crimes that attract the higher penalties. I could not have quoted them to you, but they are the crimes that attract the higher penalties.

Senator McKIERNAN—Not always in every case. Last week, even though I was not in the country, I heard that there was an admission of murder and there was no sentence attached to it.

Dr Crane—If you have been reading the press you would know that there is a lot of disquiet in the community about those particular judicial decisions—inexplicable.

Senator McKIERNAN—Where is the justice in having an arbitrary or mandatory prison term?

Dr Crane—Justice is not always seen to be done, I suppose. In relation to those cases you are mentioning, I do not think most of the community believes justice was done. I think that was a very dubious approach to those particular offences. I know two years is an arbitrary figure, but it is just a thought.

CHAIR—I do not think there are any more questions from the committee, Dr Crane, so we will close this session.

Committee adjourned at 3.53 p.m.