COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON MIGRATION

Reference: Criminal deportation

CANBERRA

Monday, 29 September 1997

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON MIGRATION

Members:

Mrs Gallus (Chair)

Senator McKiernan	Mr Eoin Cameron
Senator Stott Despoja	Mr Holding
Senator Tierney	Mr Kerr
Senator Troeth	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

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Present

Mrs Gallus (Chair)

Senator McKiernan	Mr Eoin Cameron
Senator Tierney	Mr Sinclair
Senator Troeth	

The committee met at 9.21 a.m.

Mrs Gallus took the chair.

CHAIR—I am pleased to declare open the second public hearing of the Joint Committee on Migration's inquiry into criminal deportation. One of our major tasks is to examine whether Australia's deportation arrangements have struck a fair balance between protecting society and protecting the legitimate rights of an individual who has committed a serious crime but still wishes to be part of our society. Some people suggest that our system is too ready to deport people; others argue that we are not picking up on all those who deserve to be removed from our society or that we are too lenient with those who have forfeited the right to stay.

As the inquiry has progressed, the committee has heard arguments about flaws in different aspects of the deportation arrangements. For example, there are suggestions that delays occur not just in making deportation decisions but also in implementing them. Today we will explore the reasons for some of those delays and the ways in which they may be overcome. We will be hearing first from the Department of Foreign Affairs and Trade, whose officers assist the Department of Immigration and Multicultural Affairs in deportation cases involving major bilateral issues or other foreign policy considerations.

Before commencing with our first witnesses, I remind everyone that these are proceedings of the parliament and warrant the same respect as proceedings in 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.

[9.23 a.m.]

HEYWARD, Mr Peter Maxwell, Director, Refugees Immigration and Asylum Section, International Organisations and Legal Division, Department of Foreign Affairs and Trade, R.G. Casey Building, John McEwen Crescent, Barton, Australian Capital Territory 2600

O'DEA, Mr Denis Kieran, Immigration Liaison Officer, Department of Foreign Affairs and Trade, R.G. Casey Building, John McEwen Crescent, Barton, Australian Capital Territory 2600

SPRY, Ms Janet Patricia, Immigration Liaison Officer, Department of Foreign Affairs and Trade, R.G. Casey Building, John McEwen Crescent, Barton, Australian Capital Territory 2600

CHAIR—I welcome officers of the Department of Foreign Affairs and Trade. Thank you for your submission to the inquiry, which we have before us. I apologise in advance if my phone goes. I am expecting one important call which I will have to answer, but hopefully that will be the only one.Would you like to make a brief opening statement before we go to questions?

Mr Heyward—Firstly, I will note, as you did in your introduction, that the Department of Foreign Affairs and Trade is not a main agency with respect to criminal deportations, but it does have some generic interests and, at times, a deportation may become a significant matter for the portfolio. Normally our role is to assist the Department of Immigration and Multicultural Affairs in complex or difficult consultations or negotiations with other governments on the deportation of their citizens or, if there is a formal arrangement required, in negotiation of the relevant instrument.

The impact on the broader bilateral relationship with the country being asked to receive a deportee also needs to be taken into account in any deportation. At times, a particular deportation can become a significant bilateral issue.

We also have a role to ensure that Australia's obligations under international conventions and international law instruments are met. In this case, most of the obligations relate to the human rights of deportees and they are not engaged in all situations. We also have a functional responsibility for the issue of certificates of identity in cases where a deportee has insufficient or no travel documentation.

These interests and roles are detailed in the first part of our submission and summarised in paragraphs 4 and 5. In the second part of the submission, we address more specifically the terms of reference of the inquiry in that we draw on the experience of Foreign Affairs and Trade officers over the years and make some suggestions from our perspective as to how the efficiency and equity of the processes of criminal deportation

might be improved.

In relation to the first term of reference, we note the possibility of negotiation of bilateral prisoner exchange agreements and bilateral return agreements with countries, if that is seen to be in our interest. In relation to term of reference 4, we note that improvements to processes which identify non-Australians convicted of serious offences might be possible. In relation to term of reference 5, we note the relevance of certain of our international obligations. In relation to term of reference 6, we suggest that the exclusion provisions for permanent residents be brought into line with those that apply to non-residents.

Our submission included some case studies, which include information classified as confidential which we would be happy to discuss with the committee if that is so desired, but we would note the need to preserve the confidentiality in that case.

We have also included some information on relevant obligations under human rights conventions. You will notice that that is fairly generic information and where there are specific questions relating to that I would just say that none of us are experts in the human rights side of things but if the committee has specific questions we can either take them on notice or we can have one of our experts appear before you at a later date. We have a general understanding which we are happy to share with you.

Senator McKIERNAN—I was intrigued that in your submission you did not mention or draw reference to the refugee convention.

Mr Heyward—It is a fair point. But in general the obligations contained under the refugee convention are similar though slightly more specific than the obligations we refer to. If there are questions in relation to the refugee convention, I am sure we can answer them.

Senator McKIERNAN—No. The specific matters are dealt with in what you have done here. But I would have thought that if one were to list which conventions were important the refugee one would have been No. 1, but it did not appear at all. I was just intrigued as to why.

Mr Heyward—I guess the conventions we have mentioned there are universal in their application, whereas our obligations under the refugee convention would only be engaged if somebody who had been classified a refugee and given protection in Australia was convicted of a serious crime and a decision was made to deport them. So we are dealing with a fairly small slice of the population.

Senator McKIERNAN—Right.

CHAIR—Before we formally start our questions, I ask the committee that if they have any questions on the section of the paper that is marked confidential we could leave those to the end of the meeting, so we could then move straight into in camera rather than moving in and out of in camera, which could be quite awkward.

Following up on the deputy chair, you will be aware that the opinion of the government is now that unless we have legislation supporting those international conventions we are not under any obligation to follow them. Can you indicate under which conventions you would find that would bring us into some sort of international conflict?

Mr Heyward—It is difficult to say in advance because conflict requires a partner, I guess. In that sense, it would depend on the reactions of either treaty bodies or the international community to actions we took.

CHAIR—From your position at the moment you have no concerns that perhaps if such a course was taken that we had not legislated for on the convention we would have no obligation to stand by that convention in the way we treated our deportees which would immediately bring us into direct conflict, for instance, with the refugees or humanitarian considerations?

Mr Heyward—It is quite easy to imagine circumstances in which there would be some international concern, but it is a bit difficult to be specific about it.

CHAIR—If I could come back to a more specific point in your submission—we mentioned this in passing informally at the beginning—so far we have only signed one bilateral return agreement and that was with Cuba, which seems to be an unlikely country of all the ones in the world to select. But I understand that is the only situation that has arisen. Could you give us a brief outline of how that occurred and why that one is there?

Ms Spry—My understanding is that the bilateral agreement was signed with Cuba. It was negotiated as part of a broader bilateral migration agreement with Cuba but there was a particular impetus for Australia to go ahead and negotiate an agreement with Cuba in relation to one individual—a criminal deportee with quite a serious record. That person was subsequently successfully deported to Cuba. We do have other cases involving that country from time to time. It may seem a small country but—

CHAIR—I note that later in your submission you state the need to get these sorts of agreements with other countries, particularly Vietnam where we have a little bit of a problem. I might leave that question till later.

Senator McKIERNAN—I have to follow through on that earlier question from the chair about the government's position on international conventions. There is no domestic legislation in Australia to cover the convention against torture, which you have mentioned

in the submission.

Mr Heyward—That is correct.

Senator McKIERNAN—Does that mean that the convention on torture is meaningless in terms of its operation within Australia?

Mr Heyward—It does not because Australia has still accepted the international obligation but that is not reflected in domestic law. I am not an international lawyer, so this is an area where my competence is limited. If you would like a more expert opinion or advice than mine, I am sure we can provide it.

Senator McKIERNAN—Perhaps you could take it on notice and give us a clarification of exactly where we stand in terms of the three conventions you mentioned in your submission. You might also take into account the refugee convention.

Mr Heyward—The refugee convention is different in the sense that it is reflected in domestic legislation in the Migration Act.

Senator McKIERNAN—Would the provisions be reflected specifically?

Mr Heyward—I believe so, but I will take that on notice and make sure that my answer is correct.

Senator McKIERNAN—The only recommendation you made in your submission deals with the distinction between those who are unauthorised arrivals in Australia and those who are residents who are removed. Your recommendation is for a softening of the deportation provisions as they apply to residents who commit and are convicted of a serious crime in Australia. Would it not have been better to go the other way, bearing in mind that there is, at least, a technical breach of the law in unauthorised arrivals coming into Australia? That technical breach of the law could be having no travel papers at all or destroying the travel papers or coming in on false travel papers which may compound a later offence.

Mr Heyward—Our recommendation, as I understand it, is not necessarily for softening but that the two situations should be brought into line.

CHAIR—More equitable.

Mr Heyward—Exactly. It seems that residents and non-residents are treated differently and, at the very least, a resident should have the same rights in respect of return to the country as a non-resident should.

Senator McKIERNAN—I understand that. What I am saying is: if the two were

held up and put on a white board, for example, and were measured against the other, we are soft on unlawful non-citizens and persons who were here perhaps unauthorised compared with residents who may have lived here for nine years, 11 months and 30 days who then commit and are convicted of an offence. Why is your recommendation directed towards the equalising of provisions for the residents who have breached the law and are convicted as opposed to those on the other side of the boat?

CHAIR—Do I understand that the deputy chair wants to exclude them from coming back, which would be the same as a permanent resident?

Senator McKIERNAN—I would have preferred that.

Mr Heyward—That is a subject on which we have not ventured a suggestion. We have said that either permanent residents should be subject to the same rules as non-residents or that non-residents should be subject to the same rules as permanent residents, but our position is that there should be equity between the two.

Ms Spry—Perhaps I could direct you to paragraph 44 in our submission. Our recommendation is actually a sort of either/or option: either treat residents and non-residents on an equal footing—that is, give them both the same exclusion provisions—or give permanent residents more right of re-entry to Australia than non-residents; in other words, reversing the current situation.

Senator TROETH—Just to totally clarify that, I take it that you are saying that each of those two groups of people should have rights of re-entry?

Mr Heyward—Either they should both have rights of re-entry or neither should have rights of re-entry. We did not see a reason to make a distinction between the two. In some respects—and I think we mentioned this in our submission—permanent residents who are likely to have established links with the country may have more reason to return than somebody who just happens to be in the country when they commit a crime.

CHAIR—On the face of it, it seems fairly inequitable. Let us say two people have committed a crime together. They both get 13 months—one happens to be a permanent resident; the other happens to be here on a tourist visa. The person on the tourist visa can later apply to come to Australia or they could be kept out on character checks, whereas the permanent resident who may have family or connections with Australia is banned for life. That is the dilemma, to put it clearly, is it not?

Mr Heyward—Just to add to that slightly, in that situation the permanent resident may well have family and other relationships here which would lead to those people leaving Australia as well to remain with the person who is being deported. That is not necessarily a consequence that is justified.

Senator TROETH—Could you give us a comparison of how Australia's deportation system compares with other similar countries, such as Canada or the United Kingdom?

Ms Spry—I do not think we have enough detailed information. I think we had better take that one on notice. Would you like to nominate those two countries?

Senator TROETH—Yes, Canada and the United Kingdom. We have received some evidence about delays in implementing deportation decisions. In your experience, how often are those delays beyond Australia's control and for what period of time are they?

Ms Spry—I would ask the committee to bear in mind that our department only gets involved where the routine has become problematic. We do not get involved in routine cases. They are negotiated directly between Department of Immigration and Multicultural Affairs offices and the relevant embassies. We only get asked to assist where Immigration has run into difficulties.

Senator TROETH—If you consider some of the cases that you have had within the last two or three years, at what stage does your department tend to get involved if it is at the problematic stage? Does that tend to be earlier in the routine or later?

Ms Spry—There are a small number of countries where we are asked to help at an early stage because we know we are going to have problems and we need to start the process of negotiation with the foreign embassy as soon as possible. There are probably half a dozen countries where we are asked to get involved at a very early stage.

Senator TROETH—I will not ask you to name the countries. Is that because of administrative difficulties or personality type difficulties? How would you classify those difficulties?

Ms Spry—In the case of those half a dozen particularly difficult countries the prime problem is that the receiving country is not accepting responsibility for their nationals.

Senator TROETH—They simply do not want them back.

Ms Spry—They do not want to know about it, which we can understand, particularly if they are criminals.

Mr Heyward—There are some other cases, too, where it is just a bureaucratic problem. The processes by which identifications are made and paper moves through bureaucracies in some other countries are very convoluted and difficult and identification of people can be made very difficult. Sometimes we get involved because of our capacity

to use the international network of the department to help resolve those cases as well.

CHAIR—But surely this is exactly why we need bilateral agreements, which you have recommended.

Mr Heyward—True. The only proviso we would put on the negotiation of bilateral agreements is that that in itself can be a resource intensive process. You need to judge the benefits you are going to get from the resources it takes to negotiate the agreement. That is true of any international agreement.

Senator TROETH—With regard to the bilateral return arrangements, are you able to say, for instance, how effective the arrangement with Cuba has been?

Ms Spry—It certainly worked in one specific case, which was the reason for it being negotiated. There are a small number of new cases that we are about to tackle, which I would prefer not to go into unless we go in camera.

Senator TROETH—Which countries have been approached to enter such agreements, apart from Cuba?

Ms Spry—There has been a little bit of preliminary discussion at a very informal level in the case of Vietnam and Romania. I think in the case of the People's Republic of China it would be more appropriate if you were to direct that to the Department of Immigration and Multicultural Affairs because they tend to deal direct across a range of matters, including that sort of negotiation.

Senator TROETH—How effective are those sorts of arrangements for countries which do use them already? Do you have any knowledge of that?

Ms Spry—We do not have detailed knowledge. I believe that it is a productive thing for us to look at, but we cannot guarantee that it will solve all of the problems. We will still have a situation where the person's identity and nationality needs to be proven to the satisfaction of their country. If the person gives incorrect information or gives an incorrect but plausible name of some remote mountain village that takes a year to check because there is no computerisation, the existence of a bilateral agreement will not in itself solve that case.

Senator TROETH—What happens if Australia desperately wants to deport the person but their identity cannot be established as a citizen of a particular country. I noticed that you refer to certificates of identity. Do we give them a certificate of identity and just cast them off, or what?

Ms Spry—We cannot do that.

Senator TROETH—We have to actually deport them to a destination.

Ms Spry—We actually have to put them on a plane going to somewhere and we have to know that they are going to be received in that country, either know positively or have a very reasonable expectation. Otherwise, we would have the expense of a two-way plane journey and escort costs and then the person might be left in a transit lounge somewhere at Singapore airport or Amsterdam airport or somewhere like that, which has happened in the case of other countries.

CHAIR—Can I clarify the difference between the certificate of identity and a passport which actually says, 'I am a citizen of this country.' Where is the difference? The identity documents are very similar. They say, 'We are willing to take this person and this person is so and so.' In what circumstances do you get one and not the other?

Ms Spry—Australian passports are issued to Australian citizens. Australian certificates of identity are issued to people where we are satisfied of their identity and nationality or statelessness, but it is not possible for them to get a travel document from their own country. For example, you may have a situation like that in Somalia, where there is basically no central government running the country; there is literally no-one issuing Somali passports at this point in time, as far as we know.

CHAIR—We cannot get a Somali passport?

Ms Spry—You literally cannot get it. Therefore, we can issue an Australian certificate of identity to a person who we believe is a Somali national if we know that that person is then going to be admitted to Somalia on their arrival at the Somali entry point.

The difficulty with Australian certificates of identity is that they do not guarantee right of return to Australia. That is printed in them. That means that there are some countries that will not accept them as a valid travel document and they will not accept the person for admission to their country on arrival.

CHAIR—But surely they would not actually try to deport somebody with a certificate of identity unless you had with it papers from, for instance, Somalia saying, 'We will accept this person on arrival'?

Ms Spry—Usually the way we would tackle that would be to try to get a visa issued by either the country or a neighbouring country.

CHAIR—On to the certificate of identify?

Ms Spry—On to the certificate of identity. Even though the travel documents are not being issued by Somalia, we may be able to obtain a visa for a person to enter Somalia—or a guarantee.

Mr EOIN CAMERON—Do other countries have certificates of identity? For instance, can someone from the United States come here without a passport, with just a certificate of identity saying that they are a citizen of such and such a country, and visit Australia?

Ms Spry—To receive entry into Australia a person has to arrive bearing a travel document that is accepted by Australia. The documents that are accepted by Australia are spelt out in the migration regulations.

Mr EOIN CAMERON—A certificate of identity is included in that, is it?

Ms Spry—They are done by countries.

Mr Heyward—To accept somebody to come into Australia we normally need a travel document that gives us some reasonable guarantee that, if we expel a person from the country, the country that issued the travel document will receive them back. Certificates of identity do not always do that, so they would not always be sufficient for you to come into the country.

Ms Spry—So a certificate of identity from some countries may be acceptable for Australia's purposes, but not from other countries. It depends on the issuing authority.

Mr Heyward—There are really two tests that apply to those certificates. One is that the certificate actually does identify the person and the other one is that it includes from the country that issued it the promise or the guarantee that they will accept that person back as their citizen.

Mr EOIN CAMERON—What happens in the circumstances you mentioned, with about six countries that just do not want to know about their low life? What do you do in a situation like that? Do we just get stuck with them?

Ms Spry—In some cases they will remain in immigration detention for some considerable period of time while we are trying to negotiate their eventual acceptance.

Mr EOIN CAMERON—What would be a considerable amount of time?

Mr Heyward—It is probably better to ask that question of the Department of Immigration and Multicultural Affairs. I am not sure that we know what the longest period of time would be, but a number of years.

Ms Spry—We are aware that they have had persons in detention for between four and five years. I do not think there is anyone who has been in detention for over five years.

CHAIR—And that is after they have completed their sentence?

Mr Heyward—It would be, yes, because detention is different from prison.

Ms Spry—Some of the longstanding cases are not necessarily criminal deportation cases; they may be other removals; that is, they would involve people who arrived here illegally by boat, so they were illegals from the start of their detention, rather than being in criminal detention.

Mr EOIN CAMERON—When somebody has been there for a long time, do you know what happens at the end of that time? Do we manage to negotiate to get them sent back—or do they die in detention?

Ms Spry—I think we would prefer not to speak on the details of cases. We get to hear only about some particular cases that are drawn to our attention. Immigration should have the details at their fingertips.

CHAIR—Can we put that question to you hypothetically, because I think it is an excellent question. Hypothetically, we have got somebody in detention who has served their prison term. You are now negotiating with a country to take them back and the country says, 'We're not going to take them back.' They have served their term of, let's say, three years in gaol and now you have had them in detention for two years. What happens then?

Mr Heyward—I think that ultimately we keep trying.

CHAIR—Remembering that this is hypothetical, is the person still in detention while you guys are trying to get an agreement with the other country, or do we come to the point where they have been in detention for an extra five, 10 years and say, 'Okay, I guess we're going to let you out and say hello to your kids'—who by this time have reached their 21st birthday?

Ms Spry—It is really up to the department of immigration to implement the existing provisions of the Migration Act, whatever they are.

CHAIR—So you just keep trying? You do not actually know what happens?

Ms Spry—There are avenues for them to lodge a further appeal; for instance, an appeal to the minister or an appeal against a different provision of the act. There may be some cases where an individual is eventually granted a bridging visa and is let out into the community while their criminal deportation is still being negotiated.

CHAIR—I understand that this is not a question to ask you—it is a question to ask DIMA—but it is fascinating, is it not? What happens eventually if you guys fail?

DIMA is going to have to do something with the person, which is basically let the person back into the community. Because of the character checks, they may not want to issue the person with citizenship, but they are stuck with the person for the rest of his or her natural life. Is that correct?

Ms Spry—Yes.

CHAIR—Senator Troeth, I interrupted you because your questions were so interesting. Would you like to go back?

Senator TROETH—That does tend to happen. I would like to carry on with this question of the stage at which we start to establish a person's identity. If they are in prison, I think you have suggested that there should be a development of administrative arrangements to require the recording earlier on, but that would probably be DIMA's role rather than yours, would it not?

Mr Heyward—That is a helpful suggestion from our part, but we have no power within our portfolio to implement it. It just seemed that there had been difficulties in identifying at an early stage when somebody was liable to deportation. The earlier we know, the easier it is to make the contact and have the negotiations to make sure that that can happen expeditiously.

Senator TROETH—I think you said earlier that that is DIMA's role rather than yours, but that sometimes your networks can be called in to assist in establishing identity?

Mr Heyward—Where that involves negotiation with a foreign government, yes. Where that involves dealing with the person themselves, that is not so much the case.

Senator TROETH—Thank you, Chair.

CHAIR—Can I emphasise the point that you have made a clear recommendation that, when people who are permanent residents are placed in gaol and it looks like they are eligible for deportation, from your point of view, you want the whole system to start as early as possible because of the difficulties you can have with some countries? You would not put any qualification on that, I take it? You would say, 'Look, as soon as they're in, let's start the procedure,' because you do not know how long it is going to take you to negotiate?

Mr Heyward—That would be subject to other considerations in the domestic arrangements, which we have not really attempted to go into. But, yes, in principle that would be better.

CHAIR—We have had a number of submissions on that, going both ways. Some of the submissions have suggested that if you do it too early and somebody is regarded as

going to be deported very early on, then he or she is not seen as a candidate for rehabilitation, and that is to the detriment of the person in gaol. That is not your problem, but I was just raising that as one of the reasons why people have actually asked for it perhaps later in the sentence. Those are the two different submissions.

Mr Heyward—I guess our concern would be that, if it is able to be established that the person is somebody who would be subject to deportation, the earlier that information is obtained, the better. Whether it is acted on early or not is a matter where all the considerations have to be taken into account.

Senator McKIERNAN—I have a couple of questions to clarify the present circumstance that we are in. We have only got one bilateral arrangement with any country to do with criminal deportation. What then is the body of law that allows us to deport other nationals out of this country? Is it merely informal relations between those other countries and Australia?

Mr Heyward—Yes, in a general sense. As we discussed earlier, the citizenship of a country implies the right of freedom of access to that country. If we decide that a foreign national in Australia no longer has the right to reside in Australia and we expel him, we can presume he has the right to re-enter his country of nationality. The mechanics of that are the things that we negotiate, but that is the legal basis for it.

Senator McKIERNAN—Is there any international customary law that gives legal expression to that?

Mr Heyward—Again, we are getting into foreign ground. None of us are lawyers. Ms Spry may have a comment to make.

Ms Spry—As I see it, what we are endeavouring to do when we enter into negotiations is to encourage each of the other countries to apply their own domestic laws—that is, we are asking them to go ahead and implement the domestic laws relating to their citizenship and the issue of travel documents to their nationals. So it is the domestic law of the receiving country that we are trying to apply.

Senator McKIERNAN—I know what you are saying but, with due respect, it is not answering my question. Let me put it another way. What stick, if any, do we have in Australia to force or encourage a country—let us take our mother country, as some people would say, the United Kingdom—to re-accept a citizen of their country who has offended in Australia? Is there any legal pressure over and above the informal bilateral relations we have got with the United Kingdom?

Ms Spry—I am not aware of any legal pressure that we can enforce. We can draw it to the level of high contact in the bilateral relationship and stress on a government-to-government basis that this really is very important and we would be very grateful if the

receiving country would take the appropriate action to look after their citizen.

Senator McKIERNAN—With the United Kingdom, it might be easy because sometimes they get an Australian who offends in the United Kingdom and they may wish to rid themselves of that particular individual—similarly, with New Zealand. There are some other countries in the world whose citizens find Australia an attractive destination, but that country may not be an attractive destination for Australians going overseas who want to work or whatever. A couple of countries have been mentioned here tonight.

Without mentioning the name of a country, are there consistent offenders, if you like—I cannot think of a better word—who just will not sit down and talk with Australia about the return of their citizens? I understand the difficulties with Somalia because you are talking with either one authority or five, depending on who you are talking to.

Ms Spry—For example, there are a small number of countries where we do not have diplomatic relations or where the country itself is the subject of UN sanctions.

Senator McKIERNAN—How do we return people to Somalia?

Ms Spry—For Somalia, I believe we are succeeding in returning by using Australian certificates of identity at the moment, but that is the sort of thing that can change.

Senator McKIERNAN—Do we have diplomatic relations with Somalia at the moment?

Ms Spry—No. We report on it. One of our offices overseas has responsibility for covering it but, to the best of my knowledge, there is no central government for Somalia at the moment so there is no-one to have diplomatic relations with formally.

Senator McKIERNAN—Will we handle that from Nairobi?

Ms Spry—I believe so, yes.

Senator McKIERNAN—Another issue that has come up during the inquiry is the fact that, for a person who is a citizen of Australia—and they could be a citizen after two years residency—the provisions of the deportation act do not apply. It has been suggested to the committee that we ought to think about broadening the deportation provisions to allow us to take Australian citizenship off an individual and then have them deported. I do not want to address that question. I raised that merely as background, and I noticed the looks of puzzlement on your faces. But you have mentioned in your submission this very important aspect of statelessness. In the light of my background comments, could you explain to us what our international obligations are on the issue of statelessness?

Mr Heyward—There is an international convention dealing with the treatment of stateless persons, which I do not think we referred to in our submission. It tends to be that you assume somebody has a state. It is a bit like some diseases; there is a diagnostic process by which you determine finally that a person does not have a state, except in cases where they have been a citizen of a state which has disintegrated in one way or another. That can create stateless people, and there are some classic cases of that. Typically, people for whom it is not easy to establish a state are people who do have citizenship somewhere. The difficulty is just finding it; it is not that they are stateless.

The convention on statelessness has similar obligations to that for refugees—you are not allowed to just expel people who are stateless. They have certain rights that flow to them by the country in which they are in being a party to that convention. Again, I am not able to give a detailed explanation of that, but I can easily do so if the committee would like me to.

Senator McKIERNAN—It has been an issue that has come up a number of times during the inquiry. By way of background to the committee, it might be useful for us to have that informed opinion. I suspect that a set of witnesses appearing before us later today might also raise that issue.

Mr Heyward—Okay. Would a summary of our obligations and the rights of individuals that accrue under that convention be sufficient for you?

Senator McKIERNAN—I think it would. As we proceed through the development of the report, we can make further contact with you if we need further elaboration. I think that might suffice for now, if you can understand where I am coming from.

Mr Heyward—I think so. I would reiterate our offer that, if it is precise legal clarification you require, I am quite happy to arrange for one of our lawyers to appear before you at a later date if you need to ask those sorts of questions in this sort of session rather than have them in writing.

Senator McKIERNAN—Thank you for that. At 34 and 35 of your submission, you draw attention to the Human Rights Committee and you talk about several communications involving the extradition of individuals. Has a complaint or a communication about Australia ever been made before the Human Rights Committee in this context of criminal deportation?

Mr Heyward—My understanding is no. I think the complaints that have been made have been in relation to cases under the refugee convention, but just let me check. No, there has been one.

Ms Spry—People who are simply illegal for whatever reason, rather than people who are being considered for criminal deportation.

Senator McKIERNAN—It is the criminal deportation provision I am particularly asking about. I understand the other one was a complaint about detention.

Mr Heyward—There has been one. It is called the ARJ case, in which the government wanted to deport to Iran a convicted drug trafficker and representatives of the person who was subject to deportation made a complaint to the Human Rights Committee. The Iranian argued that deportation might place him at risk of being retried, tortured or the subject of the death penalty if he was returned. The government argued, after investigating that possibility, that that risk was not real. The committee agreed.

Senator McKIERNAN—Thank you for that. You may have to consult with others, but is it possible to provide us with some more details of that particular instance?

Mr Heyward—I can do so, yes.

Senator McKIERNAN—In the next paragraph you talk about the committee against torture. Is that committee set up under the convention against torture or is it a subcommittee of the Human Rights Committee?

Mr Heyward—It is set up under the convention, I understand.

Senator McKIERNAN—The torture convention?

Mr Heyward—Yes.

Senator McKIERNAN—My final question has to do with the Teoh decision. What practical effect has the Teoh case had on deportation matters in particular?

Mr Heyward—I think that question probably falls into the area that we were discussing earlier: the extent to which obligations accepted under international conventions flow into domestic practice. If you would be happy, I will include that in the comment that we will make on that.

CHAIR—We noticed that you made no comment on the 10-year limit at all. Do you feel that there would be any difficulty for Foreign Affairs and Trade if you were trying to negotiate the return of somebody to their own country when the 10-year limit makes a country believe that that person really does not belong to that country? For instance, take somebody who was fairly young when they came here but, for various reasons, they did not take out Australian citizenship or they even—we know of one case—did not take out permanent residency before going back to their own country. That is one way of looking at the 10-year limit, but there is also the other question of whether it should be longer.

Mr Heyward—I am not sure whether the portfolio has a view on that, but if Ms

Spry would care to—

Ms Spry—I do not personally have a view on that. We have had cases where persons have been in Australian prisons for over 20 years and have subsequently been successfully deported under the criminal deportation provisions.

A small number of countries are quite happy to accept an absence of their citizens for less than 10 years as a good enough reason to regard them as Australia's problem rather than their problem. For instance, there is one country that currently has in its domestic legislation the requirement that, if a person is given permission to permanently migrate out of that country, they have to live outside that country for five years before they can apply for permission to return to their own country. That is a case where the country's domestic legislation is considerably at odds with the standard international practice that nation states provide travel documents for their citizens to enable them to travel and return to their country.

CHAIR—Would you see us having problems, from your point of view, in negotiating return if we extended that 10-year limit?

Ms Spry—It may increase the case load in some of the problematic countries.

Mr Heyward—It could make it more difficult, of course.

CHAIR—More difficult, obviously, in increasing case load, but would you see that countries would start to baulk and say, 'Come on, you have had this guy for 15 years and this one for 15 years. This is getting impossible'?

Ms Spry—That has already happened, and we have dealt with it in the case of other countries. I would not want that to stand in the way of doing what Australia felt was the best thing for Australia.

CHAIR—Good. Senator Troeth asked you for the figures on the UK and Canadian systems. Could we add the US to that, please?

Mr Heyward—Sure.

CHAIR—Does anybody in the committee have any questions they would like to ask in camera? Mr Cameron, do you want to go in camera?

Mr EOIN CAMERON—It might be a good idea.

Evidence was then taken in camera, but later resumed in public—

[10.36 a.m]

OWENS, Mr Albert George, Member, National Youth Heritage and Citizenship, Returned Services League of Australia, Constitution Avenue, Campbell, Australian Capital Territory 2612

SHELDRICK, Mr John Arthur, Chairman, National Youth Heritage and Citizenship, Returned Services League of Australia, Constitution Avenue, Campbell, Australian Capital Territory 2612

CHAIR—Welcome. Would you like to make a brief opening statement to supplement your submission or would you like us to go straight into questions?

Mr Sheldrick—I would like to make a very brief opening statement. Firstly, the RSL would like to thank the committee for the opportunity to comment both in a written submission and here this morning on aspects of criminal deportation of non-citizens from Australia. We note the degree of concern already recognised by government towards violence and crime in the community through the establishment of a national campaign against violence and crime. In the interests of social harmony and wellbeing, we support that approach.

In regard to criminal deportation of non-citizens, our main concern is that a proper balance be struck between the interests of prospective deportees and the interests of the community as a whole. We view the wellbeing, harmony and security of the community as being a most important objective in our society and demanding of weight in deportation considerations. Non-citizens who seriously abuse the privileges of shared social harmony and security should be deported unless exceptional circumstances exist.

Further to the written submission we provided, we suggest a number of considerations in the application of these principles. We accept the principle of deportation as an essential process for removing from Australia non-citizens who commit a serious crime subject to the terms of the act and after consideration by the minister. We view some crimes as being so heinous that deportation should be mandatory unless the Minister is able to be convinced otherwise.

There should be scope for appeal against the minister's decision but any such appeal should not lead to a protracted process. We suggest a prospective deportee must be notified in writing of the minister's decision within seven days and must exercise right of appeal within a further 21 days after notification. Appeal might be to a review tribunal within Administrative Appeals Tribunal arrangements.

We are not convinced that a 10-year limit or any time limit on liability for deportation is appropriate. Persons who have been resident in Australia for 10 years or more and have not sought citizenship raise a question of appropriate affinity with Australia

and its society and hence should not accrue any special provision to limit liability for deportation.

We do not view deportation as an added punishment, rather an administrative matter for the wellbeing of Australian society. Further to the position in our paper, we believe that non-citizens convicted of trafficking in drugs should be deported and any prospective deportee, irrespective of his or her crime, should serve his or her full sentence prior to deportation. Thank you.

CHAIR—I want to clarify something. You said that applicants should lodge their request through you within how many days?

Mr Sheldrick—Within a further 21 days after notification. We suggest that notification should be in seven days and they should exercise their right of appeal within a further 21 days, which is slightly different from what was in our written submission.

CHAIR—Because as the right of appeal exists at the moment, they have 28 days to lodge a request. So there is not that much difference between them.

Mr Sheldrick—Ours is a total of 28 days, so it is not vitally and vastly different. I think the big thing from our point of view is to ensure that the thing is done as speedily as possible.

Mr Owens—That the issue is expeditious.

CHAIR—Am I right in saying that the core of your submission is the protection of Australian society and you feel that we should be fairly strict in our application of the law in regard to the deportation of criminals? Is that a summary? At the same time, you recommend a special tribunal to oversee the minister's decisions. Are you looking at decisions where the department decides the person is not liable for deportation or are you looking at it only in the situation where the department has ordered deportation?

Mr Owens—We really only consider the case of the person having been decided by the minister—

CHAIR—In relation to deportation. You might be aware that the minister has expressed his disquiet that the AAT has overturned a couple of the decisions he has made. I would have thought that your suggestion is in fact moving further the other way away from the general thrust of your submission in that, by setting up a separate tribunal which sits there on top of the department's decisions under the delegation of the minister, you may find that you have a tribunal that on more occasions than occurs now is overturning the decisions of the department.

Mr Sheldrick—I can understand your concern about that. Our concern in putting

that forward was that we believe that there ought to be an appeal apparatus. We suggested that as one approach toward it. That was the basis upon which we made that suggestion. We would not wish to see a protracted appeal apparatus. It was suggested that perhaps if there is to be an appeal it ought to be direct to the Federal Court avoiding another step in the process, if you like. However, we felt that an appeal to the Federal Court, given current circumstances of the business of the Federal Court and time and so on, might not be a practical arrangement whereas an appeal to an element of the appeals tribunal may well be a practical arrangement.

Mr Owens—I think our position is probably firmer than the situation at the moment. We would prefer to go the other way. If one were to use a thing like an administrative appeals tribunal but the limits of what they could examine might be changed—that is, only matters of fact or of law, other considerations aside—I am not too sure but I think that some of the overturnings may have taken facts other than the law and/or the fact.

CHAIR—I have two questions. Firstly, I am not sure of what advantage the special tribunal would have over what was already in place. Secondly, do I understand that you are excluding humanitarian considerations from the considerations of the review?

Mr Owens—We would put that at a lower level of priority than the protection of the public.

CHAIR—How would you decide where the priorities are? Would you like to see a list, for instance, of crimes under which there are no humanitarian considerations and then a list of crimes whereby humanitarian considerations can be gone into?

Mr Sheldrick—Not really. I think that there is probably scope for the minister to consider humanitarian considerations in just about every case. What weight he puts on them is another matter. I do not think people should necessarily be excluded from bringing forward humanitarian considerations in their circumstance, but we would view the weight given to the benefits of society as being predominant.

CHAIR—If my memory serves me right, I think about 73 per cent of cases are not deported which could have been considered for deportation. I think that is the correct figure. You talked before about the tribunal or the review body—it is usually the review body that would overturn the minister's decision, perhaps on humanitarian grounds—and said the minister can certainly take into account humanitarian grounds. Would you also give that as a right to the—

Mr Owens—I would prefer to restrict the humanitarian argument in the tribunal.

CHAIR—which would then give the tribunal a very limited reason for existence—

Mr Owens—That is a factor of law.

CHAIR—simply to say the department has erred in law, which I suspect the department is unlikely to do?

Mr Owens—Yes.

Mr Sheldrick—Or, in fact, there may be humanitarian considerations. Those sorts of considerations could be part of fact, but it would be a consideration of the facts brought before the minister by the department.

Senator McKIERNAN—If one was to follow your recommendation—accepting you can limit access to the Federal Court but you cannot limit access to the High Court—by being so rigorous, strenuous, at the Administrative Appeals Tribunal level, could you not be embarking on a course of action which would stifle the operations of the High Court of Australia?

Mr Owens—I do not see any reason why it should.

Senator McKIERNAN—If an individual is not able to get judicial redress of a perception of injustice through the Federal Court of Australia, they still have the ability to go to the High Court. The constitution provides that ability until the constitution changes.

Mr Owens—Again, the High Court would only examine matters of law.

Senator McKIERNAN—Sorry?

Mr Owens—The High Court would only examine matters of law, surely? That is the way I read it—I may be wrong, of course.

Senator McKIERNAN—That is determined when the High Court makes the decision. If an individual has a complaint and the only course that the individual sees to redress that complaint—be it perceived or real—is an action in the High Court of Australia, could we, like the Chief Justice of the High Court of Australia said a few years ago, 'bottle up' the High Court? It would make it inoperable with so many actions coming before it that perhaps could go to a lesser court.

Mr Owens—Again, the main consideration is to make that as limited as possible. One would expect that the intervention of an appeals tribunal or something, particularly with the restrictions on that, would limit the opportunity of people to do that. But I do not think we can block off the ability of an appellant to take his case to the High Court ultimately. But, again, the higher the court the more restricted the matters they can examine. The High Court, as I understand, examines matters of law; the Federal Court can examine matters of law and of fact.

Senator McKIERNAN—Interestingly, there are two bills in front of the parliament at the moment—Migration Legislation Amendment Bill (No. 4) 1997 and Migration Legislation Amendment Bill (No. 5) 1997. Actually, Migration Legislation Amendment Bill (No. 5) 1997 contains a privative clause to try to stop access to the judicial process in other more wider issues of migration. I raise it in the context of criminal deportation here rather than in the other context.

I also raise it in the context of a very recent case that did reach the High Court. An individual named Ervin was here on a speaking tour, the visa was cancelled and the individual was supposed to leave Australia. A complaint was taken directly to the High Court and the acting minister had to ignominiously withdraw from the case. The context of the power of the High Court on matters of law is something that the High Court determines rather than the executive.

Mr Owens—Yes.

Mr Sheldrick—The High Court has to grant leave to the hearing in the first instance, does it not?

Senator McKIERNAN—I wish it did. The individual was not even a resident of Australia. We are talking now of criminal deportation of residents of Australia. Can you see what the ambit of the power of the court is?

Mr Sheldrick—I understand what you are saying about the power of the court. Under no circumstances are we questioning that power of the court at all, nor are we questioning the fact that it can be exercised through whatever process is eventually decided. As I understand it, as a lay person in these areas, it is within the constitution for that to occur. That does not seem unreasonable.

Senator McKIERNAN—I consider myself a lay person in this area as well, Mr Sheldrick. From your submission, you say you are happy enough with the provisions, the existing arrangements. When you look at the statistics of the number of people that we do eventually deport, or remove from Australia, since 1 July 1990 to the end of July 1996—that is, in six years—there were 677 non-citizens who were considered for deportation but out of that total only 139 were actually deported. It is not a very good strike rate, to use a colloquial phrase, to be more descriptive, is it? It is more than 10 per cent. I was actually surprised when I saw that only 139 people were deported from Australia.

Mr Owens—Without knowing the details of that, it is a bit hard to comment. They may have been genuine cases of the crime not being considered sufficient for deportation.

Senator McKIERNAN—All of them had committed crimes that were considered sufficient for deportation but, at the end of the day, only 139 were actually physically removed.

Mr Owens—We cannot comment because we do not know the nature of the mitigation.

Senator McKIERNAN—I understand that. I am not talking about the individual cases. You are saying that you are satisfied with the existing arrangements, but I am putting to you that, if the existing arrangements allow for the deportation of only 20-odd people per year from Australia, it may be a bit slack.

Mr Sheldrick—We did qualify that. I take your point, and 100 out of 600 over six years, in round figures, is not a big strike rate. There are two elements of that as far as we are concerned. We believe that the weight should certainly be with the community in the first instance. Taking George's point, I am not sure of the weight in previous arrangements, but we have said here through our paper on a number of occasions that the weight of decision should essentially be with the community.

Secondly, we have suggested in the same paragraph that you are referring to a certain range of crimes for which there should be mandatory deportation, unless the minister can be satisfied by an appropriate inquiry or other substantial information that that is not so. I would have thought that that would probably stiffen up the situation a little more than that which has been in vogue over the six years you are talking about.

Senator McKIERNAN—In your final column, 'Other matters', you open with the comment that the league does not view deportation as a punishment. Were you to make deportation mandatory for any given offence, irrespective of what the offence would be, would you then not be making deportation a punishment?

Mr Sheldrick—It is a fine point I would think but, in my view, no. This is a consequence of committing a crime in the Australian community, not necessarily a punishment at all. It is an administrative consequence.

Senator McKIERNAN—If it is mandatory, is it not then—

Mr Owens—If it is taken up under the criminal umbrella and it becomes an administrative matter, we do not see it as being an additional punishment. Analogies are dangerous, but an analogy would be that, if you had a guest in your house who interfered with your children, it would be mandatory that you removed him. Quite apart from the criminal action, you would ask him to leave.

Senator McKIERNAN—It might be better to apprehend and hold him actually than to remove him.

Mr Owens—Okay, but if he was then to undergo criminal action, that criminal action is quite apart from asking him to leave the protection of your house. I agree that analogies are dangerous, but this is the way we see it. It as an entirely different matter

from the criminal proceedings.

Senator McKIERNAN—That is the point I was actually making; it is entirely different.

Mr Owens—From the criminal proceedings.

Senator McKIERNAN—If you were to make it mandatory you would not actually be making it entirely different. It would be there. It would be part of it. It would be integral to it, would it not?

Mr Sheldrick—I do not see it that way, quite frankly. I think that the mandatory nature of it is part of administering the business rather than a punishment. The punishment, if you like, is not mandatory either.

Senator McKIERNAN—It is not now.

Mr Sheldrick—I am talking about a sentence, not removal. The punishment is at the discretion of the judge, within whatever limits there are. The fact that the person is then subsequently removed is not part of the punishment. It is not imposed by the judge; it is imposed by the minister consequent upon it. That is an administrative action.

Senator McKIERNAN—Would you still wish for it to be mandatory for certain crimes?

Mr Sheldrick—Yes, for certain crimes.

Mr Owens—Yes.

Senator McKIERNAN—So you would take it out of the hands of the minister?

Mr Sheldrick—No, no. We leave it in the hands of the minister. We did qualify it.

Mr Owens—Except when the minister thinks not.

Mr Sheldrick—It is mandatory unless the minister can be convinced otherwise; that is really what we are saying.

Senator McKIERNAN—I think we are actually circling each other.

Mr Owens—The minister virtually has to, if he is called on by the parliament or someone, justify his decision. Then it is a decision to keep the person, not a decision to send him away.

Mr Sheldrick—In other words, unless a person can show just cause why he or she ought not to be deported, then, in broad terms, he or she will be deported.

Senator McKIERNAN—You would change the onus of responsibility—for example, on those lists of cases that we have had; 677 in the six-year period—so that the minister should have to show cause in those instances that he did not deport rather than show cause in the instances in which he did deport.

Mr Owens—That is it. It changes the emphasis.

Senator McKIERNAN—It changes the emphasis.

Mr Owens—The emphasis of responsibility is the direction of the justification.

Senator McKIERNAN—I think I had better move on rather than talk about words again.

Mr Owens—We recognise that, and this is one of the things we had to address ourselves. This happens in courts-martial and all sorts of things where you do talk about if a person is convicted of a military crime and discharged thereafter. Is this regarded as an additional punishment? We had to examine this and came down on the side of saying that they are two separate issues.

Senator McKIERNAN—I heard what you are saying about two separate issues, but I would put it to you in closing on this area that you are actually bringing the two of them together in doing that.

Mr Owens—It is a fine point.

Senator McKIERNAN—In crimes that are committed before an individual enters Australia, do you think the deportation provisions should apply in circumstances where very serious crimes were convicted before the entry into Australia?

Mr Sheldrick—Does that not impinge in the first instance on whether they were allowed into Australia or not?

Mr Owens—On false grounds.

Mr Sheldrick—Is there not some sort of a screening arrangement which causes us to not allow people who have committed serious crimes to arrive in Australia?

Senator McKIERNAN—The reality is that there are people here, so should the criminal deportation provisions apply to persons who had committed crimes prior to their entry into Australia?

Mr Sheldrick—Do you mean on the grounds that they have then committed a crime in Australia?

Senator McKIERNAN—On the grounds that they have previously committed a crime. For example, they could have committed a murder, which is one of the more serious crimes, in their own country or in a third country, then they enter Australia and it is discovered at a later time. Should they be subject to the criminal deportation provisions?

Mr Owens—It is a bit hard to comment on this because it is not part of our brief. Nevertheless, I would see that as being information which was not available to the people allowing the person in at the beginning. If there was a sort of false declaration or coming in under false pretences—something of that sort—I think the minister could exercise his powers in that regard and say, 'You have come in here under false pretences; we have reviewed your case and therefore we must ask you to leave.' On the other hand, he may have some reason for saying, 'You have lived here for 20 years as a decent chap under these circumstances and have 400 people who have worked with you saying you are a wonderful person.' Under these circumstances, and justifiably in my opinion—not the RSL's—he would be quite within his rights to ask for deportation, but with the mitigating circumstances that he may consider.

Senator TROETH—What are your views on deporting people who arrived in Australia as young children? We have had cases of people who have arrived in Australia at the age of four, five or seven who have had a career in criminality and have then been deported back to their native country, one that they would hardly know and may find difficulty in adjusting to. Do you have a view on that?

Mr Sheldrick—Yes, we have talked about that. We do not see too many mitigating circumstances. If you are an adult person and you have committed crimes of that particular nature, and you are a non-citizen, we do not see that there is a substantial position which says that under the circumstances—they arrived as a child in Australia—they should not be deported.

Senator TROETH—You would like to see the 10-year rule revoked?

Mr Sheldrick—Yes. Regarding a person who has been here for 10 years, and has had a capacity to attain citizenship in that period of time and has not done so, one would ask questions about where their real affinity lay. On those grounds we do not really see any time limit being an important element in this.

Mr Owens—You are worried, though, about children or people under whatever the legal age is—let us say 18—committing crimes in which they join our adult criminal procedure. Take people who, as children, say, for survival, have been street urchins and have committed crimes and so on. We treat juveniles differently in our law and so we would probably have to apply our kind of legal rules to them. Again, this is my opinion.

Senator TROETH—So you think there could be mitigating circumstances.

Mr Owens—There could be mitigating circumstances in those. I may not go so far as to say that the minister should be asked to explain why he allowed something, but in that case it might not be quite so firmly applied.

Mr Sheldrick—I was not referring to the deportation of juveniles when we were talking. I was talking of the deportation of adult persons who may have arrived here as younger people.

Senator TROETH—Yes, I understand.

Mr Owens—Our law treats juvenile offenders differently; we should treat them differently too.

Mr Sheldrick—Treat juveniles as juveniles are treated in the law.

Senator TROETH—How much protection do you think citizenship should provide? You could still have a person who, let us say, had criminal tendencies but was prudent enough to take out citizenship. After a certain time here, they still continued their criminal career but then would not be liable for deportation, whereas a non-citizen who had not done that would then be liable for deportation. Do you see any need for different treatment or the same treatment of those people?

Mr Sheldrick—It is a dilemma, is it not?

Mr Owens—I would like to—

Senator TROETH—I am posing the ultimate dilemma in a way.

Mr Owens—I would like to see that, but I think we carry a responsibility to treat them as Australian citizens and they should be treated as Australian citizens.

Senator TROETH—Once they have taken the decision to do that.

Mr Owens—Once they have taken it, and their citizenship has not been granted under false grounds. Using my analogy of the house again, once a person has been accepted into the family, we treat them as members of the family. We say, 'Go, and never darken our doorstep again, but you are still a member of the family.'

Senator McKIERNAN—You would be a great father-in-law, wouldn't you?

Mr Owens—You can be a father-in-law and, if this guy has run off with the family funds or something, you can say, 'Remember the family,' but we have to wear it.

Senator TROETH—But you could still go to prison in Australia obviously?

Mr Owens—Yes, indeed.

Mr Sheldrick—Yes, for an extended period of time.

Senator TROETH—Thank you.

CHAIR—There has been some discussion that, if you are a permanent resident and you commit a crime and are deported for life, that is it—'Sorry, you can't come back.' However, if you are a citizen of another country and you commit that crime or even a worse crime, you can still apply to come into Australia at a later date. Do you have any comment on that?

Mr Owens—I am not too sure of the point of the question.

CHAIR—It is exile for life. In the case of a permanent resident, it is exile for life for having committed a crime in Australia while a permanent resident. Somebody who is a citizen of the US, Canada, Britain or Malta who commits a crime as a citizen of that country can later apply to come to Australia. Do you think this is equitable?

Mr Sheldrick—I am sorry. Do you mean an Australian citizen who can—

CHAIR—No. There is a different treatment for nationals of countries depending on whether they are an Australian permanent resident?

Mr Sheldrick—I see. This is not a matter that we have looked at. As George was saying before, I suppose we are giving almost a personal opinion, but I would not see a substantial difference in that area at all.

CHAIR—The suggestion has been put to us that people who are convicted of a crime in Australia as a permanent resident should have the opportunity at a later date to re-apply to enter Australia—and they may be refused. A particular case was given to us where a young man committed a crime and was deported back to his native country. Since then, he has lived an absolutely exemplary life—he married, had children and settled down. He had sown his wild oats while he was here, but had settled down in his own country. He was applying, I believe, not to come back as a permanent resident but as a tourist but, because of the present legislation, he was not allowed to re-apply to come back to Australia to visit his family.

So the suggestion has been put to us that there should be some consideration or some mechanism whereby permanent residents who have been deported for criminal activity can apply to enter Australia. There is, of course, no guarantee that they will be given permission. Would you be comfortable with that?

Mr Sheldrick—Not really. I would find that difficult but, having said that—and this is a personal opinion again—we hope for rehabilitation of various people through our own gaols and other sorts of areas. We often look toward rehabilitation and where, after a period of time, a person can perhaps exhibit substantial rehabilitation, maybe there is a chance they could apply, but it would be very, very stringent circumstances, I would think.

It makes it a punishment. It is almost verging on a punishment to be deported under those circumstances, and we have said before that we do not view it as a punishment. We view it as an administrative action.

CHAIR—Let me give you another situation. A deportee is in gaol in Australia serving his sentence. It is determined early on that he or she will be deported at the conclusion of his sentence. Should rehabilitation services be available to him or her?

Mr Sheldrick—Again, we have not looked at that in the committee but, as a personal opinion, I would see there ought not be any substantial difference between person A's and person B's capacity to be treated in a gaol the same as anybody else during the period of their sentence.

CHAIR—Often rehabilitation services, certainly towards the end of the sentence, involve letting that person out into the community on limited time to get them interacting back into the community.

Mr Sheldrick—In that case it would be an exception. We believe that anybody subject to deportation ought not be released from custody until such time as they are deported: during appeal hearings, parole or anything like that they are either in custody or deported, but there is no release from custody between those periods.

Senator McKIERNAN—In reaching those conclusions, did you take into account the cost of detaining a person in custody after the sentence has been served?

Mr Owens—Yes.

Senator McKIERNAN—You did?

Mr Owens—We believe that the sentence should be served in Australia and that the cost to the community must be borne.

Senator McKIERNAN—But it will perhaps take up to 12 months to get a hearing before the Administrative Appeals Tribunal. Are you saying that the individual must be held in detention—be it immigration detention or custodial detention—whilst that appeal process is going on?

Mr Owens—We would prefer not.

Mr Sheldrick—We would certainly prefer not to have that length of time; but we would prefer that the person not be released to society either.

Senator McKIERNAN—Would you put a limit on the time in detention—in immigration detention? We have got evidence that, in some parts of the world, it can take an inordinate length of time to satisfy the authorities of the country in which the individual holds nationality in order to prove identity. Would you set a limit on the amount of time an individual should be held in immigration detention?

Mr Owens—Off the top, no.

Senator McKIERNAN—Even—off the top—five years?

Mr Sheldrick—One would hope that appeals would be heard before that period of time, quite frankly. I understand what you are saying but, as a general principle, we believe that people remain in custody until they are deported.

Senator McKIERNAN—You would not put any limits on the time that they could be held?

Mr Sheldrick—We have not put any limits on it in respect of our considerations. We would be hopeful that the appeal arrangements would be a little speedier than that which you describe.

Senator McKIERNAN—I was not just describing the appeal arrangements; more the certification of the individual's identity for the host country to take them back. In some countries of the world it is quite easy to establish the identity of the individual, but in some other parts of the world—for example, central Europe, which has been in a position of turmoil and lots of records have been destroyed—it takes some time to check it through, particularly when there are no records available or no lines of communication in the countries.

Mr Sheldrick—I agree. I can understand what you are saying. I would have hoped, of course, that our administration system would be such that these things would be commenced well before the completion of the sentence period so that, by the time the sentence was completed, that sort of arrangement, to the degree possible, had been satisfied.

Senator McKIERNAN—Fine. Thank you, Mr Sheldrick.

Mr Owens—I think, though, the issue is the administrative problems which are likely to occur in other countries such as ex-Yugoslavia and so on, where records are

destroyed or in various other parts of the world where records have been destroyed. That is the issue.

Senator McKIERNAN—That could be an issue, but it is not only Yugoslavia.

Mr Owens—No, usually those things are not. But there are many countries where records have been destroyed.

CHAIR—Thank you very much, Mr Sheldrick and Mr Owens, for appearing before us today. If the secretariat has any more questions, we will be in contact with you.

[11.18 a.m.]

JONES, Mr Jeremy Sean, Executive Vice President, Executive Council of Australian Jewry, 146 Darlinghurst Road, Darlinghurst, New South Wales 2010

RUBENSTEIN, Dr Colin Lewis, National Policy Chairman, Australia Israel and Jewish Affairs Council, Level 2, 578 St Kilda Road, Melbourne, Victoria

CHAIR—Welcome, Dr Rubenstein and Mr Jones. We have your submission. Do you want to make an opening statement before we go to questions on that submission?

Mr Jones—Yes, if I may. The Jewish community is largely an immigrant community. The question of changing anything to do with citizenship or migration regulations is obviously treated very seriously within the community. Because so many of our community have come from other countries and because so many have taken permanent residency—and, subsequently, citizenship—any recommendation by us in areas which may in some way affect the principle that, 'once a citizen always a citizen'—as against the contrary, 'once a migrant always a migrant'—is only made after a great deal of consideration and thought and in circumstances which we believe compel us to speak in this way.

The main issue which has driven us to make a submission is our experience with a situation where somebody could be deported from the United States or Canada, due to findings in those courts of participation in crimes against humanity. Australia cannot do anything about the person under current laws unless they are found by a criminal court to be guilty of these crimes against humanity. The reason is that, at the moment, once somebody has been here for 10 years and has had their citizenship for 10 years, they have that for life.

This, to us, is very frustrating. Back in 1986, when the whole war crimes issue arose, the Executive Council of Australian Jewry submitted to the Menzies review that the only way this country could sensibly deal with the issue was to change the 10-year limit so people could have their citizenship taken away if those people had been found by a tribunal to be judged to have committed crimes against humanity and to have participated in crimes against humanity.

We were supported at the time by the Baltic Council of Australia. They also felt that, given the international experience, the only way to deal with this was to enable the country to take away from people the privilege of citizenship if they had been, obviously, not of good character at the time they applied for their citizenship.

Even though we have had different forms of application for citizenship to this country, there has always been the overriding consideration that a person must satisfy the minister at the time of good character. I fail to see how anybody who was involved in

crimes against humanity and murder, in particular, could ever be considered of good character.

That is where it comes as far as the 10-year law is concerned, but we also have the issue generally of a criminal deportation relating to a class of criminals. For that reason, we have also advocated consistently the establishment of an independent ground for revocation where it could be demonstrated within a legal framework that such persons were war criminals as has been defined by law. Other than that, our focus has been on the problem that has arisen with the 10-year law forcing Australia to hold trials in this country where it has been proven difficult for any country to find convictions in criminal courts.

CHAIR—Before I move to Senator Troeth, who has to leave, can I just get a bit of clarification here? There seems to be some confusion between the 10-year law and citizenship. You realise that a citizen cannot be deported, that the 10-year law applies only to permanent residents?

Mr Jones—Yes, but the problem is somebody having their citizenship stripped from them. The 10-year law is relevant there.

CHAIR—That is right. That is a different question altogether, which you are putting to us should be a possibility under these circumstances.

Mr Jones—Yes.

CHAIR—I will turn next to Senator Troeth, who has to leave.

Senator TROETH—My question actually focused on that. If a citizen was then stripped of their citizenship, that would render them virtually stateless.

Mr Jones—There is an issue, obviously, with that. Canada has had to deal with this issue. The United States has had to deal with this issue. They have dealt with the issue sometimes more satisfactorily than otherwise. The problem is that there is a difficulty if you have somebody who is effectively rendered stateless.

That difficulty, to my understanding, arises when the person's country of birth will not take them, essentially. That was a bigger problem at one stage than it appears to be now with the people we are talking about in that there does not seem to be the same problem now of countries where crimes against humanity were committed recognising a legal obligation to take people who have been deported from other countries for these crimes.

Senator TROETH—When they were originally born in that country?

Mr Jones—When they were born in that country, yes. But it is a big issue, and it

is a serious issue that would have to be addressed.

Senator TROETH—Do you have any suggestions for resolving that?

Mr Jones—The first step is allowing the possibility of the citizenship being taken away. A secondary question would come if you found a situation where statelessness occurs. We have not addressed that as an independent question other than to look at what has happened in the United States and Canada, which we believe are the two models closest to what would occur in Australia should this be accepted as an amendment.

Senator TROETH—I understand that, under the present act, the only way you can be deprived of citizenship is if you are convicted of knowingly making a false representation when you put your citizenship application in, if you are convicted of an offence and sentenced to prison for 12 months or more or if the minister is satisfied it would be contrary to the public interest. Of the cases that you would be considering, do you think any of those cases could be dealt with under those headings or do you think it is necessary to make other changes?

Mr Jones—Some could be dealt with under misleading information at the time of making an application, but it would depend on what time, in what city even or the point of application in which the application was being made. At the end of the Second World War we had for the first time the conception of immigration as necessitating the movement of population masses with Australia competing against the United States and some Commonwealth countries for large numbers of immigrants. We had a very small number of screening officers and a very large number people applying to come to Australia.

The evidence seems to be that, if somebody had an SS tattoo, for instance, they would have had to declare that. If they did not have an SS tattoo, there was very little question about their involvement in criminal organisations or actions.

Dr Rubenstein—Adding to that point about deprivation of citizenship, one possibility here—and this is only a suggestion, not necessarily our recommendation—if an amendment were ever required would be to alter section 21(1)(a)(ii), which is what I believe you are referring to, and add another reference to those who have been deported from a foreign country on the grounds of proven participation in murder, war crimes or crimes against humanity.

Senator TROETH—Yes. It would seem to me that some of the cases to which you would be referring would not be covered by the existing clause.

Dr Rubenstein—Which is precisely why the suggestion is made.

CHAIR—I am glad that Mr Sinclair has joined us because I think he may have

more information on this than I do. I believe the reason that Canada and the US can return citizens to other countries under this provision is that it was clearly stated in their citizenship requirements or their permanent residency requirements and we do not have such a statement in ours. To create one now would be retrospective.

Mr SINCLAIR—The retrospective bit is really one of the problems. It is also true that there is a problem for a country like Australia if we, as a country of migrant destination, create uncertainty about the nature and status of our citizenship beyond that which was there when they were first admitted as citizens. I would be interested to hear your views on it because there are differences between the position of the United States and Canada and our own position. To change to their system does create problems, as I understand it, for those who are now Australian citizens, having taken up citizenship.

Dr Rubenstein—I think there is a general principle about revoking citizenship. The fact is that it can be done. There are grounds. We are simply talking about whether extra grounds are necessary. So I do not believe that is a philosophical problem.

Certainly there are differences between the US and Canada in application for citizenship in terms of the specific questions asked. But I think a strict analogy with us is actually Canada, although they do not have the 10-year rule. They have found within their wit, imagination and principles to actually revoke citizenship within the last year and deport somebody on the grounds of crimes against humanity. Other than the essential difference of not having the 10-year rule in the Canadian case I believe the situation is fairly analogous.

As to the question of retrospectivity, to some extent this applies, although you can argue really it does not. The crimes that we are talking about were actually crimes in Australia at the time they were perpetrated overseas. But even if one could be shown that retrospectivity does apply, my response would simply be that sometimes there are countervailing principles that may be even more significant.

I think the principled situation we are confronting is the anomaly of allowing individuals to stay—individuals against whom there is a track record and against whom senior courts in the United States and Canada have found that they participated at the highest level in crimes against humanity on the evidentiary grounds of those courts. That was in a deportation hearing admittedly, but nonetheless these are very serious findings which is what makes the case of Konrad Kalejs of such significance. We are not talking hypotheticals here; we are talking proven realities and very senior courts of law that we would all respect.

The anomaly is allowing somebody who does have that finding against him to walk free on our streets. This is a more general problem—not just pertaining to World War II—of whether we have the legal tools and the principle amongst us to rectify what seems to be a highly undesirable state of affairs—allowing individuals who can be shown

to have participated in crimes against humanity, whether it was in Bosnia, Rwanda or Cambodia or during World War II, to be walking free on our streets. That seems to be a very serious anomaly, which I think the Australian public would have some genuine concerns about.

CHAIR—Just to clear that up again, Mr Kalejs was a citizen of Canada?

Mr Jones—No, Konrad Kalejs remains a citizen of Australia.

CHAIR—That is right; he was a citizen of Australia.

Mr Jones—He was deported from the United States at the time he applied for residence. That is when the proceedings were entered into. In Canada, the first time he was about to be deported, he left. At the second time, as soon as he arrived and he was found to be there, they instituted deportation procedures against him.

CHAIR—Which is much simpler than the situation you are suggesting because you are suggesting if we had somebody who was an Australian citizen. Let us go back to the Canadian example because I think that is an important one. When you fill out a form in Canada or the US I believe there are specific questions related to these sorts of crimes that we do not have on our forms?

Mr Jones—I know the situation is definitely like that in the United States. For Canada I do not have the same level of knowledge. But if we are talking about Australia, it comes back to a question that was sorted out in the High Court when there was a challenge to the War Crimes Act—that is, as Dr Rubenstein said, these crimes were crimes at the time they were committed. No-one realistically could have expected that you could commit those crimes, reveal your past and then come openly to Australia.

In Canada there has also been a principle of concealment by not declaring even if you were not specifically asked to declare it, because of relevance to your application. I do not know any details of their form, but I do know that much about the Canadian situation.

CHAIR—So you would be suggesting new legislation in Australia relating to people who have taken out Australian citizenship—ignore for the moment that they might be permanent residents—which would be of the nature that, anybody who had entered Australia with this sort of background and had not declared it, would have their citizenship declared null and void?

Mr Jones—There would have to be a hearing process, but it would allow for the possibility of deportation or stripping of citizenship on these grounds. Deportation is a second level. I know that stripping of citizenship and deportation are logically interrelated, but they are not always practically interrelated.

CHAIR—This does go beyond the terms of this inquiry, but I am sure the Deputy Chair would like to follow up on some of the things you have said.

Senator McKIERNAN—Essentially, you are addressing the Australian Citizenship Act rather than the Migration Act; am I correct in that? Do you accept that proposition I am putting to you?

Dr Rubenstein—We are addressing the 10-year rule. We are talking about amendment to the Australian Citizenship Act in the first instance, yes.

Senator McKIERNAN—But there is a 10-year provision in both the Migration Act and the Australian Citizenship Act, which you have addressed in part now. In point 3 of your letter which act are you addressing the 10-year rule to?

Mr Jones—We were addressing the terms of reference of the inquiry because, although our main concern is with the Australian Citizenship Act, if there are people in this category of serious criminals who have escaped deportation because of the 10-year rule, we also see this as a legitimate change to make, although it has not been our focus. There could be people who are criminals against humanity who are currently permanent residents who have been here for less than 10 years.

Senator McKIERNAN—Are you aware of the matters that the minister or his/her delegate take into consideration when they are considering an individual for deportation?

Dr Rubenstein—I am aware of some of those matters, having been involved in some cases as an expert witness, yes.

Senator McKIERNAN—In a deportation exercise? I need to clarify where this expert witness bit comes in.

Dr Rubenstein—Yes, at the Refugee Review Tribunal as an expert witness. I did not want to mention a particular case, but it was for an individual from the Middle East. I was called upon to give evidence about the situation in the Middle East countries.

Senator McKIERNAN—With due respect, a hearing in the Refugee Review Tribunal would not be a criminal deportation.

Dr Rubenstein—What sort of deportation would it be for an individual involved in crime?

Senator McKIERNAN—It would be an application for refugee status, an application for protection or an appeal against the decision not to provide a refugee visa to an individual in Australia, whereas a criminal deportation is for an individual who has committed an offence whilst in Australia and is sentenced to more than one year

imprisonment. It is completely different.

Dr Rubenstein—Yes. The individual concerned in this case had committed an offence in Australia subsequent to being granted refugee status so the issue was reversing that decision and deporting him. But it was a refugee hearing, yes.

Senator McKIERNAN—That was done in the Refugee Review Tribunal as opposed to the Administrative Appeals Tribunal. What was the appeal against?

Dr Rubenstein—It was an appeal to overturn the refugee status that had been accorded to an individual a year or two ago because of an offence committed in Australia since that time.

Senator McKIERNAN—And the minister made that appeal.

Dr Rubenstein—Yes. This was an appeal against a decision to deport.

Senator McKIERNAN—I am sorry. I am not following you. I think this is pretty serious because of the implication of the refugee element that you brought into it. I see refugees as completely and utterly separate from criminal deportation. The refugee convention has to be taken into account. Rather than delaying the committee, what I will do is seek details from you after the hearing and then when the department appears before the committee in a couple of weeks time we might even be able to alert them to this. I do not think the Refugee Review Tribunal—

Dr Rubenstein—It could be the administrative court. I may be confused so we will clarify that first.

Senator McKIERNAN—Perhaps you might take it on notice and at a later time provide the committee with the necessary and detailed information.

Mr SINCLAIR—That canvasses one of the issues that worries me—that is, a refugee quite often is a stateless person. If a person is a stateless person and you remove the 10-year rule, the person having been a refugee, where do they go?

Mr Jones—Currently, the 10-year rule is relevant for people for the first 10 years. It is the same principle.

Mr SINCLAIR—Forget about the 10-year rule. You are right. Whether it is 10 years or not, you are really no more able to deport them if they are a stateless person and their last citizenship was in fact your citizenship, particularly if they have been a refugee, putting individual cases aside and just thinking of the character. There are a few problems that I see which relate very much to the question that the deputy chair has just raised. I do not know whether you have thought that through but that seems to me to be one of the

difficulties that could arise, particularly in circumstances relating to war crimes.

Mr Jones—It has arisen in the United States and Canada. I remember there was one particular case in the United States where it took a considerable period of time once somebody lost their appeal against residence before a country could be found that would take that person. I recognise Australia might not be in as strong a position as the United States to influence another country to take a person sometimes. But I think it is a secondary problem to the major issue of having people as citizens of this country who were involved in crimes against humanity, and Australia has not been able to deal with these people properly because of an honest excuse being given that once somebody is a citizen of this country or a permanent resident for 10 years it is as if they have always been here, as if they were born here, effectively.

Senator McKIERNAN—On the matter of citizenship, Mr Sinclair and I had the privilege of reviewing that act a few years ago. We made recommendations on the 10-year rule in the Citizenship Act. But on the 10-year rule in the Migration Act, one of the ways and means of short-circuiting that 10-year rule is to become a citizen very quickly and very early. You can make an application after only two years. Have you directed your minds to the context of the Migration Act and the 10-year rule in the Migration Act? If so, have you got any suggestions to the committee as to how the Migration Act 10-year rule operates?

Mr Jones—The only context in which we have put our mind to it is in the broad context of if there was somebody in the category about whom we were concerned who was still a permanent resident after the 10 years.

Senator McKIERNAN—What I am saying to you is that we have had experience—one individual's name keeps getting mentioned all the time, McCafferty. He was a United Kingdom resident from Scotland. He was deported back to the United Kingdom earlier this year. He had been in Australia 26 years. He arrived here at the age of seven. He spent seven years in his country of birth. He probably did not even have a Scottish accent. The 10-year rule did operate in that because he was living free in society for a period of only six years or thereabouts and never became a citizen. Had he become a citizen, or had his parents become citizens after two years or five years, or whatever the rule was then, he would have been free from all of that and could not have been deported. Have you addressed your mind to that 10-year rule?

Dr Rubenstein—To the extent that I understand it—I am not claiming I do—it makes the requirement for extra grounds for revocation of citizenship even more compelling, I would have thought. If they had taken out citizenship and made themselves immune on the grounds of 10 years, then the need to go beyond the current provisions that the minister has to revoke citizenship seems to be strengthened, I would have thought.

Mr Jones—Could you clarify something for me? From the way you have

expressed it I am not sure if you are saying that the 10 years currently is a nonsense because it is not as if you are going to be a permanent resident for 15 years and after that you can become a citizen. The 10-year rule at the moment only disadvantages certain people who were not in the know about taking up citizenship. Therefore, the 10-year rule strikes me as a double nonsense: one is that it can prevent people who should have been deported, who could have been deported; the other is that it is penalising people for, in a sense, ignorance of what was in their best legal interests.

Senator McKIERNAN—My question to you was: had you given consideration to that 10-year rule and how that 10-year rule operates? I gave a convoluted explanation of how it may operate at the moment, because with all due respect I do not think you had given due consideration to the 10-year residency rule as it applies here.

Mr Jones—Our concern with the 10-year residency rule was in the perhaps hypothetical cases of people who committed crimes against human236
ity, who still were permanent residents after more than 10 years and remained in Australia, as against the capacity existing to deport them because they had been permanent residents for more than 10 years. So we had addressed it with that narrow focus.

As I said at the beginning, we are a community of people largely of migrant backgrounds. We step very lightly, very warily, into waters to do with any changes to the concept that once a citizen always a citizen, once an Australian always an Australian—once you change your status, you cannot go back to something previously. But because we had this particular issue with Nazi war crimes we have been forced to address this and other issues. It came up within our community because of that concern.

Senator McKIERNAN—I understand where you are coming from. From my understanding of what you were putting to the committee by way of submission I thought you were more addressing the Citizenship Act than the Migration Act and the 10-year residency rule as contained in the Migration Act.

Mr Jones—We were addressing both as far as they apply to a certain specified group of individuals.

Senator McKIERNAN—I was asking the question for my clarification. I might just add that not only do I have an interest in the Council of Australian Jewry but also I have an abiding interest in this issue as well. I, too, am a migrant to this country, so I am acutely aware of the provisions and, unlike some others, because of the position I hold, I have had to relinquish my other citizenship.

That brings us to the point that was raised earlier about statelessness. There are some countries in the world where if you migrate to a country like Australia and you seek to gain Australian citizenship you automatically lose your citizenship of birth. They do not allow you to keep it. The United States used to be one of them. You have given some

answers to earlier questions about the issue of statelessness. It is a very serious proposition. What do you do in this sense? Do we go down that track that you are suggesting and have Australia in a position where we are hawking around the world to find refuge for individuals who are just not wanted here?

Mr Jones—It is one of these cases where there are no good or easy options. If the alternative to that is saying that Australia is going to be a place which says, 'If you committed crimes against humanity and you were able to be a permanent resident and/or a citizen of this country for more than 10 years, you have found your safe haven in Australia,' and the other alternative is having a very small number of people potentially in the situation of having to find a country outside Australia, I know which alternative I would go for, although I think these are extremely difficult questions. I was aware because I was involved in framing the submission of the Executive Council of Australian Jewry back in 1986 on the subject of Nazi war crimes. One of the issues we had to address was the Convention on the Reduction of Statelessness—I am not sure of the exact title, although I have it.

I know there was some legal opinion at the time that said this was a reason why you should not fiddle with the migration side of things when trying to deal with the issue of war criminals, but that was the minority opinion of what we received and what was feasible. Certainly, it meant it was not a prevention although it meant there was another barrier to something practical being done, so I am aware of that.

Dr Rubenstein—As an empirical question, one has to look at the experience of the United States and Canada, which have deported significant numbers of people, and to what extent this has emerged as a problem in very few cases. There is an empirical component in this.

As a practical reality, the deportation option was not really pursued in the 1980s, I suspect, not just because of the 10-year rule but because of the political sudden death which would have confronted deportees. In the Australian debate on war crimes this was seen as a perhaps just but very harsh option. The political realities have changed quite significantly in the 1990s from what they were in the 1980s in that these people not only are unlikely to be stateless but are likely to be received in their countries of birth in eastern Europe, which are the countries we are talking about.

Senator McKIERNAN—You mention war crimes. Do you see that war crimes should be a provision that the minister ought to consider when he is considering criminal deportation—and I emphasise 'criminal deportation'? Do you think war crimes should be one of those added to the list?

Dr Rubenstein—Crimes against humanity?

Senator McKIERNAN—No, war crimes.

Mr SINCLAIR—Crimes against humanity can include terrorism, and that raises another issue.

Senator McKIERNAN—Terrorism actually is there already.

CHAIR—That is one of the guidelines to the minister.

Senator McKIERNAN—What about war crimes?

Dr Rubenstein—We use the term war crimes for crimes on a massive scale. If you are talking about individuals who have been implicated as major participants in units that killed 30,000 to 70,000 people or if you are talking about individuals against whom there is a prima facie case that they committed genocide and who will walk the streets free—as we are—I think you are quite justified in looking at an extra category of war crimes.

CHAIR—I would like to take this a bit further. In your submission you indicate the difficulty in Australia of getting somebody convicted under the War Crimes Act. If we did have a provision that somebody could be deported for crimes against humanity, then surely to reach that stage there would have to be some trial here to see that that person qualified. Do you see how we would get over the problems we already have with the War Crimes Act to get to that position where we could actually deport that person under those provisions?

Mr Jones—The large difference is whether it is a criminal trial or a civil trial. At various times when they have attempted criminal trials in Canada and the United States, they have found there have been obstacles that have not occurred in civil trials. Although the standard of proof by the United States judges has to be a proof beyond reasonable doubt, for some reason they have been able to find proof beyond reasonable doubt in civil cases which are immigration cases as against criminal cases.

CHAIR—So you would see a civil case brought against a person whom you believed had committed a crime against humanity and have them deported?

Mr Jones—Have their citizenship revoked.

Dr Rubenstein—We are talking about bringing Australian law into line with the standards applying in the United States and Canada so far as deportation is concerned. Yes, it is a two-step process that we are talking about here. We are talking about the necessity of revoking citizenship in the first instance, and then having a deportation hearing. Making the Australian experience really conform with US and Canadian experience is what we are asking.

CHAIR—I am not a lawyer. Mr Sinclair?

Mr SINCLAIR—I understand what you are saying. I have not been along for many of the hearings. I am interested in the point you are making because I can see the war crimes position. The trouble with war crimes and the parallel with America is that we have only really recently recognised war crimes within our legislative framework as far as I can recall. I do not know what the status of the law is in the United States. Is their war crimes legislation similar to ours?

Mr Jones—No. Certainly we have the War Crimes Act 1945. It was amended in the late 1980s. The United States, as far as I know, never enacted something similar to our War Crimes Act. It had an existing act but when they were dealing with—

Mr SINCLAIR—Nuremberg and places like that.

Mr Jones—later cases they were able to deal with them as—

Mr SINCLAIR—Under the original act.

Mr Jones—They were able to deal with them as immigration cases.

Mr SINCLAIR—You really need to look at the act to know just what the circumstances were.

Dr Rubenstein—What we did is what Canada did, which is why I think the Canadian example is certainly worth while exploring thoroughly. The Canadians, like us, and unlike the Americans, did go through a war crimes trial process with the same levels of evidence, beyond reasonable doubt, and with the same result—the difficulty of getting the witnesses and evidentiary levels required for a conviction.

What Canada has done in the last two years is to say, 'Well, there are serious cases here with prima facie evidence. We cannot get a conviction on criminal grounds but we are going to do something about it,' and they turned to this very process that we are outlining today: that is, revoking citizenship for individuals involved in crimes against humanity.

CHAIR—On the basis of a civil action.

Dr Rubenstein—And doing it at a civil hearing. They effectively have revoked citizenship in the last year. There were tests in the Supreme Court and the High Court in Canada which were upheld, and they have actually deported individuals in the last year, and there is a whole stream on line. That is why the Canadian case is particularly compelling.

CHAIR—Who brings the civil case in Canada? Is it the minister for immigration?

Mr Jones—It is him or his agents; I am not exactly sure.

Mr SINCLAIR—The nature of the civil penalty worries me and that is why I really need to look at the circumstances of the Canadian evidence. Our traditional approach in matters of this kind has been to look at the criminal law as having quite a different consequence and it is that which worries me. I hear what you are saying. We need to look at the Canadian law and just see what the consequence there is. We take on board your evidence, but I can see a problem in the introduction of the consequence of a civil action into our general concepts of the law.

Mr Jones—It is sad in one sense. Just to back you up, I remember back in 1986 when an Executive Council of Australian Jewry delegation met with Mr Sinclair in his capacity as Leader of the National Party. We were going over some of the same grounds. These were really difficult questions. At that time it seemed that the only practical path may have been amending the War Crimes Act. But, now we have the benefit of hindsight, we can see that simply was not solving a problem which remains today. The next option down the line, as far as we can see, is to deal with it from this angle.

CHAIR—I would be interested, for the purpose of this committee, if we could just put this to the Attorney-General's Department for a comment, for some background information for the committee—not necessarily for publication but just for background.

Mr SINCLAIR—Providing it can be worth while, we could get the secretary to write to the Canadian High Commission and ask the nature of the civil cases taken in recent instances regarding war crimes and get the details so that we can have that as a base reference. I think it would be of value and of interest to our committee, so I think we might get Andres to write to the Canadian High Commission and get the basis of the action they are taking and then we can have a look at it. It may be that from that we might want to come back to you, but I think we need to know what the Canadians are in fact doing.

Dr Rubenstein—We are hoping to acquire some of that material ourselves, and we would be very happy to forward it to you.

Mr SINCLAIR—If you had it as well that would be helpful too.

Dr Rubenstein—In addition.

CHAIR—Perhaps you might like to come for another discussion on it once we all have it.

Mr SINCLAIR—I would like to know what they have done in Canada because it is unusual.

Senator McKIERNAN—Did the war crimes legislation that Australia had confine

war crimes, crimes against humanity, to the European conflict?

Mr Jones—The amendment did. The amendment specifically, I think, said 'under Nazi Germany from 1933 to 1945' or something like 'ending in 1945 in the European theatre'. What was dealt with in the House did not, but by the time it came through the Senate and back it had been narrowed very much.

Mr SINCLAIR—It did not originally, I know, in the House, but I think it did in the end.

Mr Jones—Yes, in the House it was much more general, but after amendment in the Senate it dealt specifically with the European theatre of war.

Dr Rubenstein—That is certainly another issue that should be looked at seriously, we believe.

Mr SINCLAIR—That is not really for this committee this morning.

Dr Rubenstein—No.

Mr Jones—We are waiting for the relevant committee for that—or the nearest relevant committee.

Mr SINCLAIR—You should take it up with the Attorney-General.

Mr Jones—Yes, we have.

Mr SINCLAIR—The Attorney-General has an ongoing responsibility. Committees of the parliament are really only there when the Attorney-General or ministers for immigration find it difficult to make a decision. Isn't that right?

Dr Rubenstein—I might add that the Attorney-General made a decision earlier this year that he would drop the case for one individual against whom there was a prima facie case of committal of genocide. This raises our problem. There are many others who are suspected of committing serious war crimes for whom there is simply inadequate evidence. That is quite a general problem, not only with Europe, but I suspect it is more widespread and more current with World War II.

CHAIR—Yes, I suspect there are some activities like that. Thank you very much for appearing before us today Dr Rubenstein and Mr Jones. If the secretariat has any more questions, they will contact you.

Resolved (on motion by Senator McKiernan, seconded by Mr Sinclair):

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

Committee adjourned at 11.56 a.m.