COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON MIGRATION

Reference: Criminal deportation

CANBERRA

Friday, 17 October 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

(Subcommittee)

Criminal deportation

CANBERRA

Friday, 17 October 1997

Present

Mrs Gallus (Chair)

Senator McKiernan

The subcommittee met at 9.21 a.m.

Mrs Gallus took the chair.

JOB, Mr Peter Douglas, Director of Compliance, Department of Immigration and Multicultural Affairs, Benjamin Offices, Chan Street, Belconnen, Australian Capital Territory 2616

PARKER, Mr John Roland, Acting Assistant Secretary, Legal Services and Litigation, Department of Immigration and Multicultural Affairs, Benjamin Offices, Chan Street, Belconnen, Australian Capital Territory 2616

SULLIVAN, Mr Mark Anthony, Deputy Secretary, Department of Immigration and Multicultural Affairs, Benjamin Offices, Chan Street, Belconnen, Australian Capital Territory 2616

VARDOS, Mr Peter, Assistant Secretary, Compliance and Enforcement Branch, Department of Immigration and Multicultural Affairs, Benjamin Offices, Chan Street, Belconnen, Australian Capital Territory 2616

CHAIR—As you would be aware, these are the proceedings of the parliament and carry with them all that that implies. Today there will be a subcommittee of the full committee at this stage of the inquiry. I think everybody here has appeared before the committee and knows the rules. Mark, did you want to start off with an opening statement? We have got a very full submission from you, but do you want to add to that?

Mr Sullivan—Thank you, Madam Chair, if I could just say a few words but not many. I think the role of us being the last of the public hearings is for you to be able to cover as much of the ground that others have taken you over in the last couple of months. As at the end of September, there were 309 prisoners in the correction systems of this country who were of interest to us in a criminal deportation sense. Last financial year, 1996-97, 261 persons were considered for deportation and, of those, 92 were ordered deported.

Criminal deportation, as I think you have heard from many of the people who have made submissions to you, is a fairly serious business. The outcome of a decision to deport is that the person is sent from Australia back to their country of nationality and is barred from re-entry to Australia forever. The decision to deport is made on a mixture of criteria, largely the seriousness of the offence, the risk of reoffence or the prospect of recidivism, the contribution a person has made to Australia, and the ties they have with Australia. Rolled into that has been Australia's commitments to international treaties and conventions, and certainly one that is engaged in the criminal deportation process in recent times has been the Convention on the Rights of the Child.

Against this criteria we currently have a limit that once a person has been a permanent resident in Australia for 10 years they will not be considered for criminal deportation, and certainly our submission raises the prospect that there are crimes which may warrant the 10-year period being reviewed. They are so abhorrent to the Australian

community that the non-citizen should be deported. The other issue which we see raised with the committee and we have an interest in is: when do we consider deportation? In our current mix of criteria, to look properly at the chance of reoffence, we seem to need a time within the correction system to be able to get a report from the correction system as to the prisoner's conduct and prospects on release.

At the same time, a delay to near a release often means that if the deportee pursues their rights to review through the AAT and/or the courts, their term of imprisonment expires and then consideration has to be given to whether or not to maintain immigration detention or not. A fair amount has been spoken about whether during such consideration a person should be released. Prima facie we say that, having made a decision that a person needs to be excluded from the Australian community on the basis of the seriousness of a crime and the chance of reoffence, it does not seem to logically follow that that person should be considered safe to release into that same community while they pursue avenues of appeal against the deportation.

We have heard about rehabilitation programs and prisoner classification systems and the impact a criminal deportation or an outstanding criminal deportation decision may have on them. Our view on that is that we see no reason why the state correction services departments should alter a prisoner's classification or their access into programs simply because they are being ordered deported. If there is a view that the deportation order in itself increases the risk of escape or increases the risk that the prisoner may be involved in activities within the prison which see a risk assessment review necessary, we then would support such a risk assessment, but one that not just follows simply.

We have also heard about our relationship with the state correction services. I would like to say at the outset that we believe the state correction services individually cooperate with us to the best of their capacity. We have no gripe with how that cooperation works in the various states. However, as evidence has been put forward before you, that system is not perfect. The system of identifying prisoners of interest relies heavily on self-determination by the prisoners that they are of interest to us, and it does seem to us open to see some more uniform system of liaison between the state correction services departments and ourselves.

That is all I would like to say, Madam Chairman, to start it going. We have got people here from both the legal side and the compliance enforcement side who should be able to discuss and help you with any questions.

CHAIR—The way we will take this is that the submission you gave to us falls naturally into segments, which would be your introduction, and with your introduction we will combine the remarks you just made, and then it falls naturally into the terms of reference. If you are happy with that, deputy chair, I would like to attack it in those segments so that we are not all over the place.

Senator McKIERNAN—Yes, I am quite happy with that procedure, but perhaps we might deal with one of the side issues that arose during the course of the inquiry that wasn't within the terms of reference. You would be aware of the matter to do with a person who has a conviction or suspicion of a conviction before the person entered Australia and then got citizenship. The Jewish organisation gave us direct evidence on it, but it was raised at earlier hearings and it continued to raise its head as the inquiry has commenced. Are you on top of the issue that was raised?

Mr Sullivan—I am generally aware of it, Senator. If it was a specific issue I would go further into it. There has been controversy and it certainly has been heightened with the return to Australia, as a deportation issue, of Mr Kalacsj. Then it got into the questions of whether or not there was a basis for stripping him of his Australian citizenship. Certainly citizenship law, like most law in this country, has changed over time and the citizenship law which applies today has resulted in the most recent changes in respect of migration fraud and the removal of time limits.

It means that a person subject to today's citizenship laws is far more liable to have their citizenship stripped if it can be proven that criminal activity or migration fraud occurred in the lead-up to their granting of citizenship. Of course, the Citizenship Act in 1949 was a far different beast and certainly the Citizenship Act in 1957, when Mr Kalacsj became a citizen, was a very different beast. There the capacity to be able to go back in time and look at possible crimes, if there are convictions, that occurred prior to the application granting citizenship was very different. Clearly the law, as stated there, would not allow that to occur. The only option obviously then open to anyone would be to retrospectively change the Citizenship Act backwards by the 40 or so years required, and whether you would catch anyone else would be a matter that the parliament would have to work through.

Senator McKIERNAN—When it was first raised at the Sydney hearings, I think it was, before the decision for Mr Kalacjs to be deported back to Australia was raised, I was of the view that this matter was outside the terms of reference for this current inquiry by the committee. Would you agree with that?

Mr Sullivan—I would agree totally. That is a matter of Australian citizens and criminal deportation as a topic is about non-citizens. Once a person is a citizen they are outside the scope of any criminal deportation submission. If a person was deprived of their citizenship they could enter that scope, but citizens who are deprived, I think the government has acted strongly as soon as it came to power to address what it felt were the shortcomings in the citizenship law to do with deprivation, and that was to include migration fraud as a basis for deprivation and to remove the then existing 10-year limit on deprivation of citizenship.

CHAIR—I think the deputy chair wanted to put that one to rest. I am just going through your introduction and I am trying not to get into the sections of the reference

because we will obviously go into those more deeply later. But I just had a few minor inquiries of detail. If you turn to page 3, point 11:

Reoffenders, who on a previous occasion were liable for deportation but were not deported and were issued with a warning not to reoffend, are also reconsidered for deportation on the basis of their earlier conviction.

So if somebody had been warned, but the next conviction was say for six months, could it then invoke the earlier deportation?

Mr Sullivan—Yes, it can.

CHAIR—So there is no length of time on that.

Mr Sullivan—No.

CHAIR—So as long as there is another one. My next inquiry is on the way 14 is written:

Reports on interviews conducted with offenders and other persons nominated by the prisoner such as spouse, et cetera—

The way that is written, it would look like you only interview the spouse when it has been asked for by the potential deportee. I would presume that you would interview the spouse in most cases anyway, whether it was asked for by the deportee or not.

Mr Sullivan—Our current practice is to interview persons who the prisoner requests us to interview.

CHAIR—And that is all?

Mr Sullivan—If the prisoner, he or she, does at times request that we not interview people our current practice has been to not interview them.

CHAIR—Do you see that as a weakness?

Mr Sullivan—I think in terms of the coverage of persons of interest to the decision, yes, it is a weakness.

CHAIR—I was especially imagining cases where the spouse and/or the children are in some sort of view of retribution, that to not interview them would be perhaps not in the best interests of the community.

Mr Sullivan—I think a non-interview with a spouse, particularly where a prisoner asks for the spouse not to be interviewed, is viewed in terms of the strength of family ties

as being a negative. So it doesn't protect the prisoner from a negative assertion being made in respect to family ties. In attempting to keep us away or asking to stay away from a spouse we generally view that matter as saying the spouse is probably positive, if not neutral, about their spouse's deportation.

CHAIR—You are presuming if they say, 'Don't interview my wife' it is because the wife is going to say, 'Kick him out.'

Mr Sullivan—If the spouse approaches us we talk to them.

CHAIR—That is interesting. So if the spouse actually asks for an interview you will then grant that interview.

Mr Sullivan—We will interview them.

CHAIR—Good. I think we have established later on that there is no present access for victims other than—

Senator McKIERNAN—Do you limit that request only to spouses? What about children of the offender?

Mr Sullivan—No, anyone who approaches us on a criminal deportation matter we will listen to. We generally don't interview children; normally we often have written statements from children.

CHAIRMAN—On page 30, No. 17:

Of the 538 persons who were given warnings between 1 July 1990 and 30 June 1996, rather than being deported 73 (14%) have reoffended.

Do you have any way of finding out how many people took out citizenship after they were warned, because I know there is a chance that they may not be? I have got two sets of numbers. I have got 30 on the bottom, that is our briefing paper number and No. 4 at the top, which is your submission number.

Mr Sullivan—I do not know. I will try and find out whether we can tell you how many persons who have been warned subsequently gained citizenship.

CHAIR—It is an interesting one because there is the right then to refuse citizenship on the basis of character grounds.

Mr Sullivan—There is.

CHAIR—I think it would be interesting for the committee to find out if ever—

Mr Sullivan—Yes. There certainly is a decision-maker. The person would in all likelihood disclose the criminality. If they didn't it would be disclosed for them and that would probably make it harder. Then the citizenship delegate has to make a decision on whether or not to view that offence as being of such a nature to refuse citizenship on the grounds of character or not. I will try to get some numbers.

Senator McKIERNAN—Do you have any system in place to track those people that have received warnings to ensure, if they do reoffend, that that reoffence, the further offence, is brought to the attention of the department?

Mr Sullivan—I wouldn't think we have a good system to do it, Senator. As you have heard, depending on which state it is, we are told of all persons re-entering the prison system who are of interest to us. When that person has been of interest to us before the system comes up. So there is a system that whereby the second time they go into gaol it alerts the system to the fact that this person has been considered before, and then the previous files will be gathered together and the new submission will be based on the first offence or on both offences.

Senator McKIERNAN—The initial drawing to the department's attention of people that may be of interest seems to me to be quite hit and miss, to say the least. We were hopeful to talk with some of the other states' law enforcement authorities, other than the information we got from New South Wales. But it did seem to be quite hit and miss in the first instance. What would be in position to prevent somebody who had been there, found out what the system was and who then sought to cover up their nationality the second time around?

Mr Sullivan—First, there is the justice in prison systems in terms of the person who has been convicted of a crime before. There is interest in the law enforcement agencies and the justice system in knowing that they have been convicted before because it goes to the matter of sentence and consideration of the crime. So while I think we are more vulnerable at the first crime stage, that is the person who enters the justice system and says, 'I was born in Australia,' from what I have read and heard of what has been put to you, that may go undetected.

I think there is far less vulnerability at the second stage; that is if they come to attention again, because I think there is far more need to know from a justice system perception side of things that a person has been before the justice system before, has a record, and you even get into, where available, national fingerprinting indices and things like that to determine that a person may be attempting to use an alias to avoid the consequences of a criminal record being found out. I think there are far more players in the game. Let's see that vulnerability reduced considerably compared to the particular issue that you have heard before of the first entrant into the prison system saying, 'No, I'm Australian.'

At the moment I think there are about 17,000 people in prison in this country. It is obviously something which we have to do in conjunction with the correction authorities. We don't hold records of Australian citizens other than by citizenship ceremony; that is persons who acquired their citizenship. There is not a national record of births, deaths and marriages. So a person who attests to us that they are Australian born, we can only do negative checking on that; that is to see whether we have a record for them in terms of a visa record or an entry record or something like that.

I don't think it would be simply enough to say, 'Well, throw that prison population names over to us and we can do checks against them.' It is certainly at the corrections stage the interest in who a person is is the critical one. If they try an alias with us, we will probably come up with a negative and say, 'No, we haven't got a record of them. They must be Australian born.' It's a matter of trying to work out who the person really is. That seems to be something that can only be dealt with with the cooperation of the justice system and the correction system.

Correction systems generally are in the end dealing with people who have come through the justice system, or they are always dealing with people who have come through the justice system and have attested to who they are.

Senator McKIERNAN—I think we probably will be coming back to what happens at the primary stage of identification at a later time where we can further address the matters. How long does a warning last, when a warning is issued? Is that something that just stays on file ad-infinitum or has it got a limited time period?

Mr Sullivan—It has no limit in its time period. It actually means that you can be considered for criminal deportation unless you are made a citizen forever.

Senator McKIERNAN—So the offence is committed in year two and then a subsequent offence is committed in year 22, the deportation can be effected on the offence in year two?

Mr Sullivan—It can be. The weight you would give to the prior warning would not be as significant a weight as you would to a person who, for instance, was warned last month and went out and committed another serious crime next month. I mean, that would be given extremely high weight. Someone who committed a crime 20 years ago and came back before the system today, you would give it weight but not the significant weight you would give the other example.

CHAIR—My further question on your introduction is at page 5 number 24. You are talking about the draft policy:

In particular the draft policy acknowledges that the best interests of the child will be given primary consideration along with other primary considerations which go to the protection of the Australian

community.

If we turn to attachment C, which I think is the policy—it is the draft policy—number 9, you have actually listed this, and it reads:

The government is mindful of the need to balance a number of important factors in ensuring the protection of the Australian community, primary consideration being given to—

and then you have listed six of the factors that are important to balance. I was interested to note that the best interests of any children involved are actually listed at the second-to-last, the penultimate one. There are no numbers there, so there is no reason to suppose that they are numbered in order. Is the fact that that dot point appears lower down meant to be any indication of the importance that is put on CROC?

Mr Sullivan—No, it is not. What Teoh and what CROC means is that the rights of the child must be a primary consideration for us. Depending on the case, any range of these things may be other primary considerations, but there isn't an order of magnitude of primary considerations. It depends on the circumstances. In the end you have to give regard to each of the primary considerations in particular, and then decide on what weight you will give each of them.

CHAIR—But you agree that just on a cursory reading it would appear by the way it is set out, whether a person has established ties with the Australian community, it may look to be slightly given more weight than the interests of the child?

Mr Sullivan—Yes, I have no problem in any perception that the order was important in putting more thought to what order that they should be in, even without saying that gives them an order, because it is about particular cases. Sometimes the ties to the Australian community can be one of the considerations that you would give most weight to. There are several instances where those ties are so strong that they are as important, or combined with another primary consideration, which often might be the interests of a child will outweigh the weighting you give to even a very serious crime.

CHAIR—I think when we signed the letter we managed to do it on the alphabetical order to indicate that there is no primacy of people. I suspect it might be a bit difficult to get your points in alphabetical order. It is always handy with signatures. Jim, that completes my questions on the introduction and the opening statement. Do you have any questions on the introduction and the opening statement?

Senator McKIERNAN—No.

CHAIR—All right, can I ask you then perhaps to open on your questions on the first terms of reference.

Senator McKIERNAN—One of the confusions that seemed to be in the mind of a number of witnesses, not all of them, was that deportation was a second punishment for an offence. Obviously that view cannot prevail because the Minister for Immigration can't be in a sentencing position, but do you agree that is a view that is in the minds of the people—and obviously you are much closer to it than perhaps the committee is, but it certainly did come through from a number of witnesses that deportation was indeed a second punishment for offences committed in Australia.

Mr Sullivan—I think it is a very complex concept. I have no doubt that deportation is punishing to a person involved but it is not punishment. It is not a punishment determined as a result or in response to the crime you have committed. It is a consideration of whether or not, as a non-citizen, you maintain the right to be part of the Australian community. That is as a direct consequence of a crime, but other factors are weighed up. So it is not a second go at the person for committing a crime. It is the fact that the commission of a crime and its punishment draw you into another framework which is a migration framework, which is that the visa that you have been granted to remain in Australia permanently, whether or not because of a consideration of all of the factors that are involved in the criminal deportation decision, should be taken away from you.

I can see how it is easy that people see or make the argument that it is a second punishment. I do agree that it is punishing on the person to be deported. It is probably one of the worst things that could happen to an individual, but it is an absolutely separate framework considering a whole range of factors triggered by a crime.

Senator McKIERNAN—If that be the case, then why is not every deportation decision challenged because indeed every decision is not challenged, either to the AAT or the courts?

Mr Sullivan—Some people are accepting of the decision. They understand the process. Particularly where there is a most serious crime and/or a lack of ties to the Australian community, particularly family ties, people will accept a deportation decision.

CHAIR—In the terms of reference regarding the 12 months rule, you point out on page 9 No. 45:

A person may have been convicted of three offences, each attracting a sentence of 11 months, but would not be considered for deportation.

This is obviously a problem with the legislation as it now stands. How would you get over that? Would it be a clause in there that referred to anybody who had a received a sentence of more than 12 months, or had received a number of sentences which together totalled more than 12 months? Would that be the way you would be looking to change the legislation?

Mr Sullivan—That is how you would do it if you were minded to do it. It would be just a matter of changing it from the current wording, which I think it talks about 'an offence drawing' to 'an offence or offences drawing 12 months'.

CHAIR—And you would be happy then with the 12 months? You wouldn't say, if it is three offences of four months each, 'Okay, two years in this case,' or you would like to stick with the one year?

Mr Sullivan—That is open to debate. Twelve months has been a pretty reasonable benchmark.

CHAIR—What I am asking you is, is there an equivalence between a crime that has received a 12-month sentence and three crimes that have received four-month sentences? I am not going to put you in a position of acting as a judicial expert, or ethicist, but just on a gut feeling what do you feel about that?

Mr Sullivan—I don't think there is an equivalence. My lay view is that a crime drawing three months is going to be a substantially less serious offence than a crime drawing 12 months. What I find difficult is saying, 'But does four of them equal one of the more serious ones?' There are people much better equipped than I am at this. But there are people who are into crime in a meaningful way, who are found by the police and taken through the justice system and will have a lot of charges laid against them. You may find that you will get 17 charges of car theft, and each of them may bring three months. Whereas if the crime is going into a petrol station in a stolen car and wielding a knife and stealing $100, then you will be charged with car theft and armed robbery, et cetera, and you will get a lot longer sentence. There is no equivalence in the seriousness of those things, but I am not sure how many of the small ones are needed to make up a big one.

Senator McKIERNAN—Would the motor vehicle offences make a person liable for deportation if there was a cumulative sentence of over 12 months involved?

Mr Sullivan—If you allowed it to be offences as well as an offence drawing a 12-month or more sentence, it would bring them into consideration. Basically what it would mean is that, under the first criteria in the current consideration, which is the seriousness of the crime, it would be not regarded as a serious crime. So if you had other factors in the case which weighed in favour of the person remaining in Australia, in all likelihood you would probably find a warning issued.

Senator McKIERNAN—What triggers it? Is it a 12 months sentence or the seriousness of the crime?

Mr Sullivan—At the moment it is the 12-month sentence. If a change occurred and we were allowed to look at persons who had committed offences that resulted in 12

months gaol, then it would trigger consideration by those offences totalling up to 12 months. At the moment they are not considered. If someone goes into gaol on the basis of five six-month sentences to be served concurrently, or even if they weren't served concurrently, we would look at it and say, 'Not to be considered for criminal deportation.'

Senator McKIERNAN—What is going through my mind is that this may possibly include civil offences or merely political protest actions. There was a case during the last election of illegally handing out how-to-vote cards. There was a substantial prison sentence imposed. If that person had continued to offend in that manner, quite easily a 12-month thing could come up. That would not constitute a serious crime in my understanding. In that sense, I wouldn't like to see civil offences of that nature, or even minor offences such as parking fines which ultimately do carry a prison sentence, coming into consideration for deportation.

Mr Sullivan—I understand where you are coming from. It has to be a criminal conviction.

Senator McKIERNAN—Criminal, yes. I rest my case. It puts misdemeanours and political activity out to one side. Is that correct?

Mr Sullivan—Yes.

CHAIR—You have also suggested the possibility of making an obligation to deport at page 9, No. 48. You have given us a recipe that might be followed whereby deportation would be automatic. Is this actually a recommendation of the department? Or was it just, if the committee did feel that deportation should be automatic in some cases, that you felt this could be a formula?

Mr Sullivan—It was a concept that we wanted to put up for your consideration. Being the person who considers these criminal deportation matters, you do find that the weighing of a case against the various criteria is a complex task and there is no perfect outcome. This is not seeking a perfect outcome. It is really testing whether or not the seriousness of the crime should become the primary consideration in a criminal deportation decision. That is, if a crime is highly serious—and we even introduce the idea there that it depends on how long you have been a permanent resident for—then it may be enough to say, 'You shall be deported.'

CHAIR—Can I put to you, then, that in this case you could have some pretty horrible travesties of justice. Looking at your second case, let's consider the example of an immigrant family, with both spouses working very hard, and the father being an absolutely marvellous member of the community who goes to church, supports all the local organisations, but who is very protective of his children. Then some young local boy goes past, makes some indecent remarks to his daughter or is offensive to her. He immediately rushes to the defence of his daughter. He assaults the young guy, beats him up quite

severely, and in fact gets 13 months gaol, say. Under your rules, the fact that he has little kids at home who are all going to school, and another family out in the community that is extended, which reaches out into the community, is not taken into consideration. He would automatically be deported after he had served his term.

Mr Sullivan—Under this framework that is right. But we raised the idea that there would be a discretion to look at the circumstances of particular cases and substitute a more favourable decision which would come from the deeming in paragraph 50.

CHAIR—Yes, I can see that in some cases of exception circumstance the minister could be a noncompellable power to revoke the deportation.

Mr Sullivan—Yes, we certainly are not saying, 'Take this package as we have spelt it out or leave it.' It may be that there are parts of it you are attracted to and parts you are not. It may be at the most serious end of crime and we will get into the 10-year rule, and that is where someone receives a sentence which is—I mean once you get into a sentence these days of more than five years and up to life it is generally an extremely serious crime for which the justice system has not recognised many mitigating circumstances. The sort of crime that you describe there, the justice system does recognise mitigating circumstances. It may not reduce the sentence to under 12 months but certainly there seems to be a threshold in sentencing of very serious crime.

CHAIR—It certainly obviously has its attractions and you have made it clear that it has its attractions to you as a department because it takes some of that onerous responsibility off you, but I am not sure that this committee is quite as keen to take that onerous responsibility off you as you are to get rid of it.

Senator McKIERNAN—It relates to the guidelines as well. Aligned with this there have been some criticisms of the guidelines that they are not specific enough, that there is not enough clear weight given to one guideline as opposed to another. The AAT were particular in their criticism of this. But it seems to have followed through into the draft set of guidelines that have been given to us as well.

Mr Sullivan—It is why we probably concentrated on the seriousness of the crime as indicated by sentence. It is very hard to give a great deal of certainty to how you will approach each of the other criteria, because it is very much dependent on the case. Everyone would like more certainty and as the chair said, we would like to get rid of it and maybe making it certain would get rid of an onerous responsibility. Our prisoners would also like more certainty about what may occur, because they are not sure whether or not they are going to be ordered deported or not.

In terms of consistency of decision-making, the only thing I can say is that it is one of the few areas of immigration decision-making which is concentrated in one person. So whilst submissions are written by a group of people around the states, of the

department, the decisions are taken by one person. So I would at least hope, being that person, there is some consistency on how the individual decisions are taken.

Senator McKIERNAN—I wasn't questioning that at this time.

Mr Sullivan—I know you weren't.

Senator McKIERNAN—Maybe later. It is argued that there is not consistency in the judgments or the sentencing—you see it from time to time, and I don't want to go into individual cases, but some offences can receive seven years, and other offences, depending on the profile of the individual, can receive what seem to be relatively light sentences. In that context how useful is the 12-months sentencing rule?

Mr Sullivan—I think while there are always cases where we and the public look and think, 'Well, how did they come to that?', in terms of when you read a judge's comments and you look at the circumstances of crime and the sentence when doing an individual case, you are given reasonably good and clear guidance from the court and the judge as to his or her belief of the seriousness of the crime, and that certainly helps you in looking at the crime. I must say I don't look at the gaol sentence and say, 'He got four years, therefore it must be more serious than this guy who got 3½ years or three years.' I am far more interested in the judge's summation.

CHAIR—Can I just put in there about the judgments, because Andre raised with me the question of whether, if we had this mandatory deportation, whether that would influence the sentencing of the judges at all, knowing that certain sentences would bring with it automatic deportation?

Mr Sullivan—It may. Both ways, I would think.

CHAIR—You mean, 'If I give this guy a couple of months more we'll be rid of him forever.'

Senator McKIERNAN—Does a judge now take those arguments into consideration in handing down a judgment? You said you have read judgments.

Mr Sullivan—Judges will from time to time talk about criminal deportation. I haven't seen any judgment that I have read which would suggest that a judge has decided to sentence a person to more than 12 months because it will bring them in for consideration for criminal deportation, but I certainly have read judges' comments where they are fully aware that criminal deportation considerations will follow.

CHAIR—Moving on to warnings, on page 10, No. 51, you give us four options for warnings. Do you have any personal preference here? I mean, you have come up with

these four options. Rather than ask you actually for a preference, are there any that you see that may have any particular problems or are there any of your four options that you see have particular benefits?

Mr Sullivan—I think the case you yourself, Chair, raised about 20 years later, and whether once you have had a warning you would be deported you would need to be careful of. At the same time, I guess, we would like a lot more certainty about warnings. That is occurring but it takes time to occur. Certainly I can say that these days prior warnings are given great weight in criminal deportation decisions. That, I think, is becoming known by people who have had a previous warning. I think it is probably even fairer to codify this than the initial crime in that a person who has breached the law to the point where they are being considered for criminal deportation, where they are then handed a formal document that gives them the result of that consideration, and as part of that formal document are given a warning which they acknowledge in writing and which is often administered, along with relatives being present, that to make it clearer and more certain that a level of reoffence will result in automatic deportation, I think is a good idea.

It is a matter of choosing the formula; whether it has to be another deportable offence. In other words that the person must be convicted of a crime drawing another sentence or sentences of at least 12 months, and whether or not there needs to be a time frame stipulated, that it should occur within X years of the first warning or not. I think they are the only two considerations. But I think the certainty that a second offence will see you deported would be a very positive move.

CHAIR—I must say the one I am attracted to is a combination of your last two, which would mean if a person reoffends within a certain stipulated period they would be deported, and I would like to actually add, 'unless exceptional circumstances exist,' which you had in a previous one, because I think there are always exceptional cases, but then add on your next one, and if a person reoffends after the stipulated period, after the warning, they be deported if the sentence is for one year or more. That would combine elements of three of those. Do you see any problems with that? It is a hard one to give you.

Mr Sullivan—I would only like to see, if we are going to codify things, that exceptional circumstances are dealt with in terms of discretions at the end of it, not in the consideration, because if you put them in the consideration, then you may as well do it from the start.

CHAIR—Take it out. So we will take out exceptional circumstances, but at the top end, always the minister would be able to review.

Mr Sullivan—Yes.

Senator McKIERNAN—When a warning is issued, who knows about that

warning? Just the department and the offender?

Mr Sullivan—The department and the offender, and if the offender is fairly young we often call in a parent or a relative. If someone has strongly supported the stay in Australia of an offender, that person is often there when the warning is administered.

Senator McKIERNAN—Would the prison authorities in a given state or territory be told about it?

Mr Sullivan—The prison authorities are informed that the person is not going to be deported. They know then it is a warning. There are only two outcomes. There is no outcome other than a warning or deportation.

Senator McKIERNAN—But are the prison authorities told that a formal warning has been issued?

Mr Sullivan—They are told negatively, in that they are told as soon as a decision is made that the prisoner will not be deported.

Senator McKIERNAN—Would that go on the individual's record?

Mr Sullivan—That they are not going to be deported would be on the record, but not on their formal records. It would be on the internal prison files, not on the criminal record.

Senator McKIERNAN—I put it to you that it would be easy for a person to commit an offence, receive a sentence, be considered for deportation, be given a warning, and then at a later time reoffend and cover up the fact that they are not an Australian citizen, and also, in doing so, cover up the fact that a warning had been issued.

Mr Sullivan—No, I don't think it is that easy to do that. I think it is quite difficult to cover up a second serious crime where you have been sentenced to gaol for more than 12 months in the first instance, because basically the justice system has a lot of record on you, including often your fingerprints in national fingerprint systems. As I said before, the justice system is vitally interested in the fact that you have a prior criminal record. While I am not saying there is no risk that you can cover up on a second offence, I think the risk is greatly diminished, and I think the way the states' justice systems are moving is reducing the risk all the time.

There would have been a greater risk if it was in different states that you committed the crimes. If you committed a crime in Victoria, went to gaol, came out, moved to Perth with your warning under your arm, and then committed a crime in Perth and decided to front as a different person, it would have been more likely that you would get away with that a few years ago than you would today. The justice system is aware that

we are moving to close that gap.

Senator McKIERNAN—I can see how an individual could be tracked through the justice system with the nationality. It seems to me on the limited evidence that we have got to date, there is not a great deal of emphasis on the collection of that type of information at a state level. They take the word of the individual, and I think that is in fact one of the appendices to the submission. If the individual tells them that they were born in Burma and are now an Australian citizen, that is just taken as read. You have indicated earlier about your negative checking on people. So, in the context of where we are talking about the second offence, if an individual, having committed a crime in Victoria and done the sentence, has then moved to Perth and been convicted again of a further offence, and said on that conviction sheet that they now were an Australian citizen, how would the warning system, the deportation system, come into being?

Mr Sullivan—I see the risk you are talking about there, and it would be present.

Senator McKIERNAN—It would be present? Your checking mechanisms would be on name, not necessarily on fingerprinting, and if an individual said that they were an Australian citizen, no checks are done, are they, in those circumstances?

Mr Sullivan—It would probably require more delving with the corrections departments, as to: if the justice system determined that a person was actually a repeat offender, and they sought material from a previous offence and it registered the country of birth as the UK, for instance, and now the country of birth that was being purported the second time around was Australia, whether or not that would be thrown up.

Senator McKIERNAN—I can see that that probably would set alarm bells off, but there is the ability for people in the interim to take Australian citizenship, just as there is the ability for some to lawfully change their names.

Mr Sullivan—The citizenship one would not work. There is a difference between going into the justice system saying you are Australian and trying to apply for citizenship and forgetting that you were a criminal deportee.

Senator McKIERNAN—No, I am only using that by way of example, that there is the ability to change the details of an individual from a records point of view. If somebody gets married and they take the husband's name, that is a lawful change of name for the subject matter that we are dealing with. But if somebody just merely said it following the committing of an offence in another state, there are no necessary checks and balances in the system to find out if in fact the individual is telling the truth, if in fact the individual has become naturalised, or indeed if the individual been issued with a warning in the previous context.

Mr Sullivan—Yes.

CHAIR—Just having a look at what Senior McKiernan referred to, which is what happens in each of the states, often it is written, 'Full name, date of birth, country of birth (as given by inmate),' which does suggest that we have a large problem, or there is the potential for a large problem, at both the primary and the secondary level. I take your point that because of the justice system it is less likely that someone can slip through after being given a warning, but it must still be possible.

Senator McKIERNAN—Is the warning actually a written document given to the individual?

Mr Sullivan—The individual must sign the paper. It can be administered orally, but there must be a written receipt of it, unless we cannot find the person, and warnings are given to people who we cannot find.

Senator McKIERNAN—I don't think we have got information as to the number of times a second warning is issued. There has been a consideration for deportation, a warning is issued, there has been reoffence, and again another warning is issued.

Mr Sullivan—We haven't got the numbers on it. It does happen.

CHAIR—Presumably the 14 per cent who reoffend have all got second warnings.

Mr Sullivan—Some of them would have been deported and some would have got second or third warnings. I have dealt with cases which have had three warnings. Some of those are to do with particular national groups, where the warning was administered on the basis that the deportation could not be effected.

CHAIR—What is the point of a warning if you can't deport them?

Mr Sullivan—As we have discovered, these things change.

CHAIR—So it is a warning that, 'We can't deport you now, but if you reoffend and if the situation in your own country has changed, we will.'

Mr Sullivan—Yes, that actually happens more than—unfortunately one of the more common national groups that I see are Romanians, and Romanians until the early 1990s were very difficult to effect a criminal deportation on; first because they often had refugee status, and secondly, the Romanian government would not cooperate with a criminal deportation. The Romanian government today is very cooperative with the Australian government with respect to criminal deportations. A number of people that we have seen deported in recent times to Romania probably had—some of them certainly had multiple warnings.

CHAIR—In your submission you actually suggest:

The committee may wish to consider whether legislation or guidelines could provide for the deportation of a person who has reoffended after receiving a warning.

Where do you see it? Do you see it more appropriate in legislation perhaps or in the guidelines?

Mr Sullivan—I would see, if we are going to codify and give certainty, that it has to be in the legislation. I think the alternative was that if it wasn't viewed as suitable to go in the legislation, in terms of some of the constructions you talked about before, could the guidelines be altered to give a prior warning significant standing in the decision whether to deport or not.

Senator McKIERNAN—By putting it in the legislation, would it change the review rights of individuals? Would it alter it in any way?

Mr Sullivan—It certainly would. If for instance the guidelines said that a decision-maker should give great weight to a prior warning, it would still be open to review as to whether the decision-maker gave inappropriate weight to the prior warning in coming to their decision. If it was in legislation saying that a person shall be deported if they have within a stipulated time-frame been warned before and have again committed a crime attracting a sentence, then it would not be open to review the merits of the decision to deport based on that. You may challenge it on other grounds, but it would be binding on me and it would be binding on tribunals that review decisions and it would be binding on courts. So it is quite considerable differences to the impact on review.

Senator McKIERNAN—There would be considerable difference in the numbers from what has happened previously to what would be happening in the future, would there not? One would expect, if this regime was adopted, there would be a real increase in the number of people who are actually deported from Australia.

Mr Sullivan—I think probably if we had numbers over the last 12 months or more, there probably wouldn't be that significant an increase. I think it has been unusual to have had a prior warning and not be deported in the last 12 months.

Senator McKIERNAN—We haven't got all those figures.

Mr Sullivan—It is probably only from the benefit of where I sit in saying that prior warnings are, in my consideration of things, being given quite considerable weight.

Senator McKIERNAN—It is a serious one. I don't want to delay the deliberation of the committee and the committee's report on things, but mandatory deportation is something that does concern me. Obviously I don't have all the information that you have got in front of you. I don't want, however, to ask for that information and then have further time to consider it. How long would it take to get the information to us?

Mr Sullivan—It would take a significant time. We would have to review every case.

Senator McKIERNAN—Perhaps we might have some revision at a later time to see what direction we are heading.

CHAIR—What is the key piece of information you want?

Senator McKIERNAN—The number of prior warnings that were issued and what was the result—whether the individual was then sent out of Australia or not sent out of Australia.

CHAIR—Would that take that long to do, Mark? There is no quick way?

Mr Sullivan—There is no quick way of accessing it, but we will have a look at whether we can get something on that quickly.

Senator McKIERNAN—If there were 97, I think you said, were ordered in the 12 months in your opening statement, and all 97 had received prior warnings—

Mr Sullivan—If I had to guess of that 100 or so who were ordered deported, probably about 20 had received warnings—about one in five.

Senator McKIERNAN—Were there any, that came into consideration in that period of time, who had received prior warnings who received another warning rather than being deported?

Mr Sullivan—Yes.

Senator McKIERNAN—With codification or a mandatory deportation system and after a second warning, there would still be a provision for exceptional circumstances—

Mr Sullivan—The minister's discretion to alter the decision.

Senator McKIERNAN—That would be the minister only or perhaps the secretary—

Mr Sullivan—The minister could delegate that, although the minister has not delegated. When a minister has such a discretion, it is a non-compellable discretion for the minister himself. I think the examples so far could not be delegated to the secretary or the deputy secretary.

Senator McKIERNAN—If you did delegate in those circumstances, that would be

open to a different type of review, or it could be open to a different type of review?

Mr Sullivan—If you used the way we have opened discretion before, it would mean that the minister would say to the decision-maker, 'If you find in looking at a case for criminal deportation that they are going to be deported, for instance, because of a codification of the warnings rule, and there are circumstances which you believe I should examine, I may have a mind to examine those circumstances,' and accept a referral and look at the use of his discretion. I am watching John Parker out of the corner of my eye here, because when we get into these non-compellable discretions and their use, you have to be very careful.

Senator McKIERNAN—For my hesitancy as well.

Mr Sullivan—There obviously has to be a mechanism in a matter like criminal deportation whereby that compelling case can be addressed.

Senator McKIERNAN—But in the circumstances in the proposed regime—I am saying that in its kindest possible way—the minister cannot be compelled to even look at the decision?

Mr Sullivan—No.

Senator McKIERNAN—Never mind take further evidence.

Mr Sullivan—No, that is right.

Senator McKIERNAN—He or she cannot be compelled to do it. So it is quite a weighty matter we have got to deliberate upon.

Mr Sullivan—I wouldn't put huge weight on the fact that the minister cannot be compelled to look at them. In terms of the use in a non-compellable discretion, ministers have generally been willing to offer guidelines to decision-makers as to the type of case that they would be willing to look at. I am certain in respect of an issue like this, where it is a relationship between the minister and one decision-maker, that it would be very easy to have the sorts of cases which the minister would be willing to look at.

CHAIR—With respect to applications for citizenship, you have suggested that once somebody had received a warning they could not receive their citizenship for a certain stipulated length of time. Did you have in mind any particular length of time, or the nature of the crime? How were you thinking that could be carried out?

Mr Sullivan—We would probably want to see some consistency, if you went to some codification of a warning system, to the expiry of that codification. If a person who had had a warning then committed another crime and had another warning within, say, 10

years—

CHAIR—So just tie it to the warning system itself?

Mr Sullivan—Yes. We would probably say that until the expiry of a similar time-frame, that person should not be granted citizenship.

Senator McKIERNAN—On the application for citizenship is there some provision that will alert the department that a warning had been issued?

Mr Sullivan—There are a number of questions on character and criminal convictions on that. When a person applies for citizenship, the fact that we have a criminal deportation file on them will become evident through the department's registry system.

Senator McKIERNAN—That is a centrally-held system?

Mr Sullivan—It is held centrally. It is a mixture of systems at the moment. We are moving to one system. It would alert the decision-maker.

Senator McKIERNAN—Irrespective of where an application was lodged?

Mr Sullivan—The systems are available to anyone.

CHAIR—You mentioned before the difficulties of deporting criminals to certain countries. You have mentioned to Vietnam. Could there be a situation where a mandatory deportation order is made but can't be carried out because the country will not receive its nationals?

Mr Sullivan—We can get into that situation. Vietnam is an interesting case. Vietnam had a very clear policy in relation to the return of its former citizens who had left Vietnam illegally under its law. If a person left Vietnam illegally and then came to a third country, it would not accept the return of that person. It would differentiate between a person who migrated lawfully from Vietnam to Australia, and is subject to deportation. That is a different matter. The Australian government has been negotiating with Vietnam about a change in that policy for some time. The discussions have been constructive but they haven't yet got to the realisation of an agreement.

It is a tricky issue. We had a very similar issue with Cuba, for example, where a person who illegally left Cuba to go to the United States, and who was then accepted by Australia from the United States, and who then committed a serious crime and was the subject of a deportation order back to Cuba. Cuba were of the view that they had washed their hands of that individual, and that the US and Australia had been complicit in the washing of the hands. They on one occasion agreed to the return, and signed an agreement with Australia. It still is a difficult country to return people to.

CHAIR—There will be, I suspect, some difficult countries. We also have the problem of not being able to return refugees. What happens with refugees if we legislate for a mandatory deportation law? Would we have to qualify the legislation to say 'when it is practically possible to return these people to their country'? Otherwise, we have a law that says it is mandatory to deport them, and the practical consequences that we can't.

Mr Sullivan—I think you have to have those sorts of clauses. It is a matter of whether you defer deportation, whether you leave it over someone's head and say, 'You are lawfully back in the community but you have been ordered deported. If there is a change we will—whether you try—and if you fail'—then you have to define what trying and failing means. Whether you revoke, or whether you have mandatory deportation and the issuing of a deportation order, but where the department is unable to effect the deportation—particularly through no fault of the deportee—there may have to be another clause saying that the deportation may be revoked.

CHAIR—Revoked in certain circumstances when compliance is not possible.

Mr Sullivan—Yes. You would then have a revoking clause on the deportation order, with the consideration to say whether you defer or revoke.

CHAIR—Let me take you back to something you said earlier, Mark. You were talking to the senator and you said the prisoners want certainty too; they want to know what the rules are. Wouldn't it be true that many of the prisoners would rather not have the certainty? Because the mushier the guidelines, the more possible it is to work your way through them and avoid a deportation order.

Mr Sullivan—There is some merit in that. They like certainty if it says they are not going to be deported. There is a problem with certainty when it does mean you are going to be deported. But certainly when prisoners talk to our officers they report that the issue of deportation is a very worrying one. It does seem to take a very long time. Some even do say that they would prefer the certainty of a decision, and they can get on with seeking review of the decision by the AAT.

CHAIR—In No. 56 you point out that there are individuals who actually do not cooperate in applying for travel documents, and that this leads to huge delays and protracted negotiations. During that time do these people remain in gaol?

Mr Sullivan—Generally they do, but not always.

CHAIR—What would be the longest that you have ever known? I suppose it could be infinity if it just keeps going and they refuse to request the travel documents, and you have got to get them without signature. But what is the longest you can remember this happening?

Mr Sullivan—In a criminal deportation matter, not that long. In other circumstances we have probably had people in detention for up to four years while we worked through some documentation. The classic situation is where a country will say, 'Of course we will issue travel documents if our consular people can go and talk to the individual and they sign an application,' and the individual refuses to see the consular people or sign an application. That is what creates a catch-22, and generally it takes some working through with the country involved to have an application accepted without a signature. Generally it works in the end.

CHAIR—Can you give us an idea? Months?

Mr Sullivan—Months.

CHAIR—Six months? Seven months?

Mr Sullivan—Up to a year probably.

Senator McKIERNAN—When you said they remain in gaol, did you mean they remain in gaol or in detention?

Mr Sullivan—In detention, which is often in gaol, but may not be.

Senator McKIERNAN—It can be in a state prison?

Mr Sullivan—Once a person moves from their prison sentence and into immigration detention, we must make a decision as to whether or not that person shall be held in detention in one of our detention centres or whether we will request the prison authorities to maintain their detention in the prison system. We have a set of guidelines as to who it is not suitable to hold in immigration detention centres. Generally, it is about the threat to other detainees, so we rely heavily on a prison's view of the individual and their behaviour in the prison system in determining whether or not they can come to the detention system. Most would stay in prison.

Senator McKIERNAN—There is a cost then to the Commonwealth if they remain in?

Mr Sullivan—Yes.

Senator McKIERNAN—A cost per day?

Mr Sullivan—Various states, various amounts, yes.

CHAIR—Just over the page, page 12, you have raised the issue of when someone has not been sentenced to gaol but to some other institution, and you have raised two

types of institution, the juvenile detention and also the mental institutions. I'm not sure what we call them. You have actually called them institutions. I can see why you have raised it, but does this not raise ethical problems? Would we not be getting ourselves into quite difficult ethical ground if we included both the mental institutions and the juvenile detention institutions, along with gaol, as a reason for deportation? We are deporting somebody because they have committed a crime and because they are a danger to the community. People usually aren't let out of institutions until they cease to be a danger to the community. That is my understanding. I may be wrong.

Mr Sullivan—Whether or not deportation would alter that policy, I am not sure. Generally, deportation does not impact on time spent in institutions, whatever they are.

CHAIR—But you have put this in your submission. The suggestion is that, instead of referring to the gaol, we actually call it a custodial institution, which would include both a mental institution and a juvenile detention institution. Do you see any ethical problems when we start to look at people who have actually committed a crime, and for the reason of insanity, and then seek to deport them?

Mr Sullivan—Whether or not it is ethical, I think it is a far murkier situation than a straight criminal sentence in a place of correction. Anything to do with juveniles is a difficult decision, on the deportation of a juvenile.

CHAIR—Even if by the time they have finished their sentence they are 18?

Mr Sullivan—Even if the sentence may bring them past the period when they are a juvenile. Certainly where a juvenile is sentenced for a very serious crime, I can't see why the fact that they were a juvenile when that serious crime was committed and that they are an adult when released from the institution should be regarded very differently from the fact of an adult committing the crime. You don't often get sentenced to a mental institution for a period of time. It is often for a period of care, until such time as it is determined that the person is fit to resume in the community. There may have to be a looking backwards. It may have to be a looking-backwards exercise of saying that once a person has been in the care of a mental institution due to the commission of a criminal offence, regardless of whether they were competent to stand trial, they could be deported.

CHAIR—I wouldn't like to be the government that tried to bring that into legislation.

Mr Sullivan—The whole thing about criminal deportation is that Australia recognises itself as having a right in respect of non-citizens.

CHAIR—Are you saying that there is a question: is somebody who has been confined to a mental institution then a criminal? I suspect they are not.

Mr Sullivan—But the law wouldn't have to say they are a criminal.

CHAIR—But we are. We are talking about criminal deportation.

Mr Sullivan—Yes, but criminal deportation could be expanded to talk about persons in mental institutions who have been involved in criminality. Often it is found that the crime occurred, the person murdered someone, and often they are at the very serious end of crime. It is about competence to stand trial, a competence in respect of the actions they took. To extend your view of criminal deportation to a person who was involved in crime but, on the basis of illness, was not convicted but was confined in a place of care for a significant number of years until they were releasable, all we are saying is that you should consider the deportation of that person against the same criteria as you would the sane or the juvenile.

CHAIR—But you are into a really murky area here because, whereas you can say that in the criminal system if somebody is convicted to a year, that relates to the seriousness of the offence, a period in a mental institution relates not to the seriousness of the offence but to the seriousness or the length of the illness, which is a different criterion altogether.

Mr Sullivan—As I say, you don't often get a sentence.

CHAIR—That's right. It is not a sentence in a mental institution at all. It is a period of stay which is related to the illness.

Mr Sullivan—But in an exclusion from the Australian community sense, we are talking about non-citizens who should or should not be excluded from the Australian community based on criminality, and I think there is a strong case that says—

CHAIR—But it is not criminality.

Mr Sullivan—It is a crime.

CHAIR—There was a crime committed, but the fact that this person has been put into a mental institution rather than a gaol negates the criminality of it because there was no intention to commit that crime. I will turn it over to the deputy chair. Would you like to wade into this one, or would you rather wade out?

Senator McKIERNAN—I don't know how you would write it up to confine it only to criminal offence. One would need to look at the judgments that the judge would make in handing down the decision, because in some cases the individual is actually convicted but there is no sentence passed; the sentence is deferred. The conviction is recorded, but the sentence is deferred pending the person going into a mental institution, but in other cases there is no conviction recorded because the individual is mentally

incapacitated. Isn't that correct?

Mr Sullivan—I believe so, Senator. I think you are right.

Senator McKIERNAN—How large a problem is this? Statistically, how large a problem is it for the department?

Mr Sullivan—It is not a large problem. There is probably a case in the history of our cases which we had in mind in putting this forward. I know the case that drove us on the juvenile one was a young New Zealand man who had several repeat offences, whose parents were not in the country, and who was still serving time in juvenile institutions, and we found that we could not effect criminal deportation. On the mental side, it involves the murder of a spouse, for which the person has been sent to a mental institution.

Senator McKIERNAN—These instances we are talking about now, would they come under the provisions of the bill on sentencing where an Australian who has committed an offence in another country is sentenced can complete the sentence.

Mr Sullivan—The transfer of prisoners.

Senator McKIERNAN—Transfer of prisoners. Would this provision come under the ambit of that particular bill?

Mr Sullivan—No. There is an interrelationship between criminal deportation and the transfer of prisoners bill in that the person in an Australian prison who is a non-citizen and who seeks to move their place of imprisonment out of Australia could 'access the transfer of prisoner act' if there was an agreement between Australia and that country. It is interesting whether it is then a deportation or whether it is cancellation of a visa. We would probably deport them on their departure. We were having a technical discussion here, but we would deport them on their departure. I don't think in respect of mental cases it would.

Senator McKIERNAN—I was thinking it is a nice little lap of the gods to decide for us, sending it off to that bill rather than this area. One more on that area: would it not complicate negotiations, that is the negotiations the department is having with Vietnam, were you to include this provision in those talks about criminally insane people being deported back as well? Would it not make it more difficult for other countries to enter into arrangements with Australia, or indeed for Australia to enter into arrangements with other countries?

Mr Sullivan—We don't have agreements with most countries because you don't need agreements, and that is purely that if a person is not an Australian citizen and is a citizen of a country, regardless of condition of mind, regardless of whatever, if a country's laws rule that person deported they accept them. Where we have to get to agreement status, without exception the agreement is case by case. It is never that we will accept

everybody; it will be a case-by-case basis. Certainly if you presented a person with extremely difficult circumstances that individual negotiation would be a much more difficult one than the average.

Senator McKIERNAN—I would like to go back to the earlier headline, timing of deportation decisions. Is it just a review that is holding things up now? Is it not the case that the department from time to time drags its feet on making decisions on deportation?

Mr Sullivan—There is no doubt about that: it drags its feet in considering a deportation. Less so now than we did. We have a very clear and stated objective now; and that is that no-one will be released from prison without their deportation consideration occurring. We have not yet achieved that. There are 30 or so people in the community having been released from prison who haven't had their deportation decision made yet. That compares very favourably with the same situation 12 months ago and 24 months ago. Sometimes we get caught. Often an earliest release date on entry into the prison system changes and changes rapidly, but not often; it has mostly been dragging the feet.

But we are caught, and there is a debate, and you have heard, I think, both sides of it before the committee. One of the primary guidelines on decision is risk of recidivism or chance of reoffence, and the difficulty is how do you assess that without a good correction system report on the persons. Firstly their behaviour: the number of crimes that result in criminal deportation which are drug and alcohol-related are very high, and it is in the prison system where you see someone submit themself to courses and treatment in respect of drugs, in respect of alcohol, in respect of anger management, or those prisoners that refuse to participate—even in respect of some of the sex offender programs that the correction services administer. It seems to be the major way that you address that criteria of chance of recidivism, other than the fact of assessing whether or not it looks like a pattern of crime or whether it was a single crime that the person has got themself involved in.

That pushes you towards saying you should do it before release but give as much benefit of rehabilitation in the prison system as you can. On the other hand the whole system would seem to have a lot more certainty about it if, soon after conviction and transfer to gaol, a decision was taken. But certainly, I would think, the earlier the decision is taken the less likely you are of getting a positive statement about behaviour and engagement in the sorts of programs the gaols and correction services present to the willing prisoner. It is remarkable, in reading as much of our crime as I read these days in these criminal deportation submissions, just the differences in the willingness of prisoners to participate in programs which directly relate to the crimes they committed and those who are not willing.

Senator McKIERNAN—Just quickly, walk us through what happens now. Take for example, somebody has got a five-year sentence for a drug-related offence which

involved violence—a pretty serious one. When would the department move on that individual following conviction and sentencing?

Mr Sullivan—We would be notified that this person has got five years. Say that happened about now, so in October 1997 someone is convicted for five years. The correction system would tell us that this person has been convicted for five years and they have an earliest release date of 2½ years or three years, depending on what state it is, so that this person could be released in October 2000. At the moment we would aim to have that submission to me three months before release. So we would have a resubmit in our criminal deportation system which is that by July of the year 2000 a submission has got to go on to the deputy secretary. It is going to take us about three months to do the submission, so it is then in March or April of the year 2000 that you would start timetabling your interviews with prisoners and doing your other work in getting together particularly the corrections' reports on the prisoner.

CHAIR—But if you do that—you are aiming to the end of his sentence—don't you then have a problem with the appeal, and you have got the 273 days average of the AAT?

Mr Sullivan—That is the issue that has now caught us, the fact that if you hold it to that time you and they appeal to the AAT, you spill over into the AAT time frame. Our reaction when that started occurring was to release most prisoners. Our stance on release now is a harder one, and that is, having made a criminal deportation decision, a person should not be released.

Senator McKIERNAN—Does the AAT give a priority to cases which involves detention, confinement or imprisonment? Does it give a priority to those cases?

Mr Sullivan—It would be a very rare case where we would maintain detention for a primary decision. We have never kept someone in detention while we consider, at the primary stage, criminal deportation. The AAT certainly look at the fact that a person is in detention and has a loss of freedom, in terms of their being able to hear a matter quickly.

Senator McKIERNAN—Their average time, I think, to put it into—

CHAIR—Two hundred and seventy-three days, isn't it, or something like that?

Mr Sullivan—Yes, but you have to look at that in an environment where our practice was that if someone went to the AAT, we would generally release. So that was an environment where there was not a liberty issue before the AAT. There was still priority there, but it wasn't a detention priority. So I think those numbers are not good numbers to say, 'Well, the response of the AAT to people having their liberty withheld has been 273 days.' I think it is shorter than that.

CHAIR—With you preferring to keep them in detention, the AAT is going to pick up their act and process it more quickly?

Mr Sullivan—I think they would certainly look at the fact that they are imprisoned and would look at it more quickly. The prisoner has to cooperate. This gets to these various conditions in the state correction services. We were getting quite a lot of interference from prisoners who wouldn't agree to their interviews and things like that. When we tracked down why, that was largely to do with the fact that they were not wanting a criminal deportation decision against them because of the effect it would have on their security status or on their access to programs.

I think right at the start we talked about that issue, and we have got a letter which we can give you from a prisoner. In our first-ever talk about criminal deportation we talked about prisoners' concerns about criminal deportation processes. This was a man who had been sentenced to life imprisonment for multiple murders, and he had no doubt about his fate in respect of criminal deportation. He also had quite a lot of knowledge about the parole process, and so we were working with the system, as I described to you, on earliest release date. He was able to tell us in this letter—and I will pass it over—that no murderer gets paroled at the first parole hearing.

In fact, on average it is going to be another three, four or five years before he has got the possibility of parole and therefore deportation and, if he got a deportation decision against him, he had worked his way down into the lowest security level and they would have bumped him to the second highest. He said that would have been his fate for the next five years.

Senator McKIERNAN—In the scenario that you are painting of a conviction now, and the five-year sentence, you talked about a consideration that started the commencement of the report to you in March. Are those time lines not too fine? Would that not allow for a delaying process on behalf of the convicted criminal to seek to delay the decision?

Mr Sullivan—I think the way it is developing it is too fine, with delay, and looking at a possible AAT hearing. We have imposed those time frames to move to that primary objective I have talked to you about, which is that no prisoner should walk from imprisonment without a decision. So we have hit those time frames and are saying, 'That's the way to get there.' Those states that are getting on top of their criminal deportation submissions are now moving further back in time so as to be able to make the submission with more time to spare for AAT review and for them working through the system. The trade-off with that is that you have less data on what has happened in the prison system. Where it is a lifer or where it is a 10 yearer, or something like that, starting a year early doesn't hurt; you have got a substantial amount of material.

I will give you the example of a person who has been convicted of serious assault,

it is a first crime, there is family in Australia, and the person while in gaol has committed himself to a program relating to drug and alcohol abuse and anger management. You read the judge's comments, which basically would say, 'I accept that this crime was probably committed under the extreme effects of alcohol, and I note that you may have had alcohol-related instances prior. That's no excuse now, but you must fix this up or you're going to get yourself into real trouble, young man.'

You may say, 'Well, the only way we can make sure of getting this one right is to do it almost as soon as he went into the gaol system.' He gets two years, a minimum release of probably 12 months, and we may say, 'We should try and give the AAT three or four months, and we need three or four months to get it right, therefore as he walks in we should be doing him.' I found it is critical in those sorts of cases to have some idea. As I say, it seems to be remarkable that someone who gets that hint and knows they are under criminal deportation possibilities may refuse to participate in drug and alcohol abuse courses or anger management courses, or may participate badly in them. That certainly has a considerable influence on me in respect of weighing up those criteria. A lot of the crime you see come before you is in that range of more than one year, less than three years, with possible release dates of 12 or 18 months out.

CHAIR—Mark, you have got six criteria or primary considerations. When you do it, do you actually say, 'Okay, if we go in early, let's look at the first five, which excludes the recidivist likely to repeat the crime or repeat a criminal activity. It will take us time to process on the first five. Leave that one till last, so that we are already down the track and time has elapsed before we look at that final one, which is how this person has rehabilitated in prison'?

Mr Sullivan—That is possible. It seems to be that everyone says the ideal answer is that a person can take himself through the decision, and the possible or even probable review of that decision by the AAT, prior to his sentence being concluded. So it has to be decisions, it can't just be—

CHAIR—Yes, but you can start the process, and in certain circumstances the weight of the other five is going to be so heavy that that sixth one is not going to really have much weight.

Mr Sullivan—That is a very valid point to make. In some you don't even need the sixth one. If you have got a person who has a long history of crime, while you would look at a positive participation program in a gaol, it would not have a lot of weight in itself anyway. It relates more to the difficult cases. You are right in that you could look at the difficult cases and say, 'All right, that's one there where I need to see what happens in gaol.' We were just talking about getting on top of this release issue, and the 261 cases that we did last year. This year our number of releases is 136, so we are getting on top of the issue, even though there will be a fresh group coming through as well.

CHAIR—Have you got that as a percentage?

Mr Sullivan—Our rate of production last year was 261 cases. This year, to make sure that we cover everyone who is being released this year, we only have to do 136. So we will actually do those quite easily, and get into advance release dates fairly effectively.

Senator McKIERNAN—I can't remember exactly what you said in your opening comments about the participation of people in rehabilitation programs in the prison system. I think we were told in Sydney that persons marked 'of interest' to the Department of Immigration are now allowed to participate in rehabilitation programs. I think it was Sydney, but I don't have the *Hansard* in front of me. My question is, can you repeat what you said about the right of an individual—if that is the right way to put it—to participate in rehabilitation programs whilst in prison. When are the state authorities told that a person is of interest to them? Is it on receipt of that three-monthly report, or the monthly report as happens in some cases?

Mr Sullivan—Once we have gone through that report, we notify the corrections authorities that we are interested in an individual, so they know that there is possible criminal deportation action.

Senator McKIERNAN—I am just checking with the secretariat to see whether it was New South Wales or indeed it was West Australia who said it in their submission.

Mr Sullivan—I know New South Wales certainly allows some rehabilitation and training programs to continue. There are several issues. One is rehab programs. I have seen most of them allow rehab programs. There are work release programs, and there are training programs. I think you have got to look at them separately, even though they are all within the rehabilitation framework.

Senator McKIERNAN—Yes. The context in which I am asking the question is in relation to the programs for sex offenders or people who have got drug and alcohol problems.

Mr Sullivan—I have heard no-one say that they have barred people from those sorts of programs. It is more to do with the positive training programs—'Can I learn to be a metalworker' or 'Can I learn to do this while I'm in prison?'—and the work release and day release programs. What I said in my opening remarks is that we believe that is something for the corrections system, and that the threat or decision that a person is to be criminally deported should not in itself determine a change of status. We could consider issues that could arise for the corrections authorities out of a criminal deportation decision. I could imagine the person who was in a very low-security walk-out situation may, for at least the period shortly after a criminal deportation decision is notified, be more prone to exercise their reasonably free way out. But that would be on a case-by-case basis.

We do have a concern with people who it has been determined will be criminal deportees participating in programs such as work-release or day-release programs, and it is the same fundamental concerns we have about release while a criminal deportation order is there. The decision in itself is saying, 'This person should be excluded from the Australian community,' and yet we had the instance where probably the most infamous criminal deportation of the last 12 months, Archie McCafferty, was in fact four or five days a week on work release in Sydney.

CHAIR—Yes. We will adjourn now.

Luncheon adjournment

CHAIR—We are up to the second term of reference:

The appropriateness of existing arrangements for the review of deportation decisions.

I note the department has given us five alternative options of different ways that this could be approached, rather than the present system. The one I am particularly interested in is your final option:

The review body be empowered to recommend to the minister a variation to an order to deport but determinative powers to remain with the minister.

When you say the 'review body' would you be envisaging that that review body remains the AAT or would you envisage that there would be another review body?

Mr Sullivan—I think we would envisage it remaining to be the AAT. That is what the situation was in place until 1992. The AAT heard appeals against criminal deportation decisions but could only make a recommendation to the minister.

CHAIR—Can you take us through the thinking at that time of why that was changed?

Mr Sullivan—It was basically changed because of the fact that in 1992-1993 it was decided that almost all immigration decisions should be marked reviewable in a determinative fashion by a tribunal. That is when the IRT coverage was extended and the AAT moved from being recommendatory to determinative in respect of criminal deportations.

CHAIR—So this would be giving power back to the minister and lessening the power of those tribunals, although they obviously have the position where they can review it and make a recommendation? Of the five that you have got, do you have any other comment on them other than what you have here? Any negative aspects to them that you

can think of, or any particular positive aspects?

Mr Sullivan—The no-appeals process would be a difficult one. To say it is on a judicial review would be hard. The last two are really quite similar. One is saying the minister personally considers appeals whereas the other one says a body like the AAT makes recommendations to the minister. It is really the same thing but with a process built in. The process would probably help it. A Special Immigration Commissioner—I don't know if you need new structure just to do these.

CHAIR—Going back to those last two, you said they are quite similar but surely an advantage is when the minister personally considers appeals he is reliant on his department to provide him with the information.

Mr Sullivan—Yes.

CHAIR—These are the people who originally made the decision to deport, so there is a bit of a loop there that is probably a bit uncomfortable.

Mr Sullivan—Yes, I would agree with that.

CHAIR—A Special Immigration Commissioner, yes, you would need a new structure. Now:

The IRT be asked to deal with deportation cases on merit.

Wouldn't that just get you back into the same situation as you have got now?

Mr Sullivan—With the IRT I would prefer to wait at least for the MRT and then maybe just see the direction of government thinking. The amalgamation of tribunals and divisions may influence that, but I think for a body which the government is already saying will, subject to the passage of its legislation, go out of existence in June next year—

CHAIR—Let us put into the new super—

Mr Sullivan—The MRT. I think if the new super review body happens, there may be some rationalisation between what the current AAT does and what the migration division of the new superstructure does anyway. Certainly these sorts of things may move.

CHAIR—If it was an MRT, would you see it then having the powers that the present AAT has or would you see it more as in your final option, in which it could review and recommend?

Mr Sullivan—I can see—as I say, the general—

CHAIR—So you say it could have two options.

Mr Sullivan—The general process in immigration is that merit should be determinative. However, I think there clearly is a role for the minister in decisions to exclude a person permanently from this country, having been a member of its community. I don't see a lot of disquiet, displeasure, whatever words you want to use, with the AAT's decisions in criminal deportation matters. The set-aside rate is quite low. I have never seen a set-aside from the AAT where the AAT deputy president has not followed the same guidelines as the departmental decision-maker has followed but has come to a different view.

The AAT has had the opportunity, sometimes created by delay, in being able to assess some factors the decision-maker couldn't see. The AAT also has the advantage that they get a one-on-one hearing with the deportee, which obviously can go to impressing someone. I think the major issue at the moment with the AAT is time and, as I said, I would discount somewhat the current length of time and would be seeing the performance of the AAT in cases in detention under review. Unfortunately it is going to take a little while to say, 'We can measure that now.'

CHAIR—From memory the AAT has overturned nine decisions of the department. Since 63, I think, is the time span. How many has it overturned in the last two years, 1996-1997?

Mr Sullivan—Four in 1996-1997, nine since 1993-1994.

CHAIR—So in a six-year period we have got nine but almost half of those were done in the last two years.

Mr Sullivan—Yes.

CHAIR—Is there anything to be read from that? Is that just coincidence?

Mr Sullivan—I don't think you should read too much into that. The minister certainly was displeased with one decision of the AAT, but it certainly wasn't about the AAT stepping outside the guidelines. It was the AAT's interpretation of the criteria and how they should operate in respect of it. Even the AAT has since that time, even in their hearing with you, called for some greater statement of government's attitude to white-collar crime in respect of seriousness. If you look at the guidelines at the moment, you don't find in those guidelines that you should be able to classify white-collar crime in the most serious range of crimes.

CHAIR—Is it more appropriate that the minister makes the final decision, seeing as it is the minister who is responsible to parliament and has to answer to parliament for those decisions? Personally I have a worry when that doesn't happen. So I just wondered,

from your point of view—

Mr Sullivan—Yes, I think that is true in respect of exclusion. It is that latter idea of moving it recommendatory again or whether the minister should have, as he may have, as was shown in the Gunner case—the fact that he can move outside of an AAT decision to achieve the same result. Gunner's case is an interesting one. There was a criminal deportation decision under section 201, appealed to the AAT to set aside that decision followed by a cancellation of visa, a decision of the minister personally with the exclusion of tribunal review associated with it. So an alternative to having the tribunal become recommendatory is to at least recognise, if not more formalise, the fact that if a minister is unable to accept an AAT decision, that he has the power to move on his own accord or her own accord.

CHAIR—Do you have any problems with a tribunal becoming a recommendatory body rather than a determinative body?

Mr Sullivan—When I think of the number of decisions that they make and the fact that a number of those decisions where I think any minister may put his or her mind to changing the decision, there may be more efficiency in maintaining its determinative nature, but allowing a minister to come to a different conclusion if they wish. That would then go, as Mr Gunner's case is going, only to the court.

Senator McKIERNAN—How many cases apply for review within the judicial system from AAT currently?

Mr Sullivan—Out of 80 decisions by the AAT about 20 have taken it further, but last year six. So in 96-97 we had 33 matters go to the AAT with the department having its decision upheld in 15 of those matters and then six matters going to higher courts.

Senator McKIERNAN—What was the result in those?

Mr Sullivan—I will have to find that one.

CHAIR—Are you happy to move on to No. 3, the appropriateness of the current 10-year limit on liability for criminal deportation, which I take from reading this, a fairly strong recommendation from the department which would like to see the 10-year limit scrapped. Am I reading that correctly?

Mr Sullivan—Yes.

CHAIR—As you have argued very cogently for it in your submission, I actually don't have any questions on that but the deputy chair might.

Senator McKIERNAN—The 10-year thing is just a quirk of history, is it? Is it an

arbitrary figure or is there something more significant in 10 years?

Mr Sullivan—It is to do with the alien removal powers in the High Court in Pochi's matter but I think we have moved away from that relationship now, because immigration powers aren't all based now on the alien power. It is the same reason why the 10 years in the citizenship could now be removed. I think there are some consistencies here. In 1983 the basis of deportation was altered to a crime committed in the first 10 years of residence:

This adjustment was made to accord with the High Court decision on deportation in the case of Pochi (October 1982) which stated that deportation powers did not extend to an alien who had been absorbed into the Australian community. This was based on the fact that the Head of Power for the Migration Act at that time was under section 51(xxvii) of the Constitution relating to immigration and emigration. The period of 10 years was seen as sufficient for a person to be regarded as an absorbed member of the Australian community. This was altered with the Migration Amendment Act of 1983 which changed the Head of Power in migration legislation to section 51(xix) of the Constitution which related to naturalisation and aliens. Despite this variation the 10 years rule for deportation was not varied.

Senator McKIERNAN—Supposing it was varied would there not be a chance that the courts could go back to that at a future time and make any removal of the 10 year ineffective?

Mr Sullivan—No, I don't think there is any question of that.

CHAIR—As I said, I think you have made a very good argument for getting rid of it, and I was interested in the UK, Canadian and USA systems. We move on to 4, which is the effective procedures, which we have actually gone into earlier on when we were talking about the warnings and started to talk about the difficulty that seems to exist on your department getting the information it needs from the prisons. Just having a look at attachment D, which you have got at the back, looking through all the states, it seems to be that the states and territories almost uniformly take the word of the criminal who is filling in the form whether or not they are an Australian citizen or whether or not they were born in Australia.

This has come up earlier in the hearing, and certainly when we were talking to the correctional department in New South Wales. We then talked to the Federal Police and the Federal Police said to us, 'No, that couldn't possibly happen,' because when somebody was actually charged extensive checks were done by the police about the person's entire background, including where they were born, nationality, citizenship, et cetera. That would be part of their whole record and that record would then be handed on to the correctional services. But that doesn't seem to be what we are hearing from the correctional services.

I am not sure if you have any more information. I suspect if you had you would have put it in the documents, but we do have this conflict of information between the

Federal Police and what we are getting from the state correctional officers.

Mr Sullivan—Is that the Federal Police just talking about federal crime or Commonwealth crime or was it talking about police forces generally?

CHAIR—I think he must have been limiting himself to federal.

Mr Sullivan—Yes, because that is a reasonably small percentage of criminals.

CHAIR—Without having the transcript there, I was under the impression that they said, 'Look, once somebody goes to gaol there is pretty well a documentation of the criminal charges and things which would include these sort of things.' I think it was a general type of conversation which, although they were Federal Police, would seem to have related to the other police forces as well.

Mr Sullivan—We are operating on the basis of just what corrections have told us and certainly that seems to fall in line with what they have told you.

CHAIR—That is what we got from corrections too, certainly in New South Wales, and we have not spoken to the other states. But is it possible that there are two forms going on. First of all there is the conviction form, which might have all this on it, which the corrections people don't use in getting this information but sort of start afresh? Could they maybe have access to other information which would assist them in filling out these forms?

Mr Sullivan—I don't know, Chair. I think if they have got a conviction form they use it. I don't think they are into reinventing the information.

CHAIR—When we look at attachment B, pretty well every state, it says, 'As supplied by the prisoner, as given by the inmate, as stated by the offender.' So it does seem that this form—that is something else you can clarify. When they send it to you, is this done specifically to send it to you or is it an overall form that they would get the prisoner to fill out for a whole number of purposes.

Mr Sullivan—No, it is for us.

CHAIR—So is it possible that they are really being a bit lax here, and under their instructions of things they have got to do with prisoners one is get them to fill out a form for the Migration Department. So the prisons themselves are not making use of other information that may be available to them but are simply asking the prisoners to fill out these forms which they then send on to you guys.

Mr Sullivan—I don't know.

CHAIR—Because it does seem to be a totally inadequate system for the purposes that we need.

Mr Sullivan—It seems to range in its adequacy, and a uniform system would appear to be the best answer.

CHAIR—I don't know about ranging in adequacy. From reading it, it seems the only state that actually seems to be anywhere near the ballpark of doing the correct thing is South Australia who, from my memory, seem to have a fairly good system, from reading it. Would that be your experience, from the department, that you feel you are getting better information from South Australia?

Mr Sullivan—We hardly have anyone in South Australia, so it is easy. In respect of an individual, yes, the South Australian system is very good, but I may see only two criminal deportation submissions a year from South Australia. It can be pretty good. It is the four big states where we have to have the data. Some of the correctional services will say they will dump every bit of data they have got onto us. It is a qualitative issue of being able to say with certainty what would come to—

CHAIR—If we ignore the fact for the moment that my home state of South Australia is somewhat deficient in personnel—and I take responsibility partially for this, I suppose, being a South Australian—it does seem to have a reasonable system, because it says here:

> Various SA Govt. Agencies including SA police, Correctional Services and the Courts are now computer linked to the State Government's Justice Information Service (JIS). A specific computer program is run against the JIS, and produces, on a regular basis, a list of persons who have been sentenced to imprisonment for 12 months or more.

So if they give that list to you, so long as the person is not using an alias—and presumably if they have got such a good system there, aliases would be revealed—you then can match that with your own records?

Mr Sullivan—Yes, that's right. So we can only look for that person on records other than citizenship records and see whether there is a match. Adelaide gives us every prisoner. South Australia gives us every prisoner who is sentenced to more than 12 months gaol. They in the Adelaide office go through that list and check the list against our systems, visa systems, and say, 'Oh, there he is. When he came into Australia on that flight, he came in on a British passport, so he's of interest to us.'

CHAIR—And then you would check against citizenship.

Mr Sullivan—Then we would check against citizenship and say, 'And he hasn't become a citizen. Therefore he's ours.'

CHAIR—It would seem to me that if that system could be undertaken by all states and territories, although nothing is perfect, you have got a much better system than there is now.

Mr Sullivan—Yes.

CHAIR—What is the difficulty of getting the states to do that?

Mr Sullivan—I heard New South Wales say to you that we hadn't asked for all the data and they would be happy to give us all the data. The advantage in South Australia is that they do this for a small number of people quite manually. Once we move into looking at all persons sentenced to greater than 12 months gaol in any state or territory of Australia, we would be into having to automate those matching systems. But that would be the task for us to do.

CHAIR—But surely that is what we would expect. This is the post-computer age almost. You would expect that we would simply computer-match data.

Mr Sullivan—Yes, but it is not a trivial task, computer-matching data, particularly against a range of various systems. It is the way we would need to go. If we can get the access in a standard form from all of the states, we can do the matching.

CHAIR—Since you heard the department in New South Wales say that they thought that you hadn't asked them for the information and they would be happy to supply it, have you gone back to them and officially asked them for the information?

Mr Sullivan—No.

CHAIR—Are you planning to do that in the near future?

Mr Sullivan—We are hoping to be able to go to all of the justice and corrections ministries and be able to see whether they are willing to give it to us in a standard way. I don't want to build six or eight systems to match data based on the particular way it is presented to us, if we can help it.

CHAIR—So you are working on a system now that you feel would be an appropriate system to suggest that the states could access data?

Mr Sullivan—We are working on a request to the states to be able to at least present it in, first, an electronic format, and second, an agreed format. New South Wales says, 'Yes, you can have all of the material.' Some states would like our legal position to be put beyond any doubt in respect of our capacity to be able to access data. Potential criminal deportees fall into a difficult category of person, in that we have broad powers in respect of unlawful non-citizens, but a potential criminal deportee is not an unlawful non-

citizen; they are a potential deportee. We are seeking some further advice on whether we need to be able to make our position stronger in respect of our cover for the requests for information and the matching that we do, and also to make sure that we meet the Privacy Commissioner's guidelines.

CHAIR—Under the constitution, is this a migration matter?

Mr Sullivan—There is no problem with us having powers in relation to it.

CHAIR—There is no problem at all?

Mr Sullivan—It is just a matter of whether our current suite of powers, without any question, allows us to get this data.

CHAIR—So what you require is more Commonwealth legislation?

Mr Sullivan—It may be that we need an amendment to the legislation which makes it very clear that we can seek data and material in respect of a person being considered, or a person who opens himself up for consideration of criminal deportation.

CHAIR—Again, that gives you the power to look for it, but it does not put any actual constraint on the states to comply.

Mr Sullivan—No. The Victorians are cooperating, but I have heard from them that they would like to see the power better defined.

Senator McKIERNAN—Wouldn't a better way of doing things be the actual legal identification of the individual at the time of conviction?

Mr Sullivan—If it was done at the time of conviction, that would be fine with us.

Senator McKIERNAN—Wouldn't that be a better way of doing it? Are there any inhibitions in the role of doing that, or in us recommending that that be put to a meeting of the state attorneys, a Standing Committee of Attorneys-General meeting, in that common system?

Mr Sullivan—No.

Senator McKIERNAN—It seems to me that the South Australian system of providing you with all the information now, whilst it is wholesome and it is good, it would have to be wasteful as well because there would be a lot of information contained in those lists that would be of absolutely no interest to the department at all, but nonetheless it has still got to be checked. It would seem to me that the best way around it would be the identification of somebody by nationality. If they are not naturalised

Australians, they may be of interest.

Mr Sullivan—That is very true, and certainly the department, or the portfolio, does not like getting into data on Australian citizens. We have powers under our act for Australian citizens to present to us that they are Australian citizens on arrival and departure from Australia, but this is seeking data on a group that largely are Australian citizens. So if that could be avoided, that would be good.

CHAIR—We have got the letter from the Northern Territory Minister for Correctional Services, and I am just not sure what he means by this:

> In March 1995, a request was received by the Northern Territory Correctional Services from the Department of Immigration and Ethnic Affairs, seeking copies of parole reports for selected prisoners. The request was forwarded to the Northern Territory Parole Board. The board decided that before providing this information indemnity needed to be sought from the Department of Immigration and Ethnic Affairs.

I don't understand. Indemnity from what?

Mr Sullivan—I think it is indemnity from breaching the privacy. They haven't got privacy legislation.

CHAIR—So indemnity from Commonwealth privacy legislation?

Mr Sullivan—It is an indemnity from the action on behalf of the prisoner in the release of the material to us.

CHAIR—I gather you weren't prepared to sign such an indemnity, and then the whole thing stalled.

Mr Sullivan—That is right. It has stalled.

CHAIR—Where do you see it going from here?

Mr Sullivan—I would hope that if we can fix the legislation in respect of our access to material, that would cover such things as parole reports and other reports coming out of the correction system. The Northern Territory would have no problem with that. That would be a legislative indemnity. That would be basically saying they did so as a result of law. Our requests for such parole reports would then be couched in terms of a section of the Migration Act requiring them to provide us with them.

CHAIR—That seems to be a fairly necessary part if you are to do your job.

Mr Sullivan—Yes.

CHAIR—I think that was No. 4, which was the effective procedures and liaison. No. 5 is the weight being given to the views of all relevant parties, including the criminals and the victims of crime. We have touched on this before. We did have submissions from other interested parties. Some were very keen that the views of the victims be taken into account. I think in your submission you were fairly equivocal. You can see that there are problems with it, but you also see that perhaps, as the victim is a member of the community, they can offer some information on the danger to the community from the individual concerned.

Mr Sullivan—That is good summing up of our position.

CHAIR—You would see the victim's contribution as a means of getting more information to the department which would allow them to assess really the likelihood of this person being of danger to the community. I guess from a victim you might be able to assess whether the crime was a specific act provoked by specific or unusual circumstances, or whether it could be one of many similar acts. Is that the sort of thing you would be looking from the victim?

Mr Sullivan—I think that is part of it. Another part is to allow the victim to be involved in the decision-making process, and feel that they have at least had their chance to put forward their view. Making a decision about whether someone should not be a member of the Australian community is difficult, as opposed to deciding whether someone is a danger to a single member of the Australian community. There are other devices designed to provide protection in that situation.

CHAIR—Which don't actually always work.

Mr Sullivan—No, they do not always work.

CHAIR—Certainly if you are a victim, and the criminal is someone who has stalked you and made your life a misery, then there is a heck of an interest in getting that person out of the country, just for your own safety, as a member of the community.

Mr Sullivan—I think we started this whole discussion today talking about punishment. I find it difficult, as a decision-maker, when I get down to the fact that I have no doubt this individual is a threat to another individual. Sometimes it is very difficult. You may have a family law matter where children are concerned, and on the one hand you are considering the rights of the child, and you are also coming to a view that, while this person may not be a threat to the community, they certainly are a threat to their children, and perhaps their former partner, and how do you then assess that in criminal deportation terms?

CHAIR—To clarify that, let's take the example of a spouse and children. You see them as an individual unit, rather than as a significant part of the community at this stage?

Mr Sullivan—I will paint it the other way around. Let's say you have a person with an apprehended violence order against him, and a court order saying he shall not go near his—generally speaking it is former spouse—and you have a report from the prison system that the person's behaviour has been excellent, cooperative, et cetera, and a social worker report which says, 'This bloke's got no problems, except he has a great hang-up about his ex-spouse.' If you have, as many do, a view that such restraining orders may not be effective, is it right to step in as a decision-maker and say, 'Well, I can make a very effective restraining order,' and deport someone on the basis that this person should be excluded from the Australian community? That is where it gets difficult.

The most difficult cases are crimes of violence against people. Should you be seeking the views of the victims and people such as the parents of children who have been involved in sexual molestation crimes and things like that? Many prisoners who have been in gaol for some years have supportive spouses. Often where the marriage has broken up at the time of the conviction, the spouse has moved back during the time of imprisonment. So we have positive prison reports, a stack of often supported statements from a spouse, from a religious adviser, from people within the prison system. Should you at least be able to balance that with some statements from the parents of molested children—or the children themselves, if they are able—which talk about the impact or seriousness of the sorts of crimes that have been committed against them? That side I find far easier. I would see it as making my job of making a decision easier if I could balance the impact in terms of the seriousness of the crime.

A harder decision is that single-person impact. There have been sad experiences in criminal deportation matters where such individuals have not been deported, and later the matter has gone on to very serious crimes against an individual. Is that a breakdown of the criminal deportation system, or a breakdown of other systems in our society? That is a question we have to work with.

CHAIR—I imagine if you are the one who has made the decision to return them to the community, you ask yourself that question quite often.

Mr Sullivan—You do.

CHAIR—I can see the difficulty of the dilemma that you have posed.

Mr Sullivan—Sending a person outside the country forever is not the easier decision. Sometimes people say, 'Take the easier decision and deport them.' It is not an easy decision at all, particularly where you have a spouse statement saying, 'I will not go with him.' We are not talking about a separated couple, we are talking about a supportive spouse who, when asked, 'If this person is deported will you go with them?' answers, 'No, I can't.'

CHAIR—So you are saying in that case it becomes slightly harder to deport someone?

Mr Sullivan—No, it doesn't become harder—other than harder in the mind, I guess.

CHAIR—This actually leads on to another area, which you haven't covered in your submission but which has come up during the course of the inquiry. That is, whether there should be some means by which people deported under the circumstances of a criminal offence can apply to return to Australia at a later date. I believe there are some anomalies with people who commit crimes in other countries who can then come here. I think even if you are a non-citizen at all, if you here on a tourist visa—

Mr Sullivan—If you are a temporary resident in Australia, yes. There is certainly access to character waiver provisions for persons who have committed crimes overseas and wish to migrate to Australia. There are certainly not mandatory lifetime bans on temporary residents who commit crimes in Australia and are removed. So I think clearly the raising of that issue must result in consistency.

CHAIR—And how would you resolve it?

Mr Sullivan—I think consistency would say that you would want to look at the seriousness of the crime, and if a waiver could be granted on character after a certain amount of time, look at doing it. I don't think it should be an automatic thing. The last thing anybody wants is to go through a deportation process, to have for instance a spouse deported, and then find you have applications within the next month saying, 'Now waive the bad character and let this person back in. I wish to responsor my spouse.' I think it would certainly have to be time-limited before it could be considered, and then certainly not automatic.

CHAIR—So perhaps graduated times depending on the seriousness of the crime.

Mr Sullivan—Yes, and then certainly not an automatic waiver. It should be after that there is a decision as to whether it can be waived.

CHAIR—Would you see that as a decision to be made by the department?

Mr Sullivan—Yes.

Senator McKIERNAN—In Melbourne we heard evidence of an individual who had been deported and who had re-established themselves back in Italy and had left family back here and really only wanted to come for a visit. There was a thriving business back there but there just wasn't room for the individuals to do it. I think there are problems with graduated times depending on the seriousness of the crime. I think it probably should

stand alone, with deportation being deportation, rather than how serious the crime was and having it linked to a number of years. Do you think 10 years would be an appropriate time? Or is it again an arbitrary thing? Do you have a time limit after which reconsideration could be given?

Mr Sullivan—Well, I think it would have to be a significant number of years, and 10 is a significant number of years.

CHAIR—We are up to final one, No. 6:

The adequacy of existing arrangements for the removal of non-residents convicted of crime.

I only have one question at this stage. At No. 100 on page 21 you stated:

It is possible to cancel both temporary and permanent visas on character grounds.

I wondered if you had any stats on how many times permanent visas had been cancelled on character grounds.

Mr Sullivan—Very rarely. I think the cases in recent times of Mr Gunner in a criminal deportation matter, and Mr Jia, are probably two of the few cases where it has been done. Certainly if you read the act you would say that in many respects the criminal deportation provisions could be viewed by some as redundant. You have got cancellation on character ground provisions anyway. I guess recent months have shown that yes, either could be used. Administratively we have always taken permanent residents down the criminal deportation consideration route rather than section 501. We will get you numbers, but it is not many. I think it would probably be limited to two or three.

Senator McKIERNAN—How widely has the draft policy been circulated?

Mr Sullivan—Not beyond yourselves.

Senator McKIERNAN—We have published it. Are you aware of that?

Mr Sullivan—That is fine.

Senator McKIERNAN—There is no problem with that? There are not dramatic differences with what was existing beforehand. Is there a reason for that?

Mr Sullivan—No, because I think we thought the process would be that we should put to you the sorts of draft policy that we would recommend. That would give you a chance to report on it. I think part of the then government's response to the report would be new guidelines, and that we would probably go into a broader consultation on that draft of new guidelines rather than this one.

Senator McKIERNAN—Yes.

CHAIR—What percentage of deportees are unrepresented at hearings of review applications, and what impact does that have?

Mr Sullivan—We will find out. We may have to ask the AAT whether they have got a figure, or whether we do.

CHAIR—Following that, what sort of impact does legal representation have? Are people better off clearly with legal representation?

Mr Sullivan—I am not a lawyer.

CHAIR—If you were a lawyer you would definitely say, 'Yes.'

Mr Sullivan—I think as someone put to you, it is certainly is the case that we are represented in every criminal deportation.

CHAIR—By a lawyer.

Mr Sullivan—Generally by an internal, departmental lawyer. A number of persons are not represented. I think there is encouragement within the processes of the AAT for the person to be able to say what they want to say.

CHAIR—It is not like an adversarial courtroom, in any case, so perhaps there is not the need for it.

Mr Sullivan—It is not as adversarial as the courtroom. Certainly in the ones I have seen, a number of the deputy presidents go to lengths to make sure that the applicant is at ease and able to present their story. It is quite an informal, yet formal, hearing.

CHAIR—Thank you very much for spending so long with us today.

Resolved (on motion by Senator McKiernan):

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

CHAIR—The inquiry is adjourned until a date and time to be fixed.

Subcommittee adjourned at 1.45 p.m.