COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

Reference: Extradition law, policy and practice

MONDAY, 26 FEBRUARY 2001

CANBERRA

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

To search the parliamentary database, go to: **http://search.aph.gov.au**

JOINT COMMITTEE ON TREATIES

Monday, 26 February 2001

Members: Mr Andrew Thomson *(Chair)*, Senators Bartlett, Coonan, Cooney, Ludwig, Mason, Schacht and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Mr Byrne, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Wilkie

Senators and members in attendance: Senators Cooney, Ludwig, Mason and Tchen and Mr Adams, Mr Baird, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly, Mr Andrew Thomson and Mr Wilkie

Terms of reference for the inquiry:

The Committee will conduct an inquiry into extradition law, policy and practice in Australia.

The Committee will consider whether the current arrangements strike the best balance between ensuring that alleged criminals are brought to justice and that Australian citizens are protected from false accusations.

WITNESSES

Committee met at 10.07 a.m.

DABB, Mr Geoffrey Preston Morrison, Executive Adviser, Attorney-General's Department

JACKSON, Mrs Margaret Charlotte, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department

MANNING, Mr Michael Grant, Senior Legal Officer, International Branch, Criminal Justice Division, Attorney-General's Department

MARSHALL, Mr Steven, Assistant Secretary, International Branch, Criminal Justice Division, Attorney-General's Department

CHAIR—I declare the meeting open and welcome witnesses and members of the public to the hearing today about Australia's extradition law, policy and practice. We are undertaking a number of hearings at different places to hear different views about the current extradition arrangements, and that is going to assist us in determining any future extradition agreements that are brought to us for inquiry. This is the second hearing, following the first, which took place in Sydney on Tuesday, 13 February, and we are going to hold another one in Melbourne on 14 March.

You understand that we are not going to require evidence under oath and that these are legal proceedings of the parliament and so forth. Perhaps before you make an opening statement you could give us a picture of who does what in the department, for example, if an extradition application comes in and if there is a problem and so on. Who does what, just so that we understand where your particular actual work is taking place?

Mr Marshall—Certainly. In simple terms, I suppose you could envisage our relationship as a broad line going up from Michael through me to Mrs Jackson. The International Branch is responsible for both policy and casework relating to extraditions in and out of Australia. We do have a separate extradition unit which actually is responsible for advising on extradition cases and for the progressing of those cases. That unit is part of my branch. In fact, for a few years I was head of that particular unit. We do not have any of the lawyers that are currently in that unit here at the moment.

Mr Manning deals with the policy side of extradition, including the negotiation of treaties, which is, of course, of particular interest to the committee, as well as some of the broader questions associated with advice and application of Australia's extradition law. But the actual handling of case matters is done by a separate unit that is within my branch. Mrs Jackson is the head of the Criminal Justice Division, of which the International Branch is one part.

CHAIR—That is terrific. Do you want to make an opening statement?

Mr Marshall—The department would like to thank the committee for the opportunity to appear at this hearing. Clearly, the inquiry which is currently under way is a significant and a broad ranging one. The department has prepared a detailed submission for the committee which provides a brief explanation of the extradition process, outlines the history and sources of Australian extradition law and attempts to address some of the issues which appear to be relevant to the inquiry. I will not attempt to traverse the matters which are raised in that submission, although we are, of course, happy to elaborate with respect to particular areas of interest to the committee.

The department welcomes this inquiry. As demonstrated in the committee's deliberations on Australia's extradition treaty with Latvia, questions concerning Australia's extradition law and policy are inextricably linked to substantive issues regarding the form and substance of the obligations which Australia enters into with foreign countries under extradition treaties. The joint standing committee has played a key role in the government's consideration of such treaties in accordance with reforms to the treaty process introduced in 1996, and we think this inquiry offers an ideal opportunity for the committee to examine and evaluate Australian policy in this respect. As recognised in the committee's terms of reference and in the submissions received by the committee, a fundamental question concerns the degree to which current arrangements strike the best balance between ensuring that alleged criminals are brought to justice and that Australian citizens are protected from false accusations. We agree that this is a question of balance and ultimately its resolution comes down to a matter of judgment.

As the committee is aware, the Australian government's policy since 1985 has been to move away from the traditional prima facie case requirement in favour of a position whereby the requesting country is required to produce a statement of the alleged criminal conduct against the individual sought for extradition. However, we recognise that this is not the only approach which may be taken for the purposes of extradition proceedings and that other approaches, some of which may give more prominence to the evaluation of evidence in a requesting country, are worthy of consideration.

The evaluation of these issues involves questions concerning not only Australia's preferred approach to dealing with extradition but also the ability and readiness of extradition partners to meet the requirements of Australian law and practice. Ultimately, extradition has to be seen as a bridge between the legal systems of two countries, and in striking the balance it is necessary to ensure that the needs of both countries may be accommodated. Having said that, I think it is important to recognise that extradition is, by its very nature, an inherently intrusive process involving the apprehension and removal of persons from one jurisdiction to another. It is also a quite complex and potentially litigious process, with some cases taking years to resolve. The issues are both sensitive and complicated and we would underline our readiness to assist the committee in examining this subject.

Before closing, I should note that this department has recently compiled a statistical supplement to our earlier submission which includes some details regarding patterns and trends in our extradition relations and we are happy to provide this to the committee. Given the complexities involved in extradition law, it is difficult to provide a simple summary or explanation of those statistics, but it does indicate the basic characteristics and trends of the extradition process. Thank you.

CHAIR—Would Mrs Jackson or Mr Manning like to add to that or do you want to respond to questions?

Mrs Jackson—No, thank you.

CHAIR—Let us have some questions from committee members.

Mr BAIRD—One of the key things we are looking at as a committee is the issue of which countries most of the requests come from. Do they come from common law or civil law countries? What is the breakdown in terms of requests? That covers part of our concerns.

Mr Marshall—In general terms that is addressed in our statement. Basically, our most significant extradition partners are the United States of America and the United Kingdom, both effectively common law countries. During the past 20 years there have been 116 extraditions between Australia and the US and 43 between Australia and the UK. Our leading civil law extradition partner would be Germany, with 20 extraditions—that is, four to Australia and 16 to Germany—followed by France, with 13 extraditions. Overall, during the 1980s there was a total of 115 extraditions, and only 24 of those involved civil law countries. However, during the 1990s, there were 56 extraditions involving civil law countries. So the rate has been increasing over the past 10 years. But the short answer is that the majority of our extradition requests are still to the two big common law countries, the US and the UK.

Mr BAIRD—If we changed our arrangements, do you think we would see more requests from civil law countries?

Mr Marshall—I believe, yes, that would be the case. We changed our arrangements in about 1985—we changed our policy; the government policy changed—and following on from that we entered into a series of treaties. I think over the nineties, as those treaties were bedded down, there was a reasonably significant increase in extradition requests from civil law countries.

Mr HARDGRAVE—I thought I would ask about Christopher Skase. What is the big technical hold-up with Spain? I know it hides behind the treaty of Ultrecht when it deals with Gibraltar. It quotes a 1493 treaty as being more important than the Maastricht treaty and all these sorts of things. But is it a Spanish problem in that we do not have an arrangement with them? What is the drama there?

Mr Marshall—I think the position with respect to Christopher Skase is that it is no longer regarded as an extradition proceeding vis-a-vis Spain. The Australian government sought his extradition in 1994 and it was conducted under a modern no-evidence treaty with that jurisdiction. The appeal court in Spain determined that his extradition should be refused, in essence, on a humanitarian ground which is applicable under the treaty.

In a nutshell, what the court concluded was this: to remove him from Spain to Australia as contemplated in the extradition request could impair Mr Skase’s health or could even jeopardise his life. As a result of that, the Spanish court held that that would have been in violation of the constitutional guarantee under Spanish law which requires the state to respect the health and the life of persons in Spain. The basis for refusal under the treaty was the humanitarian ground which says extradition may be refused where this is inconsistent with humanitarian considerations. Since then, as has been reported, Spain has been involved in expulsion proceedings against Mr Skase. That is really a matter which arises under the Spanish immigration regime as opposed to extradition per se.

Mr HARDGRAVE—Do we treat our non-citizens as well as they treat their non-citizens? Do we go to that extent of humanitarian grounds to prevent a country from reclaiming one of their citizens holed up here in Australia?

Mr Marshall—There is under Australian law the same exceptions to extradition as may apply. It is very difficult to speculate on the precise circumstances of the Skase matter because that was one which was fairly unique in my experience. But it would be correct to say that, if a person was sought for extradition from Australia and if they wished to maintain that it would jeopardise their life to have them removed to another country, that is a matter which could be argued before the courts and could also be put before the minister in making the surrender determination.

Mr HARDGRAVE—So refugees as such in Australia who are legitimate refugees who would face danger if they went back to their original country would be protected no matter what extradition treaties existed or go to the courts to decide?

Mr Marshall—Their rights would be recognised under our standard extradition treaties.

Senator TCHEN—Mr Marshall, can I ask you a question which is not legally based because I am not a legal person? I have looked through your department’s submission and I am impressed with the legal argument which comes out. As you conclude at the end, it is basically a personal judgment. That does not give us much to go on, actually. Can I ask you a particular question about the extradition of Australian nationals. Suppose that we accept that, because of the difference between common law and civil law, for the greater good and balance we should allow the extradition of nationals to face justice in the countries in which they commit their crimes. Then assume that, should a national of another civil law country commit a crime in Australia and escape back to his or her home country where extradition is not possible because of the civil law basis, does the Australian government consider itself as having the obligation to pursue that person, to ensure that that person is brought to justice in their home country?

Mr Marshall—I would say, Senator, that the Australian government would, in circumstances where extradition has been refused on the grounds of nationality, give serious consideration to requesting the country which has refused extradition to prosecute in lieu and, in fact, has done so on a couple of occasions. I suppose, without wishing to specify a broad policy in general cases, the government normally has a concern to ensure that fugitives are brought to justice. The government would normally have concerns about a situation in which somebody who has committed a crime under Australian law is able to stay out of the reach of the Australian authorities just by dint of their citizenship, and in such circumstances would normally contemplate requesting that that country investigate the question of prosecuting the person in lieu of extradition.

I think it would also be accurate to say, at least historically, that the Australian government, along with other Commonwealth countries, has been uncomfortable with the civil law countries’ policy of refusal to extradite their nationals. Unfortunately, many of the civil law countries are not prepared to budge. That is a matter which has arisen in various multilateral forums as well as in bilateral discussions. The short answer is that, as far as the past policy of Australian governments has been, in circumstances where the request is refused on the basis of nationality, the Australian government would wish to still ensure that justice is done.

Senator TCHEN—Could you take it on notice. You said that there are a number of cases in which the Australian government has encouraged or pursued prosecution. Could you provide the committee with some of the backgrounds in those cases?

Mr Marshall—I could address some of the issues now if you wish, Senator. One which was the subject of a lot of publicity, which is still continuing, regards Australia's request for the extradition of Stephen Anas from Greece. The Greek authorities refused the extradition on the basis that Mr Anas was regarded as a Greek citizen, notwithstanding the fact that Mr Anas was actually born in Australia of Greek parentage, and refused his extradition in relation to the offence of murder. Following that refusal and in consultation with the New South Wales authorities, because the offence was one under New South Wales law, Australia did request that Greece institute prosecution in lieu of extradition. That prosecution took place, I think, in January of this year and the court, by a split decision, acquitted Mr Anas. The Greek government has since announced that it would be appealing against that decision.

There was another case, again a very recent one, involving a person named Sylviane Goutaland, who was wanted in France for a negligent driving charge involving the death of an Australian. Again, this person was a national of the country of France and the French authorities refused to extradite. We sought prosecution in lieu. The person was prosecuted, was found guilty and a fine was levied. There was no prison sentence. I understand that in that case as well there has been some talk about appealing the decision actually by the offender, and that matter is continuing.

Senator TCHEN—In that case, if you do have any information on other cases, I am sure the committee would be interested in seeing the details. As a lead-on question to that, has the department or the government considered incorporating some sort of provision in the extradition treaties that we have concluded with various countries and perhaps in future might draw up with other countries, so that it becomes obligatory for the treaty countries to take into account or follow Australia's recommendation for criminal prosecution in cases of their own nationals? I have not seen anything in the extradition treaties that have come before this committee that contain that sort of obligation, whereas we seem to provide an obligation that we will consider extradition.

Mr Marshall—On that point, Senator, our model treaty does have a provision, which admittedly does not go as far as you are suggesting. That would be something we can definitely look at and come back to the committee on. At page 61 of our submission, as the annexure, our model treaty provides, paragraph 2(a):

> Where the Requested State refuses to extradite a national of that State it shall, if the other State so requests and the laws of the Requested State allow, submit the case to the competent authorities in order that proceedings for the prosecution of the person in respect of all or any of the offences for which extradition has been sought may be taken;

I agree that that does not go as far as an obligation.

Mr WILKIE—Mr Marshall, in support of your argument that the 'no evidence' test should remain, it has been said that a significant burden for civil law countries would occur and that would result in a high rate of failure for extradition requests even from common law countries on formal rather than substantive grounds. How many have failed?

Mr Marshall—I am afraid I do not have that figure to hand. It is something that we could look at. We try, obviously, when we are dealing with Commonwealth countries, to liaise with them in order to bolster the request to ensure that they are aware of our rules of evidence, but I do not have that figure to hand. All I can say is that, based on anecdotal experience, there have been cases in which—

Mr WILKIE—It seems a very strong statement in the submission where it says that the result is a high rate of failure on request. How high is that rate?

Mr Marshall—We would have to examine that in order to get any statistical detail on that particular issue. If I could illustrate the sorts of issues which come up in relation to incoming and outgoing requests under the prima facie case system, there are some circumstances in which it is just not technically feasible for various reasons. One example could be where the evidence is only available overseas and in which the foreign country requires that we send investigators to the relevant country to take the evidence once for the purposes of the extradition request. Then we will need to have those witnesses come to Australia for the purposes of the subsequent proceedings.

In terms of sheer volume, a normal ‘no evidence’ request would probably be about as thick as our submission. A request for 11 offences to a prima facie case country—these are requests from the UK to Australia—would basically be this four volume brief, which would be some thousands of pages. That does not of itself demonstrate that cases will fail, but it does show the amount of detail and the technical issues that have to be addressed in order to mount a solid case for extradition under the prima facie case procedure.

Mr WILKIE—I would appreciate it if you could get back to us with some real data about the failure rate because I think it is very important, particularly if it is stated in a submission that there is a high rate of failure, but we need the evidence to go along with that.

Senator COONEY—The idea of the extradition procedure is that we will make available to overseas countries people within Australia for the purposes of the trial, because the overseas countries are going to administer justice. Is that the basis of the extradition regime?

Mr Marshall—In a nutshell, yes. I would say that Australia generally chooses not to enter into extradition relationships with those countries with whom we would have serious difficulties in respect of their justice system, and indeed that is one of the issues that we do try to address in presenting extradition treaties to this committee for approval.

Senator COONEY—But the countries we do sign treaties with are countries that we trust.

Mr Marshall—By and large, yes.

Senator COONEY—Are there some countries that we have signed treaties with that we do not trust?

Mr Marshall—I would say that entering into a treaty involves an assessment of trust and the conclusion of the relationship of trust with that country. Having said that, there are specific exceptions in our treaty which are designed to ensure that certain questions which might arise when considering whether to surrender a person to a foreign jurisdiction are addressed in each specific case.

Senator COONEY—That is what worries me. We say that there is this ‘no evidence’ rule and we are going to send people overseas to be tried, and I hope we only do that on the basis that we trust these countries. But now you say that there are some exceptions made which would indicate that our trust is not as full as some people might say.

Mr Marshall—I think those exceptions are ones which are universally recognised between countries.

Senator COONEY—It does not matter whether they are universally recognised. Australia has to sign a treaty, has it not?

Mr Marshall—Yes.

Senator COONEY—And we as legislators have to send our people, and hopefully they are citizens of the country, overseas to a country that we do not fully trust on the basis that, as you say, that is how it is always done.

Mr Marshall—In entering into an extradition relationship with a particular country, we recognise that that will be a longstanding relationship. As a result of that, we cannot guarantee that a given country will always be of the same complexion as it might have been at the time we entered into the relationship. Hence, the specific exceptions to expedition are applied.

Senator COONEY—If you look at article 3, it states that extradition shall not be granted in any of the following circumstances:

> ... if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality or political opinion or that that person’s position may be prejudiced for any of those reasons;

That does not really indicate a great deal of trust in the country that we are sending our citizens to, does it? I follow that up by saying that if we make an exception on that basis—that is, that we really do not trust this country that we have signed a treaty with because we put in that exception—why should we trust someone to the extent of having the ‘no evidence’ rule? Can you tell me why we would do that?

Mr Marshall—The general policy behind Australia’s ‘no evidence’ rule is as explained in the submission. It does go down to issues as to workability and practicability. The only point I would make is that if one receives a request from an extradition country in which one thinks that the charges are trumped up and that therefore the prosecution is not solidly based—

Senator COONEY—But can you stop there. That is exactly it. Who is going to decide whether the charges are trumped up? The person who is going to be doing the charging is going to be from the executive whereas that sort of issue should be left to the judiciary, should it not? That is a classical judicial issue.

Mr Marshall—That is the issue that is before the committee. Under the current law, the magistrate does it as an administrative function not as a judicial function, but persons might differ as to exactly at which chain that function should be exercised at.

Senator COONEY—I ask you to come back to the fact as to why there is this distinction. Why should we say, ‘We want a ‘no evidence’ rule for extradition’, that it is all right to send you, me or anybody in this committee overseas if a state simply asks for it, but if we think it is going to be done on the ground of a person’s race, religion, nationality or political opinion there is an exception made? In other words, there is a limited trust in these countries. If there is only a limited trust, why should we trust them to look after our people according to the law if they are charged with a crime? Why should we trust them to do that, but we do not trust them if we believe that that crime is done for a political motive? Who is going to judge that? Why should it not be judged according to the law?

Mr Marshall—Certainly we can look at that. I suppose one short answer is that, short of conducting a full trial within Australia, there are always going to be some issues as to trust involved. If, for example, we insisted from every country that we should have full, admissible, affidavit evidence within Australia, we would still be dependent upon the bona fides of that country in preparing that evidence—that is, ultimately an affidavit is still just a document which reflects a sworn statement produced in a foreign country. If the requesting country chose to fabricate the charges, they could equally choose to fabricate the affidavit evidence which forms the basis of those charges.

Senator COONEY—That is absolutely correct. Because of that, we have article 3(1)(b) which addresses that issue, but that relates to an ordinary criminal offence. So we are happy to look at ordinary criminal offences in respect of article 3(1)(b) but not in terms of criminal offences generally. I was just wondering why we make that distinction.

Mr Marshall—The short answer is that that particular provision has been incorporated on the basis of essentially universal norms and standards—that is, where the criminal justice system is used for the purpose of punishing people on the grounds specified in article 3(1)(b), that is a circumstance in which states should not cooperate in—

Senator COONEY—Say there are two Australian backpackers and somebody, who we are not quite sure of at the moment, makes a judgment that one has been taken overseas for his or her political opinion or his or her religion. We will look at that in detail, but if somebody makes a judgment that that additional issue of race, religion, nationality or political opinion is not present, then that person is sent overseas without a proper look at what the application is all about.

Mr Marshall—Again, it is a matter for the committee as to the extent to which there is a proper application form.

Senator COONEY—The answer you are giving is that, because it is always done, we should sacrifice one and save the other.

Mr Marshall—That particular ground is reflected in our extradition legislation. Of course, the parliament passes the framework upon which these treaties are adopted. But there are a range of objections to extradition which are set out in our law and in the law of most countries, and that is regarded as a legitimate one.

Senator COONEY—If a person goes overseas or we extradite somebody and he or she is acquitted overseas, who pays for the fare back?

Mr Marshall—I think in the normal course of events, assuming that they do not have any citizenship rights in that country, the person would be removed from that country and the cost of such removal would be the requesting country.

Senator COONEY—So if an Australian—say a young woman of 21 who is alleged to have committed fraud in Denmark—is taken over there and is acquitted, so she has never ever committed a crime, the way Australia looks after its citizens is to let Denmark deport her, with what all that means for her ability to get back into Europe. Is Denmark part of the European Union? I am not sure. In any event, what all that means for her ability to get back into the European Union.

Mr Marshall—I would have to check on that. I am sorry, it is not a question that has often arisen, to my knowledge, but my—

Senator TCHEN—Because they are always found guilty?

Mr Marshall—I would not say they are always found guilty, although I would say that in most cases in which a country seeks extradition there are a fair amount of resources consumed. It involves sending escorting officials over from the requesting state, escorting the person back and then, of course, conducting the trial.

Senator COONEY—That is an interesting sort of reaction that you had. You said, 'Look, this is what it cost governments.' What is it going to cost the person? Have you ever thought of that?

Mr Marshall—In advising the minister and in interpreting extradition legislation, we always bear in mind the ramifications for individuals as well as for the foreign country. I do not really know how else to answer that question.

Senator COONEY—It is a matter that should be taken into account. Have you got any idea what the average cost is for somebody extradited to a foreign land to face trial?

Mr Marshall—No, we do not have statistics on the cost of the processes in the requested state.

Senator COONEY—So they have just got to cop the cost themselves, I suppose? The same as here; there is not too much legal aid these days.

Mr Marshall—I could not specify from jurisdiction to jurisdiction. In most of the cases of which I am aware—in many extradition cases—the persons consent to extradition and plead guilty upon return to the requested state. In some instances, of which I am aware, there has been a contested trial in which legal aid has been available. But we are talking of a vast range of extradition relationships and extradition treaties.

Senator COONEY—I actually thought that you would be able to tell me, at least in the cases of some, how much it cost the people if there has been this vast range.

Mr Marshall—I am not aware. We do not hold details on that particular aspect of it.

Senator COONEY—Is any consideration given to the citizen’s position at all, do you think, or is this just a cosy arrangement between various states around the world?

Mr Marshall—I would say that a lot of consideration is given to the citizen’s position by the minister in considering whether a person, who wishes to resist extradition, shall return. In fact, there has been considerable litigation over those issues over the last few years.

Senator COONEY—But the litigation cannot include looking at the merits of whether or not a backpacker should be sent back to Denmark, does it?

Mr Marshall—It would depend upon what you mean by ‘merits’. There are, as set out in our legislation—

Senator COONEY—What I mean by ‘merits’, and what I would have thought most people who had any concept of what a trial was all about and what they mean by ‘merits’ here, is whether the person is guilty or likely to be guilty, or is there any sort of evidence that would raise the issue of whether or not there is a serious matter to be tried. That is what I mean by ‘merits’.

Mr Marshall—Fine. You are aware of the evidentiary position with respect to prima facie cases. No evidence—

Senator COONEY—is required—

Mr Marshall—under the act. But in terms of other issues, representations are made to the minister in certain cases as to whether it would be, for example, unjust or oppressive for the person to return, whether it would be inconsistent with humanitarian considerations.

Senator COONEY—They are the very points that I was talking about. They are very much judicial questions being decided by the Attorney-General. I bet he does not decide them personally. He would not have time.

Mr Marshall—Nobody may be surrendered from Australia to another jurisdiction without a surrender warrant being issued by either the Attorney-General or the Minister for Justice and Customs.

Senator COONEY—Yes, but the people who are deciding them, that is, the Minister for Customs does not actually look at the case; somebody else looks at it—somebody who may or may not have competence; in fact, probably does not have competence because it is a judicial question.

Mr Marshall—I would say that the minister does look at every case. In every case—in fact, even when the person consents—a submission is put before the minister enclosing the representations made by the individual.

Senator COONEY—So he reads all the evidence that is relevant. The point I want to make is that, if the Attorney-General looks at every case with the scrutiny that you are talking about, his time should be saved, and that issue in-house should be put back into the courts.

Mr Marshall—Again, that is a matter for the committee—

Senator COONEY—You are telling me that the Attorney-General looks at all the issues of extradition on the merits.

Mr Marshall—When I say ‘all the issues of extradition’, I mean all the issues associated with the considerations under the Attorney-General’s role. Obviously, in a ‘no evidence’ extradition case, the question of evaluating the adequacy of evidence against the accused person does not enter into that equation.

Senator COONEY—That is what I am talking about: the issue of merits. That is why I defined it for you. You then said the Attorney-General did that, but now you are saying that he does not.

Mr Marshall—Sorry, I am not trying to obfuscate here, but the position here with ‘no evidence’ relationships and ‘no evidence’ treaties is that there is not a requirement for the requested state to provide evidence.

Senator COONEY—Is that not the answer? Nobody looks at the merits.

Mr Marshall—In terms of the merits of the case against the accused, no, that is exactly the position.

Senator MASON—I should say, Mrs Jackson, Mr Marshall and Mr Manning, that your submission was terrific, in particular the executive summary—very, very handy. I have got just a couple of questions. To go to the heart of the matter, the concern that this committee had with respect to its 36 report was that, as Senator Cooney said, people could be extradited from this country with less evidence than would be required in Australia; for example, the prior hearing for a simple theft they might be facing such as life imprisonment overseas. So it is very simple. You understand that that is the political and legal issue that this committee was concerned with. The heart of it, I think, is on, I think page ix in your executive summary. You say in the top paragraph:

> While it is often argued that the prima facie case protects against extradition on ill-founded or false charges and is a right under common law—

that is what people in this committee have been concerned about and that is that the prima facie case protects against extradition on ill-founded or false charges; that is what we were all concerned about—

... successive Australian Governments have taken the view that modern extradition treaties incorporate a range of safeguards ... which give the fugitive better protection against a malicious prosecution than does the prima facie case.

I note just for the record that the DPP go even further—and I know that you are not here to represent the DPP. They go so far as to say:

It is simply not the case that foreign prosecutors are prepared to allege anything which they think will secure extradition.

My question is: what are the range of safeguards which give the fugitive better protection against a malicious prosecution than the prima facie case, because that is the nub of the issue?

Mr Manning—I think the principal safeguards we are referring to here are the so-called extradition objections set out in the act, which deal with all the major concerns about possible systemic injustices ,and that is the general tenor of those. There are also a number of other provisions which deal with procedural failings such as dual—what is the word that I am looking for—

Senator MASON—Dual criminality?

Mr Manning—No, I was about to say that, but that is wrong. I was thinking more of double jeopardy. So there are those sorts of protections designed to ensure that there are not systemic failings which will prevent the person from getting a fair trial when they get to the foreign country.

So the objective is to look more at the systemic failings rather than the particular merits of the case. I guess the underlying principle of that is that it is very difficult to judge the merits at a distance.

Senator MASON—That is the point. It is difficult to judge the merits at a distance. And I accept what the DPP says in its submission in terms of administrative convenience. I accept that. I used to be a prosecutor myself. You want that and you want ease of transition. DPP is concerned with extraditing Australian nationals from foreign countries easily and quickly, and I accept that. I do not have any problem with that. But the concern of this committee is Australian citizens in this country, and indeed foreign nationals, being extradited to a foreign country when we do not really trust them. That is what Senator Cooney was on about before. Some of those countries that we have extradition treaties with I do not particularly trust.

I do not accept the DPP's assertion that 'all the material the DPP has seen suggests that the foreign countries, and foreign prosecutors, take their obligations under the extradition process as seriously as Australia'. That may be the experience thus far, but it is not necessarily the experience in the future and I do not accept that we necessarily should trust these countries. That is it; that is our concern.

Mr Marshall—As I say, it is ultimately an issue of balance. The act does include certain safeguards which parliament introduced for the purposes of ensuring that certain protections are conferred upon persons before they might be extradited overseas. Those exceptions are also incorporated in the treaties which we put before this committee, so that extradition may be conducted in accordance with the regime under our extradition act. Beyond that, if it boils down to a question of trust, all I can say is that extradition is a two-way reciprocal relationship and if we seek cooperation from our extradition partners we must be prepared to give it in return.

Senator MASON—Let me phrase it differently: it seems so much a matter of trust. That is a crude word. It is more a matter of: we will subject Australian citizens to lesser protection at law than they would receive in this country. It is not so much a matter of trust. I am not saying they are necessarily bad countries. But their system is certainly different and the protection they will receive, in my view, in many cases will be less than they would receive here in this country. I think that is a legitimate point.

CHAIR—Do you want to leave that as an assertion or a question and move on?

Senator MASON—Let us just leave that hanging.

CHAIR—You senators know these subtleties.

Senator MASON—Just one last point: at the bottom of that same page it says:

An attempt to substitute any of these tests—

and you mentioned the other tests that we could embark upon—

for the ‘no evidence’ procedure could be expected to result in the loss of many of our treaties with civil law countries—

and I accept that; I think that is right—

... bearing in mind the fact that some find our requirements under the ‘no evidence’ procedure unduly strict.

In other words, some of them even find the current ‘no evidence’ procedure unduly strict and yet we are supposed to have confidence in these countries’ capacity to administer justice fairly. If they cannot get your act together to put together a ‘no evidence’ brief, why should we be sending our citizens overseas to face their courts?

Mr Marshall—I can come back to the committee with further detail on that. I suspect the intention behind that statement is to reflect the fact that since we have moved to a ‘no evidence’ process often in hearings before magistrates the formal requirements are interpreted in a very strict fashion. One example might be the production of seals on documents. In order to enable documents to be admissible for the purpose of extradition proceedings, the Extradition Act requires that the documentation bears the seals of the requested country and that they are accompanied by an appropriate translation.

In interpreting those particular requirements, magistrates have often ruled that certain material shall not be entertained for the purposes of determining eligibility for extradition, because formal requirements have not been met. I think the intention of the point there is that extradition is inherently technical. It quite often involves going back to the requested country in order to ensure that formal requirements are addressed, and those countries frequently find that we are asking them quite onerous questions. They come back, but they do find them strict. That is just the position that applies.

Senator MASON—Justice is an onerous thing.

Mr WILKIE—Just on that same statement in section 11 of the executive summary, I know Senator Mason has stated that he is sure that it would result in the loss of many of our treaties. It is a fairly broad statement not backed up with any evidence. What I would like to find out is: how many are likely to be at risk and which treaties are they? Which countries do find it onerous to provide the ‘no evidence’ clause? I want some quality data, not just a general statement that says, ‘Look, this would happen.’

Mr Marshall—Certainly. We can provide that.

Mr Manning—It is very difficult, though, to specify all the countries where that might be the case.

Mr WILKIE—Even if there is a number of them. Right now all we have got is a very broad statement that says, ‘We’re going to lose all these treaties’, but nothing to back that up other than a belief that that may happen.

Mr Marshall—A lot of these issues, of course, date back to 1985, when the parliament first legislated to give effect to the ‘no evidence’ procedure. We will review our files regarding those provisions. All I can really say at this stage is that I understand there were a number of deadlocked treaty negotiations which were subsequently resolved by the introduction of the ‘no evidence’ regime. But we will come back to the committee on that.

Ms ELLIS—Has Australia ever refused to surrender a person on the grounds of nationality?

Mr Marshall—The short answer to that is yes.

Ms ELLIS—How many?

Mr Marshall—Again, I do apologise. I do not have all of those details. Unfortunately, the extradition process is one which does not easily permit of statistical analysis which identifies the reasons for every case going one way or another. We can review it. What I could say in very general terms is that there have been occasions in which there have been concerns about returning somebody to the foreign jurisdiction and, because that person had Australian nationality, the minister at the time determined that it would be inappropriate and determined it on the basis of nationality. That is not to say that that was the only reason for refusal, but that was a ground upon which refusal could be based under the treaty. But that is quite rare. The general policy which governments have adopted has been to refuse nationals and non-nationals alike.

Ms ELLIS—You said in your statement that many of these cases take years and years to resolve, and you showed us an example of your briefs. I really would be interested in the cost. You said today you could not really tell us the cost of extradition. Is there any way we could get a bit of an idea of what it has cost the governments, say, over the last five years on extraditions and if there are any more cost-effective ways to do this. For example, instead of sending witnesses overseas, could you do it by videoconferencing? It seems that technology is worldwide. Has the department looked at cost-effective ways of doing this? Just in looking at your document on the floor and understanding how much per page it would cost, I wonder whether there may be simpler ways of doing it that are not so costly to the country. I am really interested in the costs of extradition.

Mr Marshall—We can certainly get some material on that. I note the DPP will be speaking after us and they might also have some information regarding costs.

Ms ELLIS—Is videoconferencing done with evidence at the moment or not?

Mr Marshall—There is some capacity for videoconferencing under Australian law, although there is not yet a comprehensive Commonwealth regime for videoconferencing. In the case of extradition proceedings, most of those proceedings are conducted on the documents. But there is some capacity for videoconferencing in various cases. I suppose in an extradition situation there are issues as to the evidence which can be produced in the requesting country as well as the ability to entertain such evidence from overseas. But again, we will be quite happy to have a look at that issue and provide the committee with further details.

Mr ADAMS—Mr Marshall, justice Cooney and prosecutor Mason were talking about justice. You could not stand up before a magistrate and argue that there was no justice in a country that was trying to extract an Australian citizen? That would not be a defence, would it, to stop it, if we had a treaty with that country?

Mr Marshall—I think the question of justice per se would not be one which would be argued before the magistrate in the terms that you have put it. The question as to whether there is an extradition objection such as whether the person is being pursued for political reasons and issues of that nature are matters which may be put before a magistrate.

Mr ADAMS—And that would be looked at as justice not pertaining to that country in which we are trying to seek the citizen?

Mr Marshall—It would depend upon the extent to which a question of justice fell within the statutory formula expressed in the Extradition Act. From a broader perspective, in determining whether a person who is ruled legally eligible for extradition shall be extradited, the minister has more authority to take into account issues concerning the degree to which extradition may be unjust or oppressive in all the circumstances.

Mr ADAMS—It is just that we are in ‘globalisation’, which is the term being used. The world is spinning a bit faster with everything that is going on. Criminals are operating as fast as capital in moving around the world, as are drugs and terrorism. Do two countries have to work together to make some of these things work so that we can bring people to justice; otherwise with lots of money they can get away from having to face a court? Do you see countries coming together? Has there been a change at all in countries trying to get over the problems where extradition is seen as a difficulty?

Mr Marshall—I think as a general principle that philosophy has informed both the Australian government's approach and that of the international community in general towards extradition relationships. Having said that, and as noted in our submission, it is often a slow process. We are talking about establishing relationships with countries which do have a significantly different legal heritage to our own and are trying to achieve some degree of agreement and concordance between our systems. But, yes, I think the trend towards globalisation, particularly in the area of crime, movement of money and movement of persons, has given greater impetus to cooperation in the extradition field.

Mr ADAMS—Is international law coping? The law is a slow thing to change and move through. Can it keep up to this faster world? Do we need to look at it differently? Is there a recognition that those countries which have a different heritage to ours have a different legal system and they are a different civil country? Do we recognise that? Do we have much recognition that they are different? Do we need to treat them differently?

Mr Marshall—I think there is a fair degree of recognition in terms of various countries' approaches to this. One might say that the 'no evidence' procedure is reflective of that insofar as it contemplates a lower common denominator for extradition. I think that does apply in general terms in many areas of criminal justice. Countries are, for example, agreeing on criminalisation of various offences which are regarded as being particularly problematic for the world community such as in the field of drugs, organised crime and money laundering. So I would say that there is some effort in moving on the part of various countries to try to cooperate, but, again, having said that, extradition is a very sensitive area. As the committee recognised in its report No. 36, it involves issues of sovereignty, it involves issues of citizenship and criminal law policy. So it is not one in which we ever expect changes to happen overnight.

Mr ADAMS—I have one further point. You said that when we changed things in 1985—and I think that was when we changed to a 'no evidence' situation to, I guess, show our goodwill towards some civil law countries—there was an increase in people being extradited. Do you have any figures on that?

Mr Marshall—We do. We have a statistical submission. Rather than try to summarise that, we will provide that to the committee. Basically, there has been an increase in the number of requests and the number of extraditions granted between Australia and civil law countries in the 1990s as opposed to the 1980s. In general terms, there has been an increase in extradition per se, although it does vary year by year.

Mr ADAMS—Do you any idea of the outcome of those? Do we monitor them at all? When people go back, do we know the statistics of how people end up? The committee is genuinely concerned about Australians ending up in some court which is not, shall we say, trustworthy. It would be interesting to know how people fared who ended up in some of those courts.

Mr Marshall—We do not have those details, and I doubt we would have comprehensive details on that question. In many cases, of course, the person sought for extradition is actually a national of the requesting country. In those cases, once they have left Australia, it is not normally a matter that we would follow up on. I am not aware of any detailed statistics compiled in relation to Australian citizens.

Mr ADAMS—There are no statistics in relation to Australian citizens?

Mr Manning—When we say that we would not follow up on it, Australian citizens facing a court overseas, just like Australian citizens who might be arrested overseas and subsequently face court, are of course entitled to normal Australian consular assistance. So it is not a question of the government simply abandoning them, but it no longer falls within our particular bailiwick. As such, we do not keep statistics on what the outcomes are. To put the matter in some proportion, I should say that the statistical supplement we have done indicates that there have been 14 Australians extradited over the past 10 years. We are not talking about a large flow, although the rights of every individual are important.

Senator COONEY—So it is your proposition that, because only 14 have been subjected to injustice, that is all right.

Mr Manning—That is precisely what I denied.

Senator COONEY—It might be more difficult if there were 14,000 and that would be a real problem. Is that what you are putting?

Mr Manning—I am merely indicating that the numbers involved are relatively small, that is, reasonable to handle it in terms of the traditional consulate protection approach.

Senator COONEY—To be fair, you were saying that, because there are only 14 people, it does not really matter whether they get a good result or a bad result according to the law.

Mr Manning—With respect, I precisely denied that at the end of what I just said.

CHAIR—There is a difference of interpretation as a result.

Senator LUDWIG—Mr Marshall, just to be a little unfair for a moment, assume you are a person who is subject to an application for extradition. Which would you prefer to have before you, the thin volume of the justice who is going to oversee the case and decide whether you should be extradited, or the three volumes? I will leave you to contemplate that as to whether you choose to answer it or not. Whilst you do that, the committee heard evidence in Sydney on 13 February from Justice Dowd. Have you had the opportunity to read that transcript?

Mr Marshall—Yes.

Senator LUDWIG—I am curious about your view of the New South Wales Justices Act 1902, particularly section 48E, as another way of looking at the issue. Perhaps you could take that on notice or provide an overview of why Justice Dowd's views should not be taken seriously instead of the current practice and procedure that you have adopted.

Mr Marshall—Certainly. I would always take Justice Dowd's views very seriously. My understanding of Justice Dowd's evidence was that he was referring to a regime under the New South Wales evidence legislation which is, in effect, the same as the prima facie case, and then the issue comes down to the fact as to how simple it is for magistrates or courts to evaluate that evidence and how simple it is for civil law countries to produce it. We have addressed some of those issues in our submission, but I am more than happy to come back with a supplementary submission that specifically addresses that issue in the statutory context to which you refer.

Senator LUDWIG—I noted that you covered some of the points. I was just curious that Justice Dowd seemed to go a little bit further or was perhaps a little stronger in his view and then as a comparison of the New South Wales Justices Act 1902. That is the only question I wanted to ask. You can decide whether or not you want to answer the first. Thanks very much.

CHAIR—Before we call the next witnesses, I want to follow that up. I refer to Justice Dowd's assertion that, first of all, he does not think that civil law countries have quite the difficulties of satisfying that test as the Attorney-General's Department and the submissions have indicated. In some ways, I do not know how we are going to resolve that.

He says this; you say that. You seem to have equal experience in these matters. His is from the bench, if you like; yours is from the prosecutorial perspective. Section 48E(2)(v) states that 'in any other case the justice or justices are of the opinion that there are substantial reasons why in the interests of justice the witness should attend to give oral evidence ...' That is to say, it seems to confer some sort of discretion on the justice, the magistrate or whatever it is hearing that initial stage; that the probative value of it needs to be tested by calling witnesses. He also asserts that if somebody wants to bring a suit, make an allegation or relay any information against anyone in New South Wales, there is no substantial reason why it should be any different internationally. I do not know whether there is much that you can say about these things, but at least I wanted to make it clear to you what we have been given by Justice Dowd and what is in our mind.

Lastly, in international law there seems to be a procedure or precedent of a thing called interpretive declarations, where if there is some ambiguity in the terms of a treaty a state can issue a declaration in some official way that it proposes to interpret such provision in this way. And there is a House of Lords case we found in the library here about that. If in the future we had to vary the terms of the treaty and there seems to be a way to do it without actually going back, rewriting it and renegotiating it, such that if the Australian government said by way of a declaration that we regard the terms of our extradition treaties to require a prima facie case or something more than 'no evidence', and we did that unilaterally, the courts could take cognisance of that here. You might care to do your own research on that. It was a case regarding—we have got it somewhere; we will try to find it for you—alien property in the first world war. It is in the appeal cases, AC law reports. We will try to dig it out and find it for you.

We are going to call some extra witnesses from the DPP's office and so forth. If you would like to stay at the table for that, please do. If you are required back in the department, you have our permission to go.

[11.10 a.m.]

DELANEY, Mr Grahame, Principal Adviser, Commercial Prosecutions and Policy, Director of Public Prosecutions Office

GRAY, Mr Geoffrey, Assistant Director, Criminal Assets and International, Director of Public Prosecutions Office

CHAIR—Do you have anything further to add about the capacity in which you appear before the committee today?

Mr Gray—I am in charge of the Criminal Assets and International Branch which has supervisory responsibility for extradition.

CHAIR—We will not require evidence on oath, but these are legal proceedings of the parliament and so forth, as I am sure you understand. Do you want to make some remarks and then we will go to questions?

Mr Delaney—As the committee would be aware, the DPP has made a written submission, and I will not repeat what is in that submission except to confirm that there are two capacities in which the DPP acts in relation to extraditions. We act on incoming extradition requests from foreign countries on instructions from the Attorney-General's Department and, as importantly, we assist in the preparation of extradition requests to overseas countries for the return of fugitives from Australia.

Extradition, of course, is part of the criminal justice process and a very important part of the DPP's work. As with every other element of the criminal process, we recognise that there must be a balance drawn between protecting the rights of the individual and ensuring that the criminal law can be effectively enforced. Crime, particularly at the Commonwealth level, is becoming more global and international travel is becoming more common. The result is that extradition is becoming an increasingly important part of the criminal justice process and we cannot really have a system under which people can escape prosecution by moving, particularly to countries from which it is practically impossible to secure their return. From the DPP's perspective, we must have the capacity to prosecute offences like serious drug crime, international and commercial fraud, people smuggling and organised paedophile rings even where the offenders are found outside Australia.

Some submissions to the committee have called for Australia to return to a system under which every foreign country, irrespective of their particular system, which makes an extradition request to Australia must provide evidence to a prima facie case standard. The submission suggests that it would be easy for civil law countries to meet that test if someone were to tell them what was required. On the DPP's part, we doubt that it would be an easy task for a civil law country to put together a prima facie case. The civil law system works differently from ours. The concept of the prima facie case does not form part of their system. We would be asking a foreign country to put together documents that do not already exist and which would have to comply with rules of evidence that they have no experience with to meet a test which in reality has no meaning to them in their legal systems. It is not that different from a foreign country requiring Australia to provide a copy, for example, of a report from an investigating magistrate in support of one of our extradition requests.

We would not like to see a situation develop where some countries would decide that it was simply too hard to make an extradition request to Australia and would stop making them or the result that those countries would also stop accepting extradition requests from Australia. It may be that there is a middle course that could apply in these cases. There may be scope for a test that would require civil law countries to provide more information than they do at present, but which would not require them to put together a prima facie case. It may be, for example, that some countries would be able to provide a copy of a report of an investigating magistrate or a certificate to the effect that the evidence has been considered and the conclusion has been drawn that there is a case to answer.

Just before finishing, the DPP appreciates the committee's concern with the possibility that an extradition request from a 'no evidence' country could be illfounded or falsely based. From the DPP's perspective, we have seen no evidence of that to date. That does not exclude the possibility that that could occur in the future, nor does it exclude the possibility that it could be made in relation to a request from an evidence treaty country. Understandably, the committee's focus has really been on extradition from Australia and in particular in relation to Australian citizens, and that is understandable. The DPP's concern is, of course, wider than that.

We have a number of outstanding extradition requests that date back to the 1980s and which arose from the corporate collapses in that time. The committee should not assume that even in relation to a 'no evidence' request there is little documentation. If I can give you an example: in the request for the return of Christopher Skase the document containing the acts and omissions that was forwarded to Spain comprised 55 pages, which of course had to be translated into the Spanish language for the purposes of those proceedings.

The suggestion has also been made that the examination could be conducted overseas by video of witnesses in the foreign country. That hearing would be similar, I suppose, to a committal hearing in our system. The committee should be aware as well that, assuming that is done, once the fugitive is returned to Australia that person would have a right to go through that same procedure again at a full committal hearing, assuming that had not already taken place. So in the case of Mr Skase, for example, once—if ever—he was returned to Queensland he would be entitled to a full committal hearing. They were the remarks that we wish to open with. We would be glad to take questions on the DPP's position.

CHAIR—Senator Mason has to attend another hearing shortly, so would you like to go first?

Senator MASON—Thank you for your indulgence, Mr Chairman and members, Mr Delaney and Mr Gray. Just briefly, just to summarise, it seems to me that the equation is something like this: that your administrative convenience and the idea of tracking down Australian fugitives living overseas for that 'no evidence' test is a great boon. I can understand that, and none of us here would want Australian fugitives to escape the Australian justice system. But the price of that—and that is what we are concerned about—is that Australian citizens and potentially foreign citizens can be extradited from this country, which is our concern, to countries where we are not convinced of their justice system, perhaps even their system of jails, the penalties applying to certain offences and so forth. That seems to me to be the balance. While you are concerned about administrative convenience and extracting fugitives from overseas, we are concerned—and you pointed this out in your oral submission just now—about people being extradited from here. That seems to me to be where the tension lies. You say in your submission, and you said it again in your oral submission just now, that all the material the DPP has seen suggests that foreign countries and foreign prosecutors take their obligations under the extradition process as seriously as Australia and that foreign courts are as assiduous as Australian courts in ensuring the rights of defendants and so forth.

When we were looking at report No. 36 we examined some of the countries that we have extradition treaties with and, to be frank with you, just on the face of it we were not convinced that all of those countries would, for example, be able to supply a justice system and also a system of jails and so forth that we thought it would be advisable for Australian citizens to be subject to. So that is our concern. Can you satisfy us of that? Can you, in a sense, ameliorate our concerns.

Mr Delaney—I do not know that I can, apart from what I have already said. I suppose the DPP is really at the practice end of the debate. I guess the assumption we make is that, when Australia enters a treaty with another country, Australia is satisfied that that other country has a legal system which is proper to recognise. As I say, we have not seen any evidence to the contrary. But I do not know that I can take it any further than that.

Senator MASON—The way that I see it is this—and I may be totally wrong—but I understand that we may enter into an agreement with some South American country and we want to do that to make sure that the Skases of the world cannot go there. I understand that. I think that we all appreciate that. We all want to make sure that those people do not escape. But what concerns us is our citizens being taken back there to face a judicial system that we are not satisfied with. There is not a lot of common ground there. I understand from your point of view perfectly that you want to stop people escaping and I am with you on that. We all are. But we are very concerned about Australian citizens. I looked at that list the last time. I am still concerned.

Mr Delaney—I do not think that I can take it much further than I already have, apart from, of course, to say that in the very comprehensive submission from the department a number of safeguards are set out there. As to their sufficiency, that is really—

Senator MASON—Just one last thing: the underlying assumption of all of this is that somehow these overseas systems are different but equal. Every time I hear the statement ‘different but equal’, that really worries me. Thank you.

Senator LUDWIG—Is it your view that the ‘full evidence’ model is just too difficult for civil law countries to comply with?

Mr Delaney—Certainly, that is the case, but I think the ‘full evidence’ model is a bit difficult for ‘full evidence’ countries to comply with. If I could crave the committee’s indulgence, I have a chronology here of one particular request to the United Kingdom that was made in June 1993 concerning alleged offences involving a shareholder loss of some $US28 million. That person is still not back in Australia. That is not an indication of a system that is working under the ‘full evidence’ regime.

Senator LUDWIG—So you would go one step further and consider that the Commonwealth countries under the London Scheme should drop the prima facie case requirement and then go to a ‘no evidence’ rule as well?

Mr Delaney—I would like to see them step back from the ‘full evidence’ procedure to some other, more efficient procedure. We must remember that in Commonwealth countries—in the UK, for example, there are the same safeguards in relation to trial by jury that we have. They have essentially the same system of a committal. To insist as well on a ‘full evidence’ request in an extradition situation seems to me certainly inefficient, but, more importantly, has proved in a number of cases to be ineffectual. That is of great concern.

Senator LUDWIG—If we look at that position, on what basis, do you say? Is it only the efficiency criteria in the sense that it is less efficient to use prima facie in terms of prosecuting the case? Efficiency—what criteria do you then attach to give that meaning? Do you then say efficiency is only on the basis of how much paper warfare people have to go through, how much complexity the paper warfare is?

Mr Delaney—I think that I would come at it from a different angle. I think the system has to be demonstrated to be effective. If a request is made and it takes almost a decade and the matter is not resolved through the UK courts, that is not effective. This is a case in which two Australian citizens await trial in Australia.

Senator LUDWIG—Is that not effective in terms of not succeeding in giving effect to their extradition rather than—

Mr Delaney—It is just not effective because justice is not being done.

Senator LUDWIG—So we have moved from effectiveness to justice not being done. Is that justice in the sense of having successful extradition or justice in the sense of having fairness to the individual?

Mr Delaney—I think that it can be assumed that, once the person is returned to Australia, that person will be accorded all the rights that anyone else in Australia is accorded in terms of the committal and trial process.

Senator LUDWIG—So assuming that we adopt a process of the ‘no evidence’ rule in the countries that we have already and then some of the Commonwealth countries, what about the issue of the rights of the reciprocity coming in? Is it also more or less efficient if then treaty obligations do not have reciprocity so that we are then in a position where we cannot extradite as easily as what they can then of us, to put it that way? Is that an effective, efficient and fair mechanism? Would you enter into an agreement such as that—where there was no reciprocity?

Mr Delaney—That really is a question, I suppose, for government and for an overall policy. It is certainly something that I could understand will be exercising the committee’s mind. But I do not know that I can assist on that.

Senator LUDWIG—And then you suggest at page 2 that the extradition process should be streamlined to bring it up to date and reduce the scope for delay and technical challenge. When you say that, is that an endorsement of the 'no evidence' process? Is that what you say would give you that?

Mr Delaney—We are saying that the 'no evidence' process has in our experience proved more effective than the 'full evidence' process.

Senator LUDWIG—But that is effective in achieving extradition.

Mr Delaney—Yes.

Senator LUDWIG—What other criteria do you use to then judge effectiveness? Or is it only when someone is or is not extradited and how long it takes? If it is a long time, it is inefficient; if it is a short time, it is efficient?

Mr Delaney—Yes, I take your point. I am really talking about, I suppose, in particular those cases where we seek extradition from foreign countries and when the person is returned we try that person and he or she is either convicted or acquitted.

In terms of requests from countries, as I have mentioned, we act on instructions from the Attorney-General's Department. Once the matter has been concluded by the court and the person is found to be susceptible to extradition or not, that is really the end of our role. I really cannot assist on what occurs subsequent to that.

Senator LUDWIG—Effectively, if I summarise your argument, in terms of extradition into Australia, you then say the 'no evidence' rule without satisfying a prima facie case is sufficient, because once you have the person you are confident that our judicial system will give the person a fair trial?

Mr Delaney—Yes.

Mrs DE-ANNE KELLY—I notice on page 5 of your submission you state:

> However, in the view of the DPP, it would be counterproductive for Australia to start refusing to extradite Australian citizens to civil law countries. The immediate effect of such action would be to make Australia a safe haven for any international criminal who happened to be an Australian citizen.

America has a somewhat lesser test. Is America a safe haven for American citizens who are international criminals?

Mr Delaney—I do not know whether there are any and the number, if there are, of American citizens who might be taking refuge within the United States in those circumstances.

Mrs DE-ANNE KELLY—But there is not an international outcry about international criminals of American citizenship hiding in the United States, is there?

Mr Delaney—No. I agree with you; there is not.

Mrs DE-ANNE KELLY—Then, with respect, why make that assertion about Australia?

Mr Delaney—It is just on the basis that the number of people that we have agreed extradite to civil law countries—European countries, for example—may not be extradited in circumstances where we reject those treaties. And they would then be free to reside in Australia.

Mrs DE-ANNE KELLY—Moving to the US model, you say there is a risk that some civil law countries may find it difficult to comply with this test or see it as an additional requirement. Is there any evidence that the probable cause requirement in the US causes difficulties for countries requesting extradition?

Mr Delaney—I might ask my colleague to answer that. It has more direct—

Mr Gray—The short answer is that we as the DPP have not asked the Americans. I have no idea. I do not know if the Attorney-General's Department has. We do not really know what experience they have with civil law countries. I assume they have the same obligation on them. I assume there are countries that will extradite to the US. I suspect there are countries that will not. The point of that was really to point out that there is no evidence. Though it should not be assumed that countries have no problems with the US, unless somebody goes and asks the US. We have not done that. The concerns on that point would be resolved if the US authorities were to say they have got no problems in that area.

Mrs DE-ANNE KELLY—I can well understand the DPP's push for efficiency. You are concerned with one-way traffic, which is getting alleged scoundrels that are of Australian citizenship back to Australia, which is certainly very worthy. But the committee's other concern is for Australian citizens that may well be sent to a country where we have little knowledge of the justice system on what would be seen as fairly flimsy evidence.

I would like to ask you about a case that was referred to the committee from Mr Chris Nyst—I hope I am pronouncing that correctly—of Witheriff Nyst Lawyers. He refers to a 1992 case where a Mrs Holt was to be extradited to the United States. She was held in a Brisbane women's prison for nine months before finally being released on bail by the Federal Court. Finally, it was found there was no prima facie case against her. I also note that her husband went to the United States. And one would have to say that the United States would be seen as a country that has a reasonably fair justice system. But Mr Holt was extradited to America, where the case was dismissed for lack of due process. Crucial documents were missing. He was finally released by the American court, but he had spent 513 days in Australian prisons pending extradition.

I know that is only one case, but that does encapsulate the concerns that the committee has that even in a country like the United States, where there is a fair justice system one would presume, the material supplied to Australia is not sufficient to establish a case. Could you comment on that, please?

Mr Delaney—Only to this extent—and I do not know the details; I did see the reference to those cases in the submission—that was in a 'full evidence' situation, as I understand it, prior to the arrangements that presently exist in relation to the United States. Even where you have a full brief of evidence, you are not necessarily going to know, when you go through and look at all the evidence, tick off the elements and say, ‘There appears to be a case there’, whether those witnesses are ultimately going to be available in the country to which extradition is sought. You have no real control over how that prosecution is run once the person gets back to, in this case, the United States.

I do not know that there is a simple answer to that particular conundrum. Assuming, for example, that those two people had been arrested in the United States rather than in Australia, they probably would have spent as much time in an American prison, I suspect, before being ultimately tried. Regrettably, it is part of the criminal justice process that people do spend time in prison before being either acquitted or convicted, and particularly people whose extradition is sought, because they are classic risks, I suppose, for flight.

Mrs DE-ANNE KELLY—Why is it not possible for Australia to prosecute its own citizens where it has concerns about surrendering them to another country?

Mr Delaney—I think it is possible. It would be something you would have to look at fairly carefully in terms of procedure, cost and getting witnesses to Australia to give evidence, and interpreters.

Mrs DE-ANNE KELLY—Is it commonly done?

Mr Delaney—No, it is not, in my experience, commonly done.

Senator LUDWIG—Is that because of cost?

Mr Gray—The situation has never arisen. You would have to have a situation where extradition is requested so you have got to have an extradition treaty. Under the way the current provisions are, it is only if the extradition has been refused on grounds of nationality. As Mr Marshall said, there have been refusals on grounds of nationality, but that has never been the sole grounds. It has always been a case of whether there are other reasons not to prosecute so the question has not arisen. There is no reason in theory why it could not be done. But the logistics, if it was a big document based case with lots of witnesses, could be pretty horrendous.

Senator LUDWIG—That would apply to civil law countries, where the logistics would be large if they chose to prosecute within their own country. The same thing would be faced.

Mr Gray—Civil law countries operate differently. This is what you keep coming back to. I think it would be far easier for a civil law country to prosecute an Australian offence than for us to prosecute a foreign offence, because they have the system of investigating magistrates, documents and they do not have rules of evidence in the sense that we recognise. They call the defendant in and they question. This is the great difference between their system and ours.

An investigating magistrate will question the defendant and they will find out how much of the case is in dispute and how much needs to be put, which is I think ultimately the reason why they have so much difficulty with the concept of prima facie cases. They have a step in their process that we do not have. They get to point X. The defendant comes before the investigating magistrate and they find out what is admitted and what is not. Those facts which are admitted are not further investigated. Under our system, everything has to be investigated. The prima facie case is evidence on every element. Under a civil law system, a lot of the elements of the offence are just not investigated.

Senator LUDWIG—It would not be unusual then to be able to provide a situation where for those countries where there seems to have been a suggested lack of trust, although I do not use that term myself, we could then adopt a process of pursuing the prosecution ourselves rather than allowing for extradition.

Mr Gray—The whole concept of lack of trust is really something that we as the DPP cannot comment on. As I think I said before, the assumption if there is an extradition treaty that we can trust the foreign country really is not an issue that I have given a great deal of thought to until today.

Senator LUDWIG—That is not the issue I wanted to concentrate on but whether it was an option that could be pursued.

Mr Gray—I reckon there are a whole range of alternatives that do not involve requiring countries to do something which is something they cannot do. The other element that we have not talked about is that there was some reference to the cost of all of this. You have seen the length of the papers there. The first thing the foreign country has to do after it has put together the brief would be to translate it into English, because we are talking about non-English-speaking countries. I can tell you that, as a result of having to pay the cost of translating mutual assistance requests, that can be a horrendously expensive exercise. It can run into hundreds of thousands of dollars.

Senator COONEY—I want to take up the point Mrs Kelly made, and I refer again to the paragraph on page 5. It states:

> The DPP would support any move that might overcome the obstacles which prevent Australia seeking the extradition of foreign nationals. However, in the view of the DPP, it would be counterproductive for Australia to start refusing to extradite Australian citizens to civil law countries. The immediate effect of such action would be to make Australia a safe haven for any international criminal who happened to be an Australian citizen. That would not be in the interests of Australian law enforcement or the Australian community.

In making this submission, does the DPP give any weight at all to Australian citizenship?

Mr Delaney—In the sense that there should be a differentiation between Australian citizens and others?

Senator COONEY—Just the fact that a person who is an Australian citizen might expect his or her country to show some concern for him or her. The way this is put, it simply says that if you are an international criminal—and this is, of course, before it is established whether you are an international criminal; this is before the person has been convicted—who happens to be an Australian citizen. There is no status given to the position of being an Australian citizen. It does not matter whether you are an Australian citizen or not; we are going to send you back on the say-so of another country. It is a proposition that I find difficult to comprehend.

Mr Delaney—That is certainly not the conclusion that we are seeking to have readers draw. I suppose we are simply pointing out that that is a possible consequence. You could have people in Australia who are Australian citizens but who would not be susceptible to being brought to justice or having had their guilt or innocence determined.

Senator COONEY—I keep coming back to the ‘no evidence’ system because I think it is an important issue, especially considering the fact that all of my children have been overseas. Take a backpacker who is accused in, if you like, Germany of doing something—and he or she may well be falsely accused—by a drug dealer. In that case, Germany sends over the papers and you send that child of mine back to Germany. The family then has to pay for the defence in Germany. I should imagine that it would be much the same as the costs of a defence here. If he or she is acquitted, I then have to pay for their journey back. There is no suggestion—you cannot comment on this, but this is from the Attorney-General’s Department—that the government would in any way help that person. Is the DPP saying, ‘So as we can get our Christopher Skases back, the families of Australia can subsidise the legal system by paying for trials of their children overseas plus their fare back home’?

Mr Delaney—No, that is not a suggestion I would make.

Senator COONEY—But it seems to follow from what you say, does it not?

Mr Delaney—I suppose what was said there is really a general statement—that is, to drawback from the arrangements we presently have will, in our view, put in jeopardy the extradition of alleged offenders both from and to Australia. That is something we would not like to see happen.

Senator COONEY—In the conclusion it says that the extradition process is already slow and cumbersome, and you have talked about the costs. That again is a proposition which is consistent with the belief that what you are really after here is a subsidisation of the system by the people of Australia, by the families in Australia, to ensure that we get our Skases back because the government cannot afford to, or it appears it cannot afford to. But that is not a proposition I think that you agree with, but the language would be consistent with that. It says that the extradition process is already slow and cumbersome. I do not whether you heard the Boyer lectures by the Chief Justice. He said that in many ways democracy is slow and cumbersome and the sort of thesis that Churchill had in his 1947 speech, but is this all about efficiency, saving money, making sure that the wheels keep grinding at an economic pace and it does not really matter what happens to people?

Mr Delaney—No, I do not think it should be described in those terms. As I think I mentioned in my opening remarks, there has to be a balance. Just where that balance is struck is a matter on which opinions differ, and no doubt the committee will have to struggle with that particular question itself.

CHAIR—Before we hear evidence from the Federal Police, Mrs Kelly wants to ask a further question.

Mrs DE-ANNE KELLY—I have a question to the Attorney-General’s officers here. In relation to the case Senator Cooney just mentioned where a family may have a case in another country, is there any legal aid available? Does Australia generally give legal assistance to Australian citizens? Is there a means test, or does it simply not happen? Is legal aid only available in Australia?

Mr Marshall—The short answer to that is that there is a mechanism for legal aid for Australians overseas in certain circumstances. I think it is called the special circumstances scheme. I do not have the guidelines on me and it is not a matter with which I am closely familiar. In certain situations when an Australian is involved in court proceedings overseas, they may have recourse to that. That is a means tested scheme. In terms of availability of legal aid, many countries do have it. For example, the United States has it as a constitutional requirement. Many countries in Europe do have legal aid schemes.

On the other point Senator Cooney mentioned in terms of the Australian government not having any involvement in the proceedings once a person is surrendered overseas, as Mr Manning pointed out there is some consular responsibility to monitor the welfare of Australians overseas which amounts to ensuring that they receive treatment which would be equivalent to that which the country would normally confer on individuals under their legal system. As Mr Manning also mentioned earlier, it is not a process that the extradition unit monitors itself.

CHAIR—I want to explore briefly the grounds of refusal for extradition. Those ones that the minister has available to him or her under the present scheme include, for example, where the request for extradition may have been made for the purpose of prosecuting someone on the basis of their race or religion. So, clearly, in Australia where we have got lots of immigrants and large communities of different religious faiths—Muslim, Jewish and so forth—what happens in the case where an Australian is the subject of an extradition request and, with the requesting state, there is strong anecdotal evidence or even obvious evidence that a person of that particular faith would be treated less than fairly there?

The way that this is drafted, it says that if there are substantial grounds for the minister thinking that the prosecution is brought because that person is Jewish or Muslim, or whatever, then you can refuse extradition. That seems a fairly high threshold where the person is Jewish, Muslim, or whatever, and the state to which they are being sent is pretty obviously harsh for people of their faith. Yet here with this paper committal there seems to be no opportunity for some kind of element of that to be brought to bear in the decision to extradite or not. Where does that person find some purchase in this scheme as it is now?

Mr Marshall—In terms of the actual processes—and I would like to check on this to give the committee greater detail—my understanding is that a person may mount an extradition objection at two stages of the process. They may mount it before the magistrate and they may mount it when it comes up for the minister's consideration.

There is, in effect, a reverse onus that applies in relation to the second step, whereby the minister has to be satisfied that there is no extradition objection in relation to that particular case. So the minister would receive information from the person regarding the circumstances which might apply in the criminal justice processes overseas and is required to form an opinion as to whether or not that person is likely to be prejudiced at trial on account of his or her race, nationality, et cetera. There have been cases—I can dig up the references—in which persons have raised those sorts of claims in the processes of seeking judicial review of the minister's decisions. So it is a legitimate factor that is considered if it is part of the extradition process.

CHAIR—I appreciate that. I suppose we went through this when we talked about that Latvian treaty when we were talking about these things in the abstract. There might be the possibility of an appeal from the minister's decision on administrative law grounds and so forth except that, in the end, there is a feeling among the members that one of the reasons people tend to come to Australia as refugees or whatever is that these prejudices do not affect our system of justice. Hence where there is some doubt about this, on purely almost subjective grounds—you know, a Muslim kid being extradited to Serbia, or a Jewish kid to a Muslim country; this kind of thing—it would be much safer to have a prosecution take place here. So this provision of prosecution in lieu, as you call that, is that available under the current scheme now?

Mr Marshall—It is, although it is available in very limited circumstances. That particular regime contemplates prosecution of an Australian national in circumstances where the request for extradition has been refused solely on the basis of nationality and in circumstances where the requesting country would not be prepared to surrender its nationals. So it is almost like a form of providing for our ability to exercise reciprocity in those limited circumstances.

CHAIR—Yes, I see.

Senator LUDWIG—Were we to step back from the 'no evidence' rule and adopt something else, how many proceedings currently would be put in jeopardy?

Mr Marshall—That is a very difficult one to advise on at this particular point. What that would involve would be, first of all, examining the proceedings that are under way in Australia pursuant to a 'no evidence' extradition relationship and then examining potentially the reaction of other countries if we unilaterally decided to impose a 'no evidence' requirement in relation to the request that we had made.

Senator LUDWIG—How long is a piece of string? Perhaps you could tell us—not how long a piece of string is—how many current proceedings are under way in relation to the 'no evidence' rule, if we have not already asked for that?

Mr Marshall—Within Australia or both in Australia and overseas?

Senator LUDWIG—Yes, both. That way we can at least assess how many.

Mr Marshall—Right.

CHAIR—We might then ask for the third leg of your effort, the Federal Police, to join you at the table. If the current witnesses would like to stay to add to any answers, by all means, or if you would like to retire, by all means, or have a cup of coffee.

[11.53 a.m.]

HUGHES, Mr Andrew Charles, General Manager, International and Federal Operations, Australian Federal Police

CHAIR—Generally we do not require evidence on oath, but we have to make it clear that these are legal proceedings of parliament. Hence everything has to be very much on the level, so to speak. Do you want to make some remarks and then we will have some questions?

Mr Hughes—Thank you. I would like to thank the committee for the opportunity to comment this morning. The AFP acknowledges the focus of the committee's inquiry is the balance between ensuring that alleged criminals are brought to justice and protecting Australian citizens from false accusations. The AFP supports the views of the Attorney-General's Department and the Commonwealth Director of Public Prosecutions. We thought it might be helpful to expand on the criminal environment issues raised by the department and the DPP to assist the committee to better understand the context in which international extradition occurs in modern law enforcement.

The criminal environment in Australia is becoming increasingly transnational in character and form. For example, drugs—we are seeing criminals involved in importing drugs into Australia who are based in countries like Myanmar, Thailand, Hong Kong China, and the People's Republic of China, and indeed Australian criminals here deeply involved in that type of activity.

A recent example of the extent of the transnational elements involved in narcotics trafficking in which Australia was directly involved occurred in November last year where for the very first time we actually took the fight against drugs offshore to Fiji. The investigation involved members of the AFP, members of the National Crime Authority, the Royal Fijian Police, the New Zealand police, the United States Drug Enforcement Administration and other local authorities. That ran for a series of weeks and culminated in the arrest of three people, one of whom coincidentally will be extradited from Kiribati to Fiji, and the seizure of 357 kilograms of heroin, which we are alleging was destined primarily for Australia and also possibly North America.

Other examples of transnational crime in which the AFP and other Australian law enforcement agencies are involved in, of course, are things like people smuggling. Now we are seeing criminals involved in the Middle East, in south-west Asia and South-East Asia and again with very clear connections to Australian criminals involved in the large-scale smuggling of people to Australia. We are involved in working very cooperatively with Indonesian National Police and Royal Malaysian Police. We send our people smuggling strike team across there where they work and advise and assist where they can, within the limits of their jurisdictional capacity, the local authorities to actually investigate this type of criminals. We have been successful in preventing at least 700 people who would otherwise have arrived on Australian shores. I could talk also about money laundering and the international implications for money laundering.

The main drivers increasing the complexity and uncertainty of the criminal environment are advances in information technology and globalisation, and the committee has heard very briefly a few matters relating to that this morning already. For example, with IT, the merging of communications technology and information technology itself exemplified by the Internet is creating huge opportunities for criminals—as well as for law enforcement—but for criminals as well. Government online policies—for example, the use of electronic mail by businesses is becoming more commonplace and these sorts of initiatives can be attacked from anywhere around the world, including from within Australia.

Globalisation, free trade, mass movement of people, porous borders in many countries—all are conducive to criminal activity and exploitation. Australians, regrettably, are active overseas, including in vulnerable countries in our own region. A priority issue for Australia is the national security implications of that type of activity, where it has a real destabilising effect in developing countries in the region. There was an example a few years ago of a South Pacific island nation that was subjected to an attack of fraud by an Australian criminal in the amount of $US90 million. He was seeking reserve bank guarantees to be issued. He was successful in that endeavour and, as a result of the AFP's activity here in Australia and in the UK, that scheme was dismantled and potentially saved that particular government from a very serious situation with implications for Australia in terms of national security.

The key to the way the AFP is dealing with this is international law enforcement cooperation and, increasingly, collaboration, such as the example in Fiji I mentioned earlier and our efforts in Indonesia and Malaysia. This must be underpinned by an efficient, effective and as far as possible seamless judicial process. Any tightening of Australia's extradition requirements would be counterproductive to enhancing cooperative law enforcement arrangements and would be inconsistent with international treaties to which Australia is a signatory, including most recently the Palermo convention against transnational organised crime which was signed in December 2000.

Senator LUDWIG—What sort of involvement do you have in the extradition process at the moment? Can you give us a brief overview of what it is your role is if a person is being extradited?

Mr Hughes—Do you mean the AFP?

Senator LUDWIG—Yes.

Mr Hughes—For a person being extradited from Australia?

Senator LUDWIG—Yes, we will deal with both, but you can start with that one.

Mr Hughes—Dealing with from Australia first, the AFP has the responsibility for executing the process, which would be a warrant of apprehension—a warrant of arrest—for the individual and then bringing that person into the processes of extradition to the other country.

Senator LUDWIG—That does not change if a 'no evidence' or a prima facie evidence rule is applicable to the person, does it?

Mr Hughes—No.

Senator LUDWIG—What about the other way?

Mr Hughes—Into Australia?

Senator LUDWIG—Yes.

Mr Hughes—It would depend. If it was the Australian Federal Police that were seeking through—

Senator LUDWIG—Sorry, assume that it is your matter and you want the person?

Mr Hughes—And not a state job. We will send officers overseas. Once the judicial process is complete in the foreign jurisdiction, we will send an officer or officers across to that jurisdiction to escort the person back to Australia.

Senator LUDWIG—Who prepares the case? Once you collect all of the evidence, do you hand it over to the DPP's office for prosecution?

Mr Hughes—That is all done prior to any movement from Australia by the AFP.

Senator LUDWIG—Say, in the case of a 'no evidence' rule, do you then request the DPP to satisfy the requirements? Who does that?

Mr Hughes—We provide a full brief of evidence, as we would do whether the suspect was domiciled in Australia or whether they were overseas. A full brief of evidence goes to the DPP for adjudication and consideration. It then goes from the DPP to Attorney-General's to consider international extradition, if the person is then resident overseas. So our role really stops at the end of the investigation and then it moves on to the other authorities.

Senator LUDWIG—So it does not really matter in that sense whether it is a 'no evidence' or a prime facie evidence rule that is being faced, because you are still providing all the evidence that you can obtain to warrant a successful prosecution?

Mr Hughes—Ultimately, when we are talking about extraditing to Australia we need to ensure that the long-term goal, of course, will be to convict the person responsible for the offence. So we need to have a full brief of evidence in most cases. There could be exceptions to that in the event that there were urgent circumstances, but I cannot recall any in recent times.

Mrs DE-ANNE KELLY—You mentioned that, unfortunately, there were Australian alleged criminals causing a good deal of harm in developing countries. Is that a growing trend? Are there those who are willing to exploit our neighbours? Do you see that as continuing? What has brought it about?

Mr Hughes—I think there is a number of things, not the least of which is what is referred to as the arc of instability to the north and to the north-east of Australia. That is presenting criminals with an opportunity to exploit the situation, because the normal mechanisms of law and order are either non-existent or at least very weak and so provides them with an ideal ground to either exploit the people, government and businesses in that environment or use it as a safe haven in which to attack other countries, including Australia. In answer to your question, as we see this arc of instability, regrettably, increasing I think it is a reasonable assumption that we will see an increase in the exploitation of that by criminals and criminal groups.

Mrs DE-ANNE KELLY—If that arc of instability, though, also involves a degree of political instability and perhaps a question over justice and how it was meted out, is it still sound to streamline extradition processes back to those countries, regardless of the fact that a criminal may have indeed committed the acts? Or in your view would it be preferable to try and prosecute in Australia under Australian law?

Mr Hughes—I could answer in two ways, I guess. Anecdotally, I can recall a case in which I was involved many years ago now, which was a 'no evidence' case from the Philippines in the case of murder. The Philippines were seeking the extradition of one Australian citizen and his partner. The question arose about the Philippines in this particular case and their standard of judicial practice at that time. The Australian prosecutor made a very good point in that those people looking outside in at Australia would see in recent times we have had two royal commissions into corruption in our police services, we have seen a corrective services minister jailed, we have seen a police commissioner jailed for corruption, we have seen a former state Premier jailed, and we have seen a High Court judge accused of perverting the course of justice. From my perspective, that was a very interesting observation by the prosecutor in that case.

Mrs DE-ANNE KELLY—You are implying that, while we may consider our justice system superior to our neighbours', our track record may look pretty poor?

Mr Hughes—Like the committee, I have great faith in our criminal justice system. But others outside could be excused on the face of our performance over the last decade to think otherwise.

Mrs DE-ANNE KELLY—Finally, do you believe any changes to extradition laws are required?

Mr Hughes—I think the change that the AFP—and I think I am confident in speaking on behalf of my law enforcement colleagues in the states and territories here—would most like to see would be the wider application of the 'no evidence' rule. We have the London scheme, for example, which requires prima facie evidence. As we have heard in previous evidence, that is a relatively more cumbersome process. In this fast paced world, which one of the members of the committee mentioned earlier this morning, we really need to have a system which can keep pace with that whilst still maintaining the balance of fairness to the accused.

Mrs DE-ANNE KELLY—Thank you, Mr Hughes. I think you are the first person who has put another complexion on it for me.

Senator COONEY—You have prepared briefs for warrants. Do the federal police have hand-up briefs?

Mr Hughes—For?

Senator COONEY—Crime. For prosecution?

Mr Hughes—It depends on the matter and it depends on the jurisdiction. For example, we fall into line in Australia with the state requirements. Where there is provision for hand-up committal, we will do that.

Senator COONEY—But in any event, the point I wanted to make was that the Australian Federal Police are very used to getting briefs together in respect of an alleged crime. And even within the force itself there is a structure as to whether or not a matter should be forwarded to the DPP.

Crime is becoming more and more internationalised. The Federal Police have got a number of members in various countries; is that right?

Mr Hughes—Yes. We have 33 liaison officers in 22 cities in 21 countries for precisely the reasons that you have indicated there.

Senator COONEY—And regardless of what you can say about other institutions in society, the Federal Police have got a good reputation?

Mr Hughes—We like to think so, yes.

Senator COONEY—Both at home and abroad, I would suggest. If that is so, what would be wrong with the Federal Police assisting overseas countries preparing a brief to send back here? I ask that in this context: people say, ‘Civil law countries have a lot of trouble getting a brief together that would satisfy a magistrate or a judge here.’ But the Federal Police have no trouble doing that.

Mr Hughes—It is an interesting proposition. Clearly there would be resource implications. But leaving those to one side, there would be issues of professional pride involved with the investigators overseas we would have to deal with. That might sound a lightweight response, but we would need to manage that. And there would be issues of jurisdiction as to how far the AFP could go outside of Australia. We do regularly assist local law enforcement in the compilation of briefs of evidence and we are currently in that process with Fiji in that earlier job I mentioned for November last year. But in terms of preparing a case to come to Australia—for the extradition of a person from Australia—that would need, I think, a lot of consultation certainly with the A-G’s department and others.

Senator COONEY—The real problem is the one that you have suggested. If you do get a person sent overseas to whom terrible injustice is done, that is a real problem for this country, particularly if it is one of our citizens. We are proud to be Australians. This is the centenary of the year in which we became a nation and it is appropriate that we remember we have got citizens as well as people who are criminals who call themselves Australian citizens. It is the way you look at it. I am just trying to find a way to balance it. I would have thought that what we might well be doing—and I suppose you cannot comment on this because it is a matter of policy—is expanding the number of officers we have overseas so that they can work more closely with the law enforcement authorities over there and prepare a brief that would be suitable to show that there is at least a colour in the case that is brought against an Australian citizen.

Mr Hughes—I can comment to this extent: I was fortunate enough to have served overseas for three years in London and we covered the UK, west and northern Europe. There were many occasions when local authorities would come to us for advice about what would be required in the Australian courts and system. So it is not unheard of now, but I think your proposal is to go one step further and to actively go out there.

Senator COONEY—My proposal is that we have Federal Police in situations round the world where they can be called upon to help prepare a brief to go to a court in Australia.

Mr BAIRD—In terms of what you have said, I agree with De-Anne Kelly that it was a very clear approach. On the balance of probabilities, do you think that we risk dangers for Australian citizens if we free up the extradition arrangements? In terms of just speaking across the table and in your normal straightforward approach, what do you consider the risks are, in the lives of Australians, if we free it up?

Mr Hughes—Could I turn it around the other way: what are the risks to Australians more generally if we insist on a very slow and cumbersome system in a world where speed is dominating every aspect of our daily life? I am just not convinced that—

Mr BAIRD—What are the risks—to answer your own question?

Mr Hughes—If we become a safe haven, for example, for criminals, Australians or otherwise, if we are unable to enjoy the confidence that Senator Cooney has mentioned with our international law enforcement partners so that we can freely and frankly exchange intelligence and information, I think that would be to the detriment of Australia more generally and Australians. It comes down to that balance which I think the committee—

Mr BAIRD—But do you feel there are appropriate safeguards for those countries that we regard as perhaps not having the same standards that we would consider appropriate in terms of laws of evidence and so on?

Mr Hughes—It has been my experience, having worked now directly on international investigations for the past seven years, that in those matters—and it is not an exhaustive account of every single matter that Australia has been involved in—I know of no case where I personally felt uncomfortable that the individual was going to a jurisdiction where they were at undue risk of not being dealt with fairly.

Mr BAIRD—Could the same be applied to the rest of the panel; they do not know of any case where they had reservations as to whether they were going to be dealt with appropriately in a particular legal jurisdiction?

Mr Marshall—I am not aware of any cases where extraditions have actually been granted. I think it would probably be right to say there have been some cases in which extraditions have been refused. But, no, I am not aware of any.

CHAIR—Thank you kindly. You might like to stay and hear the evidence of the next witnesses.

[12.15 p.m.]

NYST, Mr Christopher Stephen John (Private capacity)

CHAIR—Do you have anything further to add about the capacity in which you appear before the committee today?

Mr Nyst—I am a solicitor of the Supreme Court of Queensland and Supreme Court of New South Wales and a partner in the firm Witheriff Nyst.

CHAIR—You are appearing in your personal capacity?

Mr Nyst—Yes, in my personal capacity as a lawyer who has represented a number of people whose extradition has been sought since the enactment of the 1988 act.

CHAIR—Thank you. I have to formally advise you that, although we will not require evidence on oath, these are legal proceedings of the parliament as if they were taking police in the House of Representatives or the Senate, so the giving of false or misleading evidence is a serious matter. Would you like to make a brief opening statement and then we will go to questions?

Mr Nyst—Thank you. My general comment, which I have made on many occasions before, is that it is my view that the Extradition Act 1988 is bad on a number of bases, not confined to the ‘no evidence’ rule/prima facie case controversy that I think the committee has dealt with at length. I essentially believe it is bad law because it abandons many of our traditional values primarily, and central amongst them is the presumption of innocence.

It is my view that the act not only abandons the presumption of innocence but in effect supplants a presumption of guilt. It enshrines a situation where there is a presumption against bail, and I think that flows from the presumption of guilt that I speak about. It denies any appeal against a finding against bail. It allows reliance on totally hearsay, utterly untested and often very sketchy material. It refuses the citizen the right to challenge the factual basis of that material, and in fact it even goes a step further under section 19(5) of refusing the person a right to effectively call evidence to prove his or her innocence.

On all those bases I say that it is bad law and I say that it really is borne out of no valuable principle or standard whatsoever, only out of administrative expediency and pragmatism, in other words, a wish to get the body as quickly as one can and with as least political embarrassment and as little cost and administrative effort as one can. I submit that that is a very poor building block on which to base any legislation.

The true effect of the legislation is that a person can be arrested on the basis of a hearsay statement coming from overseas—often a very sketchy one. Indeed, the statement does not even have to have arrived by the time the person is arrested. That person can then be taken from his family, home and so forth and placed in a prison cell for up to 45 days before a word of evidence is given or heard. Then he can be dealt with on the basis, as I said, of pure hearsay and what ultimately remains totally untested material and, in those circumstances, is refused bail or refused bail unless he or she can show, under the requirements of section 15 and later at section 21, special circumstances.

There has been talk about what jury systems think of our jurisdiction and what they think of our judicial system and so forth. But really, I say at the end of the day it is what we think of our judicial system that is important. If we think that the principles that we have enshrined are the correct principles—and they have been a long time in the making—if we think that they are the correct principles and we think that they are the principles upon which we ought to form our judicial system and our society, then I say we should have the courage to stick to them. I have no understanding at all as to why we suddenly drop them in the context of requests from overseas nations for the repatriation of our citizens overseas.

CHAIR—Can we perhaps just leave it there and go to questions. We can elucidate some interesting things from you, indeed, by way of cross-examination. Would you like to begin, Mrs Kelly?

Mrs DE-ANNE KELLY—Thank you. You give us the example of Mr and Mrs Holt who were incarcerated, I think, for nine months, Mrs Holt, and 513 days, Mr Holt. However, we have had another view of extradition given to us today by the Australian Federal Police who maintain that the level of criminal action in some of our developing neighbouring countries by Australian citizens is very high and increasing. Obviously, that is undesirable from a justice point of view, but it is extremely undesirable from a perception of Australia point of view. Their view is that, in fact, the extradition procedures need to be more streamlined. How do you balance those two demands? We obviously have a responsibility to ensure that Australian citizens of criminal intent are brought to justice and yet we are not surrendering our sovereign nationals readily to questionable judicial systems overseas.

Mr Nyst—Senator, we balance it every day.

Mrs DE-ANNE KELLY—I am not a senator. I am just a humble backbencher.

Mr Nyst—I am sorry. We balance it every day in our criminal system in the sense that there is no doubt that we could move much more quickly in the criminal jurisdiction if we did without a trial; we simply went straight to sentence. But we realise and recognise that there are some principles that ought to be applied, and one is the presumption of innocence.

In the international context, it is my view—and I put it advisedly—that all of this business about making it streamlined and so forth is really a furphy for saying, ‘Let’s save ourselves a bit of trouble and the potential for political embarrassment’, because the reality of it is that if somebody has committed a crime, if you are ready to try them in this country or if you are ready to try them in the other country, then you have a case and, if you have a case, you can show what that case is. If you do not have a case, then you should not be dragging them halfway across the world.

It is all very well for the AFP or anybody else to come along and say, ‘Oh, there are lots of criminals doing nasty things all over the world.’ That is undoubtedly so and in the cases of these specific individuals who are committing criminal behaviour here and there, then if it can be proven against them, then they will be brought to justice. If it cannot be proven against them, then they ought to have the rights of any other citizen, in my submission.

Mrs DE-ANNE KELLY—May I ask you one more question, if I could, please. Were the committee to decide to leave the extradition laws as they are, where does that take us from here? I note that the International Criminal Court, for instance, adopts the same extradition procedures as the state, in other words, the state under which they are trying to prosecute. So in that case they would be Australia's extradition procedures. Bearing in mind there are no grounds for refusal and that an international criminal court is looking at matters like genocide, which I am sure we all deplore, and a definition of aggression, would you have any concerns that, if our extradition laws are too open, we leave ourselves exposed in other ways?

Mr Nyst—I am sorry, I don't know that—

Mrs DE-ANNE KELLY—Were there an international criminal court, that our extradition laws would not provide sufficient protection for Australians called before such a court?

Mr Nyst—I really do not see how that would impact upon it. Were it to impose the same standards, for example, as are currently imposed in the context of a request from the United Kingdom, I really do not see how that would impact upon the situation so far as an international criminal court is concerned.

Mrs DE-ANNE KELLY—Thank you.

Senator COONEY—I just would like to hear your comments on the following. When the extradition treaties were originally made, the classic case would be where somebody, say, committed a murder in France and fled to Australia or to England and that person was extradited for that specific offence. These days, it seems that the crime is an international crime in the sense that a drug run involves a number of countries or people smuggling involves a number of countries. At the moment the people who are being caught are those who are at the end of the line—the victims, as it were, the asylum seekers or the drug users on the street.

Clearly, the world has to do something about the global situation. Do you see any distinction between the old way, where you had a specific crime committed in a specific country and that person fled and the way we dealt with that, and the way we have to deal with these crimes that involve a series of countries?

Mr Nyst—I really do not. The reality of it is where one has a crime that covers several national borders, in reality—

CHAIR—Let us try to proceed. Senator Cooney?

Mr Nyst—Senator, the point that I was making was that, where a crime is committed over various national boundaries, then it really expands the jurisdiction of the prosecuting authorities. It seems to me to cover prosecution within a number of national states. In effect, a prosecution is not hampered by virtue of the fact that, let us say, for example, some acts towards a criminal enterprise were committed in the United States, some were committed in Australia and some in the United Kingdom. All three of those nations would then have the ability to prosecute within their national boundaries.

CHAIR—In the cases where you have been acting for accused persons within the Australian jurisdiction and the prima facie test is on foot for committal proceedings, the elements of that appear to be the sufficiency of evidence and its admissibility. That is how it has been described to us. If we were to try to reinstitute this test for extraditions, which part of that dual concept would be of most protection for your clients—for accused persons—admissibility or sufficiency?

Mr Nyst—They are very hard concepts to separate, in my view. Others might have a different view, but the reality of it is that to say that you have information—let us say, for example, you take a current situation where you can effectively just have some police officer from Manila write a two-page statement about what I have done wrong in Manila and it includes all kinds of assumptions, hearsay, material that we would not call evidence, material that is at best of very doubtful or poor quality. Then that, obviously, goes to the sufficiency of evidence as well as the quality of the evidence.

I must say that I do not think that one ought to overcomplicate this. It is a very, very simple test and one that we are very familiar with—the prima facie test—and it really comes down to the issue of whether or not one is willing to apply the standards that we have traditionally thought were appropriate. In other words, if you say somebody is presumed innocent, then you require them to be proven guilty on some sensible material. To say, 'Look, it is too hard for the French to understand', or 'It is too hard for the Italians' is a nonsense, in my respectful view, because it is really a matter of just getting on to the phone and saying to somebody, 'Look, you say that this man did 'X'. We just need a statement from somebody who actually saw it.' Those are concepts that the Italians and the French and everybody else understands. They may not be standards that are necessarily applied at every stage in their judicial process, but they are quite simple concepts and they are not hard things to get around.

The reality of it is that every day in our extradition processes there is liaison between our DPP here and the prosecuting authorities in other countries. That liaison can include, 'Look, we need material of this kind' or, 'We need this particular seal on something.' At the moment that kind of liaison is being confined to the really technical issues because only technical issues are required under our current act.

But, if anything, it is a simpler process to describe to somebody how they ought to come up with proper first-hand evidence. It is simpler to explain that than it might be to explain how we need various seals applied and so forth to make the supporting documents admissible in a court of law here.

CHAIR—Thank you very kindly for doing this. We appreciate the view you put and your written submission. If there is an opportunity in the future for questions on notice, are you willing to accept written questions from committee members?

Mr Nyst—Yes, I would be happy to.

CHAIR—We might do that if necessary, but thank you for the evidence this morning.

Resolved (on motion by Senator Cooney):

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

CHAIR—I declare the public meeting closed and thank all witnesses.

Committee adjourned at 12.33 p.m.