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JOINT STANDING COMMITTEE ON TREATIES

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JOINT COMMITTEE ON TREATIES

Wednesday, 14 March 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 and Mason and Mr Bartlett, Mrs De-Anne Kelly and Mr Thomson

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 9.05 a.m.

FLEISCHER, Mr Tzvi, Editor, the *Review*, Australia/Israel and Jewish Affairs Council

HYAMS, Mr Jamie, Researcher, Australia/Israel and Jewish Affairs Council

RUBENSTEIN, Dr Colin Lewis, Executive Director and Editorial Chairman, the *Review*, Australia/Israel and Jewish Affairs Council

ACTING CHAIR (Senator Cooney)—I have a screed here to read but, given your experience before committees over the years, I do not think it is necessary to read it all. I declare open this hearing of the Joint Standing Committee on Treaties. I welcome the witnesses, Hansard, committee members and everybody else. This is our third hearing. Do you want to make a statement or would you prefer us to go straight into questioning? Usually people give a statement.

Dr Rubenstein—Thank you very much for the opportunity. I would like to give a short statement, and maybe my colleagues will each add something for a minute or two. Firstly I would like to thank the committee for the opportunity to be here this morning and to present evidence. I would like to emphasise that one of the major preoccupations of the Jewish community and certainly the Australia/Israel and Jewish affairs Council over the last 15 years or so is the presence in Australia of individuals against whom there is substantial evidence of their participation in crimes against humanity during the Nazi occupation of Europe, particularly in the eastern areas of Europe. For a variety of reasons, we are focussed on the reality that to a certain extent Australia remained a haven for such war criminals from the Second World War, and I might say we are also very concerned about the fact that Australia may be a haven for war criminals from subsequent conflicts in other theatres.

Therefore, in focusing on the question of justice and war criminals, our attention is obviously focused—as has the parliament's over those years—on ways of addressing that situation and finding effective mechanisms to do so. We were encouraged by the developments in the late eighties and the efforts of justice in terms of three prosecutions in Australia in the early nineties. We are disappointed with the outcome of that but we are more disappointed that the towel was, so to speak, thrown in after the completion of those three cases and the closure of the investigating arm, the Special Investigations Unit, in the early nineties which left Australia with very little capacity to continue to seriously address this ongoing issue. It is really in that context that we have looked at two other mechanisms to pursue justice with regard to war criminals.

One is, as you know, the area of deprivation of citizenship and deportation which has been used so successfully in other jurisdictions in the United States, and increasingly so in Canada. That is a very interesting alternative to Australia's route, because they pursued the same war crimes route that we did in the late eighties and early nineties and had the same lack of success but, instead of throwing the towel in, they turned to the very difficult task—in all senses: ethically, morally, legally—and nonetheless pushed on and have succeeded in the area of deprivation of citizenship and deportation. They have kept doing so, as recently again as the last couple of weeks. That is an option that we have certainly advanced before other committees of the Australian parliament in recent times, as you would be aware. We are looking forward to the report of the government on the citizenship issue in this specific item, which I believe is due in the next month or two.

We believe that through a loophole of the law alleged war criminals have escaped denaturalisation and deportation because of the so-called 10-year rule. That so-called 10-year rule was nonetheless revoked back in 1997 but so far it has not been tested as to whether it would apply to those naturalised before 1958, as we believe it probably would and as a previous DPP opinion suggested it may. Nonetheless, that option is at the moment not a live one, even though we hope it could be activated in the future. It is in this context that extradition has emerged as an important part of the armoury of tools in the quest for justice in regard to war criminals. That really has been our focus.

We are very pleased with the changes that have taken place in the legislation in the last 15 months and we are pleased with the active and energetic pursuit of extradition treaties with relevant countries, particularly Latvia. We wholeheartedly support the recommendation that this committee has made with regard to supporting that extradition treaty and are looking forward to its very early ratification. Similarly, we support the negotiations ongoing for completion of an extradition treaty with Lithuania, another very relevant country in terms of alleged war criminals in Australia. It is in that context that our focus and support for extradition particularly lie, and we believe that the extradition arrangements we have are proper and effective. We do not believe that there is any incongruity or injustice in the differing standards that apply to common law and civil law countries.

We are looking forward to the completion of extradition with regard to Lithuania. I might add that there are a number of alleged war criminals in this country who would certainly stand as candidates for treatment similar to the charges that have been laid in extradition requests lodged for Konrad Kalejs. We are heartened by the fact that similar developments are taking place in other countries, that Lithuania itself has convicted a war criminal in the last month, Kazys Gimzauskas, and that similarly they have laid charges and requested extradition for one Anton Gecas, living in Scotland, also in the last month. That leads us to believe that Lithuania itself is very much focused on this issue, as has Latvia become in recent times, and that this is a very real, pressing and lively issue for the Australian context as well.

In terms of suggestions questioning existing extradition arrangements, as I have said, we do not believe that there is any incongruity or injustice in the arrangements that currently exist, unlike some of the evidence tendered to this committee by Professor Shearer, for example. I will ask my colleague Mr Fleischer to address this specific issue.

Mr Fleischer—As we said in our submission, the basic arguments put in your inquiry into the extradition treaty with Latvia that Professor Shearer raised and to some extent the committee supported were that, under current extradition arrangements, particularly with civil law countries, Australians may not have adequate protection from unfounded, false or vexatious charges without the requirement for foreign countries to present a prima facie case to an Australian court. It also was raised that it perhaps is incongruous to have two different regimes: one for common law countries where prima facie cases are required, and one for civil law cases where no such case is required for extradition.

AIJAC argues that neither of these points is correct, because the correct paradigm for understanding extradition arrangements between Australia and other nations is that Australians should and must get the full benefits of the law of those countries in which they are accused of crimes—until and unless their human rights are violated, of course. If we look at a comparable

case, if an Australian were accused of a crime abroad and arrested abroad—in other words, on a trip or while living abroad—one would expect that the legal processes that he would undergo would be the legal processes of the country in which he was then resident and in which the crime he was accused of committing had been carried out. If an Australian commits the same crime and comes back to Australia, there is no reason to then demand that he has to have the legal processes of Australia apply to him before the crime can be investigated.

Australia should do everything in its power to make sure that his rights are fully protected, but that means making sure that all the legal hoops are jumped through in the country of origin and that all proper legal procedures are followed in the country in which he is accused—just as we would expect that, when someone comes to Australia and is accused of a crime or is engaged in legal matters, Australian legal processes as well as Australian law will apply to that person in respect of his actions while he is in Australia. Of course, there will be exceptions where there are countries where we do not believe basic human rights are being protected, but there is no suggestion that the civil law system as followed by most nations outside the British Commonwealth does not respect human rights as understood by universal human rights treaties or recognised by UN treaties.

There is not a danger that Australians will be subject to extradition without any evidence at all—when an offence has been committed or there are vexatious or other extraditions from civil law countries because they do not have to present evidence to an Australian court of the guilt of the individual or a prima facie case of the guilt of the individual—because there are ample measures that protect them. First of all, the civil law countries do have protections; people are not simply arrested without a case being produced to a magistrate in those countries, and that is required. In addition, there is a series of protections in the treaties and in the Australian extradition law at the moment which block extradition to cases where there are doubts; for instance, if there are extradition objections such as that there is reason to believe that the trial would be prejudiced for reasons of political offences, race, religion, nationality, political opinion—anything of that sort is already protected—furthermore, if there is reason to believe the alleged criminal will be subjected to torture or the death penalty. All these reasons are reasons built into the law already where the person cannot be extradited.

Furthermore, there is totally unreviewable discretion to withhold the surrender of any alleged criminal who is an Australian citizen under current extradition law which can be invoked. Furthermore, as a protection, because these are to some extent lodged in the political arm of the government, these are also subject to court review. Both the issuing of a section 16 notice to arrest someone for extradition, plus the final decision to allow extradition by the minister for justice, are subject to court review, as we see at the moment in the Konrad Kalejs case. Konrad Kalejs is challenging in court the section 16 notice issued against him, ordering him to appear before court to be subject to extradition hearings. So it is not the case where these are totally political issues, not subject to judicial review.

Finally, it is very important to understand that there are good reasons supplying a prima facie case on the part of civil law countries is problematic. The historical experience is that such cases make it very difficult for these countries to successfully extradite people accused of crimes of any sort, including war crimes. The reason is that not only are they unfamiliar with Australian law and the evidentiary requirements of Australian law, they also tend to collect evidence in different ways. So, even if their evidence is reviewed by an Australian lawyer after

they have completed their investigation and have come here with an extradition request, typically they still fail because they have not collected the evidence in the way that an Australian court normally expects.

It already is the case that an extradition to a foreign country generally is a long, drawn out legal process. We are saying in the case of Konrad Kalejs, where there is no prima facie case, that it will take at least 18 months, and possibly a couple of years. In the issue of Second World War criminals, these evidentiary requirements are typically used by defence attorneys to try to draw the case out to the point where the elderly accused—this has happened in the US and Canada—becomes too ill to stand trial or be extradited. Because we have an interest in seeing to it that Australia does more to make it clear that we do not want to serve as a haven for war criminals, this is unfortunate. And this can also apply in cases where war criminals are from other conflicts. This is particularly important because we do not have the provision to prosecute people here from other conflicts. If we have an individual here who committed war crimes in Cambodia, he cannot be prosecuted. He can be extradited, but he probably cannot be denaturalised either, because of the 10-year rule. If they cannot be extradited, basically there is nothing we can do about them. Of course, an extradition request has to be made, but we do not want to see a situation where there are people here against whom credible accusations have been made that they are war criminals and basically nothing can be done about it. The example of civil law countries has been that, if you demand a prima facie case for extradition, most of these cases will fail. It is just that they collect evidence differently.

As I said, I believe that there are adequate provisions to protect Australians from unfair, unjust prosecutions. First of all, Australia is not obliged to sign extradition treaties with countries where they believe the legal system is not up to our standards. Furthermore, they can get out of extradition treaties when they believe the legal system has suffered; that always can happen. Secondly, there is a provision for political review, which can completely prevent an Australian citizen being extradited if the minister for justice is not satisfied that the trial will be fair. Thirdly, there is a provision for judicial review of the minister's decision—which is almost always invoked by people who oppose their extradition—which makes it certain that the minister's decision is correct.

We have extensive 'no evidence' extradition treaties with many countries, and I believe that there has not been evidence that there have been serious problems with any of these. It is difficult to cite a case where one could say, 'This person should not have been extradited under these arrangements.' I would argue that our current extradition arrangements are probably adequate in protecting the human rights of Australians and in ensuring that extradition remains a possibility where it is important.

I would like to add one thing. If the committee remains concerned that the current arrangements provide inadequate evidentiary safeguards for Australians with civil law countries—and I hope that they do not—AIJAC would be in favour of seeing that there are institutional arrangements similar to those which currently apply in Canada. They have created a situation where the evidentiary requirement is that they provide, simply, a list of the evidence available against a person to be used in their trial in that country; that it be certified by judicial or prosecutorial authorities in that country; and, finally, that a judge in Australia be satisfied that that is sufficient for that country to hold the trial on the basis of that evidence—not under Australian law or, in that case, Canadian law.

Our preferred alternative is continuation of the current regime for civil law countries. However, if the committee is unable to agree or does not agree, with all due respect, our second preference would be something similar to the Canadian situation, where a very limited form of evidentiary listing would be supplied by the country, therefore expediting extradition; basically making extradition possible for these countries. I point out that even that, though, would add to the complications in these already very convoluted extradition trials. It is already the case that there are a variety of mechanisms that people subject to extradition can appeal under—and generally do; this is yet another, and evidentiary ones tend to be very complicated and can draw out the process even further. Again, given the moral importance, we believe, for Australia—and also our obligation under international treaties—to deal better with war criminals, we think that that is problematic, given that other avenues for dealing with war criminals do not seem to be being pursued at the moment or that there are difficulties with that.

Senator LUDWIG—Starting from page 4 of your submission, perhaps we can take your arguments one by one. Suppose that we pick a country to test the validity of your assertion and to map your paradigm out. Say that we pick Israel. Is that a civil law country, or a common law country?

Mr Fleischer—It is more similar to civil law than to common law. It is a somewhat mixed system there. There is also a British tradition. So it is mixed.

Senator LUDWIG—So we put it as more tending towards civil, as I understand it; but obviously it does have some unique common law attributes. We then take the next part and say: does it have an extradition treaty with Australia? I think the answer is yes.

Mr Fleischer—Yes, I believe so.

Senator LUDWIG—In looking at that then, say that an Israeli citizen committed a crime whilst on holidays—let us make it an easy crime of fraud, for argument's sake—in Australia, and then returned home and Australia then sought to extradite. I understand—and forgive me if I am wrong—that Israel will not allow its nationals to be subject to an extradition. If that is the case—and perhaps you could confirm that before we go to the next point—

Mr Fleischer—It frequently will not; that is correct. It is not always the case, but it has happened in the past.

Senator LUDWIG—Then we examine your proposition in 6 where you then say, on the other hand, if an Australian committed fraud in Israel—because there is at least a civil or a common law tradition and Australia does allow its citizens to be extradited, and there is an extradition treaty in place—that Australian would be then subject to Israeli law, as you correctly argue in the reverse for Australia. But there is no reciprocity there, is there? Why I raise that is that you then come here to push a point quite well—it is not one that I find troubles me—but we then find that it does not have the same reciprocity. You argue quite well that Professor Shearer is wrong and that the basis for him being wrong is because Australian laws would be subject to Australian legal processes. There is no doubt that Australia has a good legal process and legal laws. But, if we pick a number of countries, then it does not hold. The argument is not as valid, because I would suspect that Israel has very good laws as well and a very good judicial system. So I would be confident—and this is why I suspect Australia signed the extradition treaty with

Israel—that Australian citizens extradited to Israel would be treated fairly. Could you just help me with that? I just need to get over that.

Mr Fleischer—The basic problem is, and you are right, that many civil law countries are reluctant to extradite their citizens routinely. The difference is that civil law countries—and this is not generally true of Australia—can prosecute their citizens for crimes committed anywhere in the world. If an Australian committed—

Senator LUDWIG—I understand that.

Mr Fleischer—a murder in Israel or in Canada—no; take a civil law country, and Canada is not a good example—or in France or in any other civil law country, if that country does not extradite him, he cannot be prosecuted here. The difference is that most civil law countries will prosecute people, and they are allowed to prosecute people, under their own laws for crimes committed abroad. Without a major overhaul of Australian law which would allow prosecution here, unless we have some sort of reciprocal arrangements, we are basically left with a situation where a person who commits a crime abroad and comes back to Australia cannot be prosecuted anywhere. That is the difference between the two systems.

It is not the case that civil countries never extradite their citizens; they do sometimes, and there are benefits for having extradition arrangements with them. They are more reluctant, there is no doubt about it; but there is a difference in that you can see some measure of justice done at least in those cases in their own countries, and Australia can participate generally in seeing that the crimes are prosecuted.

Senator MASON—Does Israel prosecute its own?

Mr Fleischer—Israel will prosecute Israelis who commit crimes abroad, yes.

Senator LUDWIG—But when you say an Australian is accused of a crime and a foreign nation receives the full benefits of the legal system of that nation, it is not that he is subject to the same legal process that would apply in Australia. That only applies, in your view, to us. It does not apply if we picked a country such as Israel. Do you see the problem that I keep coming back to? We will go one step further: we will accept the argument that with civil law countries it is difficult to extradite their nationals and that they then will prosecute their own because they have an ability to do that; they have law, for argument's sake, to allow that to occur, and their legal processes will deal with them to our satisfaction. That is a subjective consideration. If we then look at the International Criminal Court, Australia has signed and at the moment we are examining whether we should ratify. Should we ratify, Australia may then choose to implement that International Criminal Court—the jurisdiction, the law behind it—in Australia in domestic legislation. Take war crimes as a terrible example: it could then prosecute war criminals prospectively, as I understand it. There might be a seven-year gap, depending on the International Criminal Court and a couple of the provisions, but conceptually, prospectively, we will be able to do that. So then there would be an Australian law. Therefore, why would we then wish to allow our Australians to be extradited if there is an appropriate law that can be enforced?

But there is another curious thing about that before I allow you to answer that. Perhaps you could include in your answer an answer to this question about the International Criminal Court, which includes war crimes, although prospectively, and hopefully there is a seven-year gap. Israel did not, as I understand it, support the establishment of an International Criminal Court, and I do not know where it sits in terms of ratifying that. It seems curious to me—and perhaps you can help me with this—that, where you advocate for Australia to have extradition treaties with Latvia and Lithuania for the purposes of extraditing war criminals—amongst other good reasons, and that is not to say they are not all good reasons—in terms of the International Criminal Court, which includes war crimes, although prospectively, Israel does not.

Mr Fleischer—You are not completely correct.

Senator LUDWIG—That is why I am happy to be corrected.

Mr Fleischer—The previous government did announce that they would seek to sign and ratify the introduction of a criminal convention. I am not sure what the current Israeli government's position is at the moment, but the previous government said that they were going to do so.

Senator LUDWIG—That is encouraging.

Mr Fleischer—So that is not completely correct. As I have said, there has been a change of government in Israel. That was before the election; what will happen now, I do not know. But, in general, it is being debated still in Israel, I suspect, but they will eventually accede to the treaty. As for the issue of the International Criminal Court, we have not studied it in detail. In general, we are in favour of additional measures to make sure that war criminals meet some measure of justice where they cannot be prosecuted at the moment. Like I said, I have not studied in detail the provisions and whether they are good but the idea that there should be international mechanisms is, I think, a good one. My understanding of it is that it is meant to be basically a port of last resort when there is no other mechanism for seeking war criminals, and there are good reasons for that. But that does not counter the need for extradition and other mechanisms, particularly since there are controversies about exactly how the court will run, under what legal system and who the judges will be, et cetera. In any case, the actual operation of the court prospectively is some time off and will not apply to many countries who will not accede to it, unfortunately. It does not completely solve the problem, in any case.

Senator LUDWIG—No. Some of the papers that I have tell me that Israel sided with the US, although you did not have to show your count as to whether you were going to ratify the International Criminal Court statute. Perhaps I will check my papers as to where they got their information from. Your current government is probably a little bit more conservative than your previous one, so as to the likelihood of that happening I will leave it for you to guess. But the point I am getting to is that the reciprocity issue troubles me. The International Criminal Court is another example of where you are advocating the position of extradition for war criminals. But, in terms of where we can make a difference in the world marching forward, establishing the International Criminal Court to deal with war crimes—although it is some way off, we may not yet ratify it and there are many problems that surround it—is, I think, a positive statement of Australia being integrally involved in that process, whereas other civil law countries are not. You advocate the process of an extradition treaty to retrieve war criminals but, in terms of the

International Criminal Court, there is a reticence from Israel, as I understand it. As I said, I am very happy to be corrected. Perhaps you come back to me and tell me whether I am right or wrong about that. But I understand that there is a reticence.

Dr Rubenstein—If I could intercede, the Attorney-General announced unequivocally that Israel would ratify prior to the election, and that was under the previous government. As my colleague said, there is now a new government, so whether or not they feel committed by that decision we will have to wait and see. One would assume so, but the vagaries of democratic politics being as they are—as you well know.

Senator LUDWIG—That would be encouraging. But that is the area where I think your argument in paragraph 5 does not seem to sit well with all the countries that we have actually signed treaties with. That is the reciprocity problem, I guess. Do you have any further comment on that?

Mr Hyams—One other benefit of our extradition treaties is that they discourage criminals from other countries coming to Australia. So whether or not you have reciprocity it still fulfils that purpose. We do not particularly want—to use your example—the Israeli fraudster feeling that he can come over here without having any recourse and be free to continue his activities.

Senator LUDWIG—But your argument means that the Israeli cannot go home. The Australian, if he went home, could be extradited back to face the Israeli jurisdiction, whereas if the Israeli who has committed fraud in Australia goes home they would then face Israeli jurisdiction.

Mr Fleischer—Again, it is not black and white because civil law countries do sometimes extradite. They are more reluctant, it is true, than common law countries generally are. But there is no complete lack of reciprocity; it is not totally one-sided—Israel has extradited people in the past, and other civil law countries have as well. Again, it is a jurisdictional problem. Yes, there is some unevenness and it is because they are more reluctant to do so. However, it remains the case that Australia is quite capable of refusing to extradite any citizen they choose to under current extradition law: the minister can decide not to do so and the courts can review it. So we are not in a situation where we are obliged to extradite people; we facilitate it where we think it is appropriate. In general, when dealing with war crimes it is one of the ways that we can facilitate punitive justice for some people who may have come here and where there is credible evidence that they may have committed war crimes or other serious crimes. Again, it is very difficult to prosecute them here. It is not in our interest, certainly, to have arrangements that allow them to come here and basically live free.

I do not think anyone would argue that it is in our interests to have war criminals or other serious criminals come here and have no provisions for dealing with them. With war criminals from the Second World War we have a criminal provision for prosecution, but it is not really being used at the moment. We do not have the option, generally, of denaturalising them and removing them from the country. All that remains is extradition; we should at least have the option of extraditing them. With war criminals from subsequent conflicts, we basically have no other option than extradition. So if we do not have extradition arrangements, the only other alternative is to change Australian law—and it is a major change—to allow the prosecution of any crime here for anywhere in the world. It is a major divergence from the general common

law tradition. One other point is that we need to have some provisions for extradition. The proposal to reinstate prima facie cases for civil law countries effectively means that extradition with those countries is virtually non-operable, from past experience. So that is not really an option. So, yes, there is a degree of unevenness in the arrangements with civil law countries. They are more reluctant to extradite than are common law countries, because they can prosecute their citizens for crimes committed abroad in that country. However, unless Australia is willing to totally change its legal system to allow that sort of prosecution, having means to extradite is an important Australian interest, including to civil law countries.

Senator LUDWIG—Thank you very much. I would be pleased if you could find out about Israel's current position with the International Criminal Court.

Mr Fleischer—In Israel?

Senator LUDWIG—Yes.

Mr Fleischer—All right.

Senator MASON—Gentlemen, thank you for your submission. As always, Senator Ludwig has gone straight to the heart of the matter. Before I join in on that issue, there is a bit of background that the Attorney-General's Department has put to us. It just may help you, as I understand it. In the 1980s we had some well publicised examples of Australian criminals abroad where it was very difficult for the Australian government to get these alleged criminals back to Australia—this is public knowledge. Because of that we changed our extradition arrangements to facilitate that process. We did it by the extradition act and the adoption of what was called 'no evidence' extradition arrangements. I used to be a prosecutor myself. I have to say that at one level I endorse that, because it makes it much easier to get alleged criminals who have escaped Australian justice back from other countries overseas. I suppose what concerns the committee is when Australian citizens, in particular in Australia, are sought by other countries for supposed crimes. As legislators, of course we are here to protect the interests of Australian citizens and so we are particularly concerned about that. Increased prosecutorial expediency has been bought off by, in a sense, allowing our citizens to go overboard on a no evidence basis. With that background, I want to jump to what Senator Ludwig was speaking about before. You go straight to the heart of the matter in paragraph 8 of your submission, where you say:

> There is no problem with Australian citizens being extradited "without any evidence at all that an offence has been committed". Civil Law countries do not simply hand out arrest warrants for no reason, so if the appropriate procedures have been followed, it is safe to assume that the requesting country has sufficient grounds for making the request.

Then, in paragraph 14, you say:

> To impose evidentiary requirements on further treaties could well send the unintended message that we do not trust the justice systems of other countries to the same extent.

You are probably right. What concerns me—and, I suspect, other members of the committee—is that at times we are not necessarily confident that other systems will necessarily protect alleged criminals to the same degree as the Australian justice system might. So our concern is not anymore with the prosecutorial scope and increasing that field but rather with protecting Australian citizens. I am informed that we have, for example, treaties with Albania, Bolivia,

Colombia, Cuba, Haiti and other places. Mr Fleischer, I am not convinced necessarily that those countries seeking extradition from Australia would necessarily have the same protections for accused people that, for example, Australia would have. That is not all civil law countries; I am not making that comparison. It is not with Israel; it is perhaps with other countries. Sure, we can get people back from Cuba or Haiti, and that is wonderful, in terms of prosecuting; but I am concerned about Australian citizens having to go there. That was the point that Senator Ludwig made, I think. That is the nub of it.

Mr Fleischer—If we have treaties with countries where Australia is not confident that the legal system in that country is free and fair—and that should not apply to all civil law countries—

Senator MASON—I accept that.

Mr Fleischer—I understand you said that, and I am agreeing with you; but there may be specific countries. First of all, Australia should consider not having extradition treaties with those countries. But there is a variety of mechanisms that Australia can use if it believes that someone is being prosecuted and will not receive a fair trial abroad. If an Australian citizen is involved, there is an absolute discretion built into the criminal law at the moment for the Minister for Justice simply to say no.

Senator MASON—You put that very well in your submission, and you are quite right: the minister does have that discretion. But let me answer that. Forgetting the law, the politics of it would be to say, 'Even though we have entered into a treaty with you, we do not trust your justice system.' I have a similar problem with the International Criminal Court, and we will get into that later this morning. But do you see the problem? If the Attorney-General or the Minister for Justice says, for example, 'No, we will not extradite an Australian citizen to country X, and the reason is that we do not trust your justice system,' you might ask the question, 'Why did we enter into the bloody treaty at all?'

Mr Fleischer—That is another problem. We are not here to comment on every specific treaty. There may be specific treaties that Australia should or should not have entered into, and I could not comment on that. However, I would say that in the event, for instance, that we arrive at a situation where Cuba has requested extradition for someone and we believe that he will not get a fair trial, and the Minister for Justice feels under pressure to extradite him in any case, because of political reasons, that person can then go to the courts and can argue, under the current extradition law, that he will not receive a fair trial in that country; that the administrative decision was incorrect; that one of the extradition exceptions should apply, such as the political offences sought on account of race, religion, nationality or political opinions; that a trial for an otherwise extraditable offence would be prejudiced for one of these reasons; or there is the threat of torture or the death penalty.

Senator MASON—Forgetting the death penalty and forgetting the political aspect to it, I am not even suggesting that that necessarily applies, but simply that the judicial system may be susceptible to pressures other than strict judicial discourse.

Mr Fleischer—In certain countries. As I said, the current treaty provisions are probably adequate so that, if we had the case of a country whose judicial system we did not have

confidence in putting pressure on Australia to extradite an individual, and the Minister for Justice, for political reasons, decided to accede to that, and then the person challenged that in the Australian courts—which they have the right to do—they probably would succeed. It is probably the case that, if there are countries whose judicial systems we do not have confidence in, we should probably not sign extradition treaties with them—

Senator MASON—That was what I was going to get to next. In a sense, the assumption—

Mr Fleischer—If you want to have absolute protection. But I do not think that is the case with, for instance, Latvia and Lithuania. At the moment, they seem to have adequate judicial systems, which have developed in the last few years, happily. Again, I do not think the point should be that we should change extradition law as such. Perhaps we need provisions in specific treaties as well, if we have specific doubts. But I do not think the solution is to change extradition law to make it very difficult to extradite everyone, in order to account for these countries. The solution for these countries whose political systems we not believe in is either not to sign treaties with them, or else to put orders in council into effect, which will modify those treaties or regulations and will allow greater latitude for people to use the courts, or else to have slightly different, modified, treaties which allow somewhat greater judicial review. However, the solution certainly is not to put prima facie case requirements on civil law countries, which effectively renders any extradition virtually inoperable.

Senator MASON—That is a very good try, Mr Fleischer. You know it is a matter of balance though, isn't it, between the prosecutorial expediency on behalf of the Australian authorities versus, to use your words, the adequate judicial systems of other countries? And the degree to which that 'adequate' is in fact 'just' is the issue, for us.

Mr Fleischer—Yes. As we said, protecting the human rights of Australian citizens is absolutely a role of Australian extradition law. We absolutely support that. However, again, we want to do that in a balanced way that will protect the rights of Australians. If there are countries where we believe that human rights are not protected in the judicial system, basically we should not be signing extradition treaties with them, or we should be modifying them so that we have very strong protections for people accused from those countries. In general, we should facilitate extradition, particularly where we are confident that people's human rights will be protected, particularly for issues of war criminals especially—because there are no other mechanisms to prevent people who have committed war crimes from coming to Australia and then being home free.

Dr Rubenstein—I would add that I do not think we should devalue—and I am sure you are not—the integrity and the independence of the Australian judicial system. There are a number of safeguards built in to the process judicially—not to speak of whether it is problematic politically at the end of the day, for one reason or another, for the minister to exercise the very obvious discretion that he or she has. So there are enormous safeguards on the Australian side, in this process with any country, even with Cuba. It is hard to believe that, if the situation was so blatant, one of those safeguards would not be activated.

Senator MASON—I am not so sure, in the sense that when you enter into a treaty with another nation there is a legitimate expectation that, unless there are some quite peculiar activities—political crimes and so forth—that extradition would be a matter of administrative

assumption. Anyway, we can debate that. In fact, as Senator Ludwig said, many of these themes are debated. We are hearing also about the International Criminal Court today, of course, as you know. Some of these themes will be readdressed there. Just one last point, and I will finish there. You mention in your submission, at paragraph 2, that for a variety of reasons there remains a very real danger that Australia will effectively remain a haven for war criminals from both the Second World War and more recent conflicts. Just as a matter of interest, by the way, do you think we are effectively a haven for war criminals, or that we are potentially one? I only ask that as a matter of interest. I would not want us to be.

Dr Rubenstein—The prima facie conclusion from the report of the Special Investigations Unit is that there are people from World War II who came to Australia in very large numbers, against whom credible cases could certainly be mounted. We had three prosecutions, and the fact of the matter is that, in the 1990s, successful prosecutions have been lodged internationally in many jurisdictions of comparable standing to our own—for the very simple reason that the archives of Eastern Europe and the former Soviet Union, in particular, have become available. That is why we have had not only successful criminal prosecutions in countries like United Kingdom, Germany, France, Italy and so on, but also a very successful record of deportation from the United States and Canada, using that archival evidence.

Senator MASON—Thank you for that.

Dr Rubenstein—So the answer is that this is still a serious issue in the Australian theatre.

ACTING CHAIR—We have talked in terms of, if you like, matters of the mind. I would just put what may seem an emotional issue, just to test it. Mr Fleischer, you are too young; Dr Rubenstein, you are probably old enough and have had time to know about this. Children, when they get a bit older, tend to go overseas, put on their backpack, and away they go—the Rubensteins of the world, with their Australian passports. It seems to me that we should have laws that protect them, more so than the present ones do—on the basis of a demand made from overseas, that is it, with the no evidence rule.

I do not know whether you have seen this list of matters that Australia has extradited people to other countries for. The main one is fraud, but drug offences are quite big; murder and serious assault account for about 15 per cent; and then theft and robbery. If one of those children gets caught up over there and returns here, and extradition is sought of those people, surely we should have a system—as they do in Israel, from what I can gather, and in the Commonwealth countries—where we say, 'Look, we are not going to extradite our people, our children, unless there is some sort of evidence that indicates that they have committed this crime.' That is all that has been asked, so that we can then feel satisfied that we, as Australians, have given rights of citizenship to our young who go over there and might get caught up in a situation where those countries seek extradition. You might not want a prima facie case, but at least, surely, we want some sort of thing so we can say, 'Look, Mr Fleischer, Australia's No. 1 citizen, has children are over there, and he has at least given them enough protection to say that they are not going to be extradited without some sort of evidence,' before we send our children across.

Mr Fleischer—Again, the issue depends to some extent on what countries we are talking about. It is true that our young people may visit countries which have poor human rights backgrounds or have—

ACTING CHAIR—Can I just stop you? I have heard the answer you have given. I am talking about not so much those countries but Australia's image or picture of itself, of giving some protection to its citizens. What do people get from being an Australian citizen? What does it mean if we simply extradite our children on the say-so of some other country, no matter how reputable—whether it be Israel, France, the United Kingdom, or anywhere?

Mr Fleischer—Again, first of all, you recognise that extradition only occurs for serious crimes. It has to be at least one year's prison, both here and in the country in which the extradition is sought. So no-one is going to be extradited for very minor offences.

ACTING CHAIR—No; but they could be charged with fraud. Drug offences would be a big one; that is 19 per cent. Or there is theft or robbery.

Mr Fleischer—Let me continue. The extradition treaty, again, includes the right for Australia simply not to extradite anyone who is a citizen. If we are not convinced that there is substance to the matter, the Minister for Justice can simply refuse to extradite. The discretion is absolutely there. It is written into the treaties. So it is not a violation of any treaty to do so. As has been pointed out before, it is not that unusual simply for civil law countries to invoke that provision, if we are not satisfied with someone's evidence. But, in general, you have to remember that, if someone comes from a reputable country, there is still a very heavy evidentiary burden to be met before they are going to be extradited. Firstly, the minister will institute a section 16 order, arguing that there is a valid extradition request and that it does not violate extradition provisions. That is based on documentation, an arrest warrant, based on judicial evidence brought before a magistrate in the country that seeks extradition. If we have a reputable country, you would expect that the magistrate would not issue an arrest warrant on no evidence.

ACTING CHAIR—I can follow all that. But what you are saying to me is that a judicial process takes place in the country that wants to extradite—say, Greece—and that judicial process, when it gets here, is not put before a judge; it is put before the Attorney-General. That in effect means—

Mr Fleischer—It is. But the minister for justice—

ACTING CHAIR—The Attorney-General's Department.

Mr Fleischer—That is correct, but the decision is then reviewed by a court if the individual character whose extradition is sought chooses to appeal, and they almost always do.

ACTING CHAIR—But can you see what you are saying? You are saying, 'We do get a judicial process in this by way of review of the minister for justice's decision.' Why do you put that into the argument as being very important? I agree it is important. You say, 'It's important that there be judicial review of the decision by the minister for justice.' Why have the minister for justice there at all? Why not let the process just flow through to the courts and call for some evidence? It may not be prima facie evidence, it might not be a great deal of evidence, but at least some evidence so that we can say that our citizens who are accused of an extraditable offence have got a right to go to a court to challenge that. That is the proposition I am putting.

Mr Fleischer—Do not forget that they already have the right to go to the court and challenge that in several stages. And, as I said, an extradition request is not lightly undertaken by a foreign country, because it is a long, drawn out process.

ACTING CHAIR—Can I stop you, because I want to go back. You make a whole series of propositions. You say, 'The country that is going to extradite is going to be an excellent country; do not worry about that. That is going to be done by the magistrate over there; do not worry about that. The Attorney-General's Department'—because that is who is going to decide it, not the minister for justice—'are going to be perfect. They are going to decide it. So, in any event, so there is really no need for a judicial decision at that level.' But if you want that, you can go to the minister for justice and get him or her to knock you off and then you can go to the courts. It is just that it is a very expensive process, may I say, for some young Australian who is charged with a drug offence in Germany.

Mr Fleischer—Yes, it is a long process. But in any case part of the expectation is that people who are guilty of serious drug offences do face some sort of justice. Yes, it is a long process and it can be expensive. However, it would not be less expensive if, for instance, if we had a prima facie case; that just gives more evidence for appeals with lawyers and court cases, which are also very expensive. If we look at comparable countries—Britain, for instance—they do not require a prima facie case for most civil law countries in the European Union. They have a situation very similar to ours, actually. Legally, it is slightly different but essentially, in effect, it is similar to ours. The British also travel extensively in the European Union.

ACTING CHAIR—But they are part of the European Union—they have signed up. They get a lot of benefits in the European Union; we get nothing.

Mr Fleischer—Most European countries are civil law countries.

ACTING CHAIR—We have not been able to get our meat into England; we probably will now, though. England is not really an example for us, is it? They have abandoned us.

Mr Fleischer—My argument again is that if a person, whatever age, is charged with a crime abroad, Australia has fairly ample safeguards for that person—including total discretion by the ministry of justice to refuse on the grounds that they are an Australian citizen—and the right to review that decision in a court of law. That should be adequate. Do not forget that extradition is not the end of the matter. The person goes to that country and they still have a trial where their evidence must be presented. They are not convicted after they are extradited just because they are extradited.

ACTING CHAIR—Would you have any worries about extraditing a young Aboriginal boy, charged with the theft of a bottle of Coke, to Darwin?

Mr Fleischer—There is no problem with that, because that would not be a crime for which he would be jailed for one year.

ACTING CHAIR—I am just talking about within Australia itself.

Mr Fleischer—Australian internal law is a different subject.

ACTING CHAIR—All I am trying to point out to you is that you may have some problems even within Australia about extradition. But you would have no problems about extraditing people overseas, it seems.

Mr Fleischer—No. Again, if we expect people who come here to obey Australian law and follow Australian procedures, we also have to reciprocally expect with adequate safeguards, and I think there are adequate safeguards, that if a person commits a crime abroad they will be subject to the law of that country. If they commit drug offences in Germany, to some extent we have to accept that Germany will have to try them. We cannot try them here and then—

ACTING CHAIR—But they have not committed the drug offences; they are accused of committing the drug offences.

Mr Fleischer—German courts generally have a pretty good reputation. Hopefully, after they have gone through the whole extradition process—and it is extensive, with a lot of judicial review, with a lot of scope for appeal, which takes a very long time—then they are extradited to Germany. Germany will have to prove in a court of law that they actually committed the crime before they do anything to them. So it is not the case that people are going to receive inadequate protection without having fair trials. That is what we want to make sure about. I do not really think it makes a huge difference for a young person or an older person, providing that we understand that this is only for serious crimes; we are dealing with crimes that have at least a year's jail in both jurisdictions. So if we have a country with a crazy law that says possession of one ounce of marijuana gives you 20 years in jail and it is only worth a fine here, then we do not extradite them. That is what the treaty says.

CHAIR—I am Andrew Thomson, chair of the committee. I apologise for being a little late. Your proposition is that there is some existing protection in the procedure now. But would you support a regime where there were no grounds at all to refuse extradition?

Mr Fleischer—No.

CHAIR—Good. So, in that sense, I am sure you will object to the statute for the proposed International Criminal Court which we are hearing after we deal with this, because, strangely enough, that statute provides for no objections to the extradition of persons required to appear before that court. Given that the nature of the crimes under that statute are said to be greater than crimes that are in normal criminal jurisdiction, we have an issue there to deal with. You might care to consider a supplementary submission to that, because these two inquiries we are having have just collided in that respect. We were quite surprised to find in the fine print of that treaty that there are no grounds for refusing extradition to that court at all. That is something on which I would be grateful for your opinion.

Mr Fleischer—We were asked briefly about it before you arrived. What I said at the time was that I have not really studied the provisions of the treaty for the introduction of the criminal court. We are broadly supportive of greater methods to prosecute war criminals where they cannot be prosecuted at the moment. However, I have not studied the specifics of the treaty. If there are specific problems we would have to study them before I could comment on them.

CHAIR—I appreciate that. But please do, because it is worth hearing the council's opinion on that. Thank you kindly for your evidence.

[10.09 a.m.]

SPRY, Dr Ian Charles Fowell QC, Member, Council for the National Interest

CHAIR—Welcome. I have to formally point out that, although we do not require evidence under oath, the committee hearings are legal proceedings of parliament, so they warrant the same respect as if they were taking place in either the House of Representatives or the Senate. Hence, the giving of any misleading evidence is a very serious matter. Do you have any comment on the capacity in which you appear before the committee?

Dr Spry—Yes. As well as representing the Council for the National Interest, I am the editor of the *National Observer***.**

CHAIR—Thank you. Would you like to make an opening set of remarks, and then we will go to cross-examination after that?

Dr Spry—Yes, thank you, Mr Chairman. First of all, might I congratulate this committee? I think that it is doing a quite remarkable job in examining matters of this kind which formerly have been very much left to public servants and ministers acting upon advice—which is really why we have the sorts of problems that we have. I think this committee is doing an outstanding job. I just wish that other committees of the parliament, if I might say so, would act with the same independence and rigour as this committee is doing on these very important matters.

Mr Chairman, I have prepared a short addendum to my original submission; it is only a couple of pages, and I have copies of that here. It might be convenient if that were handed across to members of the committee. The committee will see from my original submission that I have expressed concern—indeed, incredulity—that a situation has developed where, on a mere demand by one of a large number of foreign countries, an Australian can be arrested and extradited without any protection. One of the other matters that I have referred to is that, if one looks at the appendix to the A-G's Department submission, one sees that, for example, for bilateral extradition treaties, out of 58 countries no fewer than 43 either require a prima facie case or some general equivalent. As for the non-treaty extradition relations, no fewer than 66 out of 72 countries require either a prima facie case or some general equivalent. Yet, for some curious reason, we had in 1988 the Extradition Act enacted, which does away virtually with all safeguards.

I am sorry to say that I really cannot agree at all with what I heard said by the gentlemen from the Australia-Israel council a few moments ago. There is simply no protection at all for Australians who may be subjected to very unpleasant proceedings in foreign countries. To take an example, last year I was in Zimbabwe and I spoke there to many of the High Court judges. There is no doubt that in Zimbabwe the police are corrupt and the judges are under continual political pressure, including pressure of physical reprisals upon them; and yet there would a possibility, under the concepts of the Attorney-General's Department who are pushing this idea that one does not need a prima facie case, that somebody could be extradited on a fairly small matter, simply at the demand of Zimbabwe.

I do not mean to be at all critical of the Australia-Israel council; they are of course entitled to make submissions. But it did seem to me, on listening to them and having read their submissions, that they are looking at the matter not really entirely from the point of view of the interests of Australians but that they have in mind more general considerations which would not perhaps be shared by the majority of Australians. Really, they showed a quite remarkable lack of concern for the protection of general Australians and, in my submission, sectional submissions of that kind should not be granted very great weight.

In the course of my submission, I refer to Professor Ivan Shearer, who is an acknowledged expert in extradition law. Professor Shearer adopts very broadly, if I might say, the same approach as I do; that is to say that he is of the opinion that it was essentially wrong to get rid of the requirement of a prima facie case or some equivalent. In my submission, he is unduly concerned about the difficulty of proof of establishing a prima facie case. He has suggested instead that the appropriate test is a test of sufficient evidence to raise a 'reasonable cause to suspect'.

I wish, with due respect—and I agree with much of what Professor Shearer has said—to warn the committee that the concept of a reasonable cause to suspect is a very indefinite and inadequate basis on which one could have somebody extradited; that with 'reasonable cause to suspect', suspicions can be brought into existence extraordinarily easily. Often, these suspicions can be dispelled, but there can be suspicion on the most slight evidence. It would be a matter to be very worried about if that particular test were substituted for the test of a prima facie case.

It may of course be that the requirement of a prima facie case should be modified in some way to facilitate proceedings in other countries. I do not think so. Quite simply, having given the matter some further reflection since I wrote my submission, I think that one should simply adhere to the prima facie evidence rule and one should bear in mind that a very large number of other countries do that.

I would also submit to the committee that—as you see from submission No. 1 of my additional submissions of today—in the case of Australian nationals that test be adopted. I believe that is appropriate because Australia must protect Australian nationals. Many of the countries which we see referred to in the tables of the AGD submission do not in fact allow any nationals to be extradited; they simply disallow the extradition of nationals. By requiring a prima facie case in respect of nationals, we will not be going as far as those countries and therefore they could hardly object. At the same time, of the countries which require a prima facie case, many of them also could not object if we restored that particular requirement. So if one looks at the actual tables which are set out of other countries, there are very few which could possibly object to anything of that particular kind. I do not think that the objections of those countries should be given particular weight.

I heard while I was waiting members of the committee saying that it is a matter of balancing, and of course it is a matter of balancing. But some of our law enforcement agencies in Australia, in their understandable desire to have people brought back from abroad for trial here, are not sufficiently mindful of the fact that by making it easy to get somebody to come here from, say, Cuba or Haiti—those are two countries which were mentioned—we are also making it easier, if we adopt a reciprocal basis, for people to be brought from Australia to such countries. I must say that I am quite horrified by the list of countries with which we do have

treaties. I have referred to this matter in paragraph 6 of my original submission. These treaty countries include Albania, Bolivia, Colombia, Cuba, Haiti, Hong Kong, Indonesia, Iraq, Liberia, Nicaragua, Pakistan, Paraguay, Venezuela, Yugoslavia, Bangladesh, Botswana, Brunei, Fiji, Ghana, Lesotho, Malaysia, Namibia, Nigeria, Singapore, Tanzania, Uganda and Zimbabwe, and there are many others too. One should bear in mind that it was said this morning that only serious crimes are crimes on which somebody can be extradited, and that really is not true at all. There has been an enormous increase in the number of statutory offences over recent years, and there are many crimes which can carry a possible punishment of one year or more which are really relatively minor or which may be relatively minor.

I went through a statute or two the other day and perhaps I may mention a few of these provisions without giving too many, because it is a matter of the committee's time. For example, a threat to inflict serious injury: that carries up to five years. The threat may be very minor and partly frivolous. Nonetheless that is something. Stalking: up to 10 years for stalking. Stalking is sometimes a major offence, sometimes a very minor offence. Nonetheless, for the most minor matter of stalking, somebody could be extradited. Negligently causing serious injury: that is a crime under section 24 of the Crimes Act with punishment of five years. If one is driving a car there are many accidents, especially in a foreign country. It might be particularly easy to have a motor car accident and negligence may be found to have taken place. It may be just a small lapse and somebody could be extradited from Australia to some other country with a curious legal system. Section 31, various assaults: up to five years. Section 74, theft: up to 10 years. Some thefts may be minor, some may be major. If we look at the Commonwealth Crimes Act, we see under section 6 aiding or abetting a person who commits any offence against the law of the Commonwealth: that is a penalty of up to two years. It may be some very minor thing; nonetheless: up to two years. Any person who defrauds the Commonwealth: up to 10 years. Fraud can be a serious offence; on the other hand, it may be somebody who just exaggerates a $10 item in his tax return. Even in some minor case like that, somebody could be extradited. Section 85N of the Commonwealth Crimes Act, a person knowingly or recklessly causing a letter to be received by a person not the addressee: one year's punishment there. Somebody might hand a letter to somebody who was not entitled to it. The point I am making is that there are lots of offences which may be extremely slight; nonetheless, one may find these quite draconian provisions for extradition applying.

In my respectful submission, what this committee should do is complete its task of completely reviewing the extradition laws. I believe that there should be very substantial amendments to the Extradition Act. Certainly in the case of nationals, there should be restoration of the prima facie case test or some equivalent—which has to be a real equivalent and not some watered down version of it. In the case of a non-national, that is the area I find I have the greatest difficulty with. Obviously we should be most concerned about our nationals. But even then, it goes very much against the grain to have to feel that somebody who is in Australia, is a resident of Australia although not a national, can be arrested and sent off abroad without any proof.

Even in those cases, some measure of proof should be required. It would not necessarily have to be the same measure of proof as for nationals. It could conceivably be something less than a prima facie case, but it would have to be something very major. That is a matter which I have not been able to make my mind up on, if I might say so, as to what that test should be. I see no

harm in maintaining the prima facie test for everyone, but I am particularly concerned that it should be maintained for Australian nationals.

CHAIR—Thank you. Let us now have some questions.

Senator LUDWIG—Just looking at the issue of nationals, do you believe that it would be preferable for Australia to prosecute its own nationals for crimes committed in other jurisdictions? Although the avenue does not exist now, is that a direction that Australia should consider, in your view?

Dr Spry—I am inclined not to think so, unless it is proved to be necessary in the public interest that such a radical change in the law should be made. Historically, people in particular countries have not been subject to prosecution for offences carried out abroad. That is a very major protection indeed for citizens of a country. I think that very strong circumstances would have to be shown before one changed that. With respect to the senator, I would not say that there are not some circumstances in which that might not be appropriate. But, once one steps out on that path, it becomes very dangerous. A lot of these old rules established by the common law, not only in this country but in other countries, have a lot of commonsense behind them. If a crime has been committed in some other country, there are problems of witnesses and problems of language, very often. In answer to the senator's question, it would be inappropriate to have prosecutions for what happens abroad—at least ordinarily.

Senator LUDWIG—To give you some expanded view, I raised that because, should Australia ratify the International Criminal Court—

Dr Spry—I am speaking on that this afternoon, yes.

Senator LUDWIG—Then because it contains, to use a terrible example, war crimes prospectively committed from the time of ratification, for argument's sake, and Australia does not have the ability to prosecute war crimes in Australia, then immediately—as my poor reading of the statute would suggest; and I am only too happy to be corrected—it would mean that, for that crime and some others that the International Criminal Court would deal with, there would not be the ability of Australia to be, as I think the argument runs, the last resort. It would in fact be the first resort to send them to the International Criminal Court, because Australia does not have the ability to prosecute its own.

That sits incongruously with your view now, in that sense. Although there is not a history of Australia prosecuting its own, similarly to the way that a civil law country may do, we are changing; our society is changing. If we adopt the International Criminal Court, you then have a position where it really sits with difficulty with your first suggestion, in that sense. Perhaps you could help me over that hurdle.

Dr Spry—For reasons which I will indicate this afternoon, I think there are very strong grounds for our not ratifying the International Criminal Court treaty. I think there are other ways in which the matter can be approached, by setting up specific tribunals to deal with particular countries, as has happened in the past. That is a preferable approach, for a large number of reasons. I understand your concern about this. But one has to bear in mind always in this area that a primary consideration is the protection of Australians—Australian nationals particularly.

If a small number of people slip through the net and are not punished when one would perhaps, in a perfect world, wish them to be punished, one should not undermine the position of ordinary Australians in order to accomplish that, really.

Senator LUDWIG—But we might be talking about quite heinous crimes.

Dr Spry—Yes; that is in fact so. That would in fact be so in the case of countries which refuse to extradite their own nationals—other countries do that. But if I might say, before you go on, I am suggesting something less than that, really. I am suggesting that if a prima facie case could be made, then we would extradite these people who are guilty of heinous crimes; whereas in many countries, there is no extradition at all of such people under any circumstances. So we would be adopting a more enlightened attitude, if I could put it that way, in that regard.

Senator LUDWIG—In respect of the standard which you went to earlier, I am curious about what you think the appropriate standard would be. I know it is an arbitrary line, but I was curious about your views on where the standard should be set.

Dr Spry—If I might say, in the case of nationals, I feel it should be a prima facie case. This is something which is known to our law, and it applies to Australians. If an Australian is to be charged in the courts—

Senator LUDWIG—I am sorry; you perhaps may have misunderstood me. I meant in terms of the one year. I understand your argument in relation to the nationals—

Dr Spry—I am sorry, Senator; I misunderstood you. That is a very complicated matter. It is a matter that I have suggested this committee should examine, because it does seem at the moment that very minor crimes can be the subject of extradition proceedings. However expensive, or whatever is said, there is in fact great doubt about the legal process in other countries; in fact, if I may say so, there is great doubt about the legal process in this country. Justice is not always done. Guilty people are often acquitted. With people in civil actions, very often the wrong person wins. Legal proceedings are unfortunately not a matter of absolute justice. It is very regrettable, but they depend upon judges, witnesses, counsel, solicitors and so on, who often make mistakes.

As to exactly what the limit should be, as opposed to one year, that is a matter for very serious consideration. Perhaps it should be 10 years. I gave some thought as to whether it should be 10 years. One can argue the case that an offence should require punishment of up to 10 years before there should be extradition. But I would not like to commit myself finally to a 10-year figure without giving the matter a great deal of thought.

Mrs DE-ANNE KELLY—Dr Spry, you made reference to the previous submission. What is there to stop Australia becoming a haven for war criminals, were we to adopt the suggestions that you have put forward?

Dr Spry—I think that there can be alarmist talk about this. I would view the Australia-Israel council submission as being somewhat alarmist. There are many countries which refuse altogether to extradite nationals, full stop, but they are not regarded as havens for war criminals. Take Israel itself: one of the things I find very difficult to understand is that Israel itself will not

extradite its nationals, and Israel itself requires a prima facie case, according to the AGD submission, which I have here. That makes it very curious that they are taking this sort of approach. Can it be argued that Israel is a haven for war criminals? Perhaps there are war criminals in Israel. Perhaps there are war criminals in many countries in the world. But it does not seem to be reasonable to assert that, just because one has proper protection of one's own people, the country becomes a haven for war criminals.

If of course we found that, due to some extraordinary event in the future, we had tens of thousands of people coming from, let us say, China who turned out to be war criminals in some particular way and we could therefore be regarded as a haven, that would be a very undesirable situation. I am sure that we could stop it. We could send people back. They would not get here in the first place, in any event, in large numbers, I imagine. It is a very speculative and far-off thing. But we should not be alarmed by the use of such words as 'haven for war criminals'. We should not be alarmed into making bad judgments which are to the detriment of Australians.

Mrs DE-ANNE KELLY—Under the existing arrangements, the minister has a great deal of discretion to refuse to surrender someone who is alleged to have performed a criminal act. Is the minister really the appropriate body or individual to judge this?

Dr Spry—No; in my submission, certainly not. The minister is a political animal and he is entitled to take into account all sorts of political considerations as well as legal considerations. It is very difficult to know exactly how he would treat any particular case. I think Australian nationals are entitled to feel secure in their country and not to have to depend upon a minister who, of course, in turn relies upon departmental advice. In view of the AGD's submission in this case, I would be very concerned about departmental advice, really. I think that is entirely inappropriate and I think that actually the committee has itself formed that view in its earlier report.

Senator MASON—Dr Spry, thank you very much for sending me the *National Observer* every quarter.

Dr Spry—My pleasure.

Senator MASON—I do have a good look at it. Thank you for that. Indeed, I read your article about the International Criminal Court published in there some time ago. Just briefly, I am not sure whether you heard this from the previous witnesses. I mentioned, in a sense, a potted history of what has occurred over the last 20 years with respect to extradition—and that is that we changed our extradition processes because there were Australian nationals who committed often serious crimes in this country and who escaped overseas and were outside the arm of the law. As someone who used to prosecute for the Commonwealth, I can understand their frustration. So in a sense, we changed the presumption, and the no evidence rule was adopted in 1986.

This process is a matter, obviously, of balance. I notice that in paragraph 10.3 of your submission, you say that, although it is desirable in some cases that persons be extradited to Australia for trial, it is more important that Australians and particularly Australian nationals should feel secure in their country, save where at least there is strong proof of serious crimes. In a sense, that is perhaps the nub of it. You would come down, on balance, that it is most

important for legislators, such as we are in the parliaments of Australia, to legislate to protect Australian nationals. Is that right?

Dr Spry—Definitely. Indeed, as I point out in the final paragraph, really the principal purpose for the formation of a nation is the protection of those who are to become its citizens. That is absolute basic to the formation of a nation. We are here as Australians; we formed a nation for our protection, essentially. That is a paramount consideration, in my view. We should not allow ourselves, as I said earlier, to be encouraged by well-meaning prosecutors who justifiably wish to catch particular individuals: by all means assist them, but we should not do so by giving away safeguards which are quite basic for ordinary Australians.

Senator MASON—But that is really the nub of it.

Dr Spry—It is.

Senator MASON—It is a balance—

Dr Spry—It is a balance.

Senator MASON—and you have to fall somewhere, but it depends where you find the balance. You would say your primary obligation is really to the Australian citizen.

Dr Spry—Yes, I would also think that other methods should be sought as far as possible. If, in a particular case, an extradition treaty does not exist with, say, Zambia—let us say there is no adequate extradition treaty there for any reason at all, including the fact that we require a prima facie case, et cetera—I think that other methods should be pursued carefully to see whether there is some method of getting that person out of that country.

Senator MASON—You mention also in paragraph 6 of your submission certain countries—Albania, Cuba and Haiti and others—with which we have bilateral treaties.

Dr Spry—Yes.

Senator MASON—You go on to say that it is impossible to be confident that in many of these countries there might not be legal improprieties, breaches of human rights, extraneous or undue pressure or corruption within the judicial process and so on.

Dr Spry—Yes, and in the police too. I did not expand upon that, but particularly in the police, yes.

Senator MASON—So your argument would be that to allow the extradition of Australian citizens to countries where the no evidence rule applies would be very unwise.

Dr Spry—Very wrong, I think. Many Australians are simply not aware of these changes that are to take place. I must say that, when I looked into this closely and came to appreciate that authorities in any of these countries could issue a warrant and one would be simply thrown out of Australia, I could hardly believe my eyes.

Senator MASON—The history of it—perhaps I am drawing a longer bow here—is that this is perhaps the price of the Trimboli affair and other affairs. You would be more aware of that than me. That is, in a sense, the political background to it.

Dr Spry—Yes, indeed. To make another comment, that is not the only problem. We also have a department which is unduly anxious to enter into all sorts of treaties. Doubtless, people get promotions or they do not get promotions depending on how many treaties they enter into. That is really quite extraordinary. We also have the problem of what I might call 'internationalists'. There are a lot of people in Australia who seem to be more concerned to promote internationalism than to protect Australians. Those are two additional problems which are quite serious as I view them.

Senator MASON—I think we will get to that later today with the International Criminal Court as well, Dr Spry—

Dr Spry—Yes.

Senator MASON—but thank you for that. The previous witnesses said in effect that the concerns you have raised could and will be addressed, first, by the minister for justice in the exercise of his or her discretion and, secondly, in the potential judicial review of the legal processes that occur in Australia. That was really the argument: that the concerns that you may have and the committee may have could be addressed by the minister and by the courts. What do you say to that?

Dr Spry—What I would say to that is that, first of all, I have dealt with the position of the minister who acts on departmental advice. That is not an adequate security, in my opinion, and people should not be forced to rely upon that. But the other point about the judicial review is that it is very expensive and very limited. If somebody in Australia is to be extradited to Zambia—to take my example—and he goes before a court, how does he prove that he will not get justice in Zambia? It is not an easy matter. Would he call witnesses from Zambia? It would almost be a hopeless case to do that.

Senator MASON—Some people may argue that their system is just as good as ours, just different.

Dr Spry—Exactly, that is the sort of argument you get. The unfortunate Australian would have to call people from Zambia to say that there is corruption in the police and that the judiciary are being influenced by this and that. The Commonwealth might call contrary evidence. You just do not know what attitude would be taken by the Commonwealth. It is simply not realistic to require a person to rely upon very limited rights of that particular kind.

Senator MASON—Do you know of any examples of Australian citizens being extradited to other nations—I think you mentioned cases of minor crimes, so let us say theft—where there are doubts about the judicial process and so forth? Are there any actual examples of where people have been extradited in, let us call them, potentially unjust circumstances?

Dr Spry—I do not know where one would get the statistics for that. It is a very difficult question. There would be statistics kept from Australia, I suppose. One could also, I suppose,

make inquiries into other countries as well as to what actually took place in those countries. I am concerned more about the potentiality than what actually takes place. We may not have had a request for extradition from, say, Haiti at this particular stage, but the fact is that if a request is made you or I have to go off to Haiti.

CHAIR—The doctrine of the separation of powers goes, I understand, to the different roles of the judicature, the legislature and the executive. In this case, there has been a legislative act to take what was originally a judicial exercise of power and give it to a member of the executive.

Dr Spry—Yes.

CHAIR—Where would the traditional common law doctrine of that stop parliament from doing it? If it were taken further—if you like, if more such decisions were given to ministers that were previously made by magistrates or even judges—is it possible the High Court would hold that invalid using a traditional ground of common law?

Dr Spry—I do not think that in this particular case it would be held to be invalid. One gets into very technical areas here about the judicial power of the Commonwealth. But this would not, in my opinion, be a case where it would be held to be bad. I do think that there is very great danger as a matter of policy in departing from basic rules such as a rule that you have to have a prima facie case. Rules of common law are adopted over many years. There is great danger in departing from those rules in order to give a sort of bureaucratic or administrative decision by a minister or otherwise.

CHAIR—I put the question again: how strong is this doctrine in the common law? Can parliament override it?

Dr Spry—Yes, parliament can override it generally, subject to the Commonwealth Constitution. The Commonwealth Constitution does have some limits in it.

CHAIR—If it says that the Commonwealth can invest its judicial power only in certain courts, then how does it invest a judicial power in a minister?

Dr Spry—The argument would be that this is not actually the vesting of a judicial power because a minister does not have to act judicially. He is entitled to take into account all sorts of policy considerations and other considerations—administratively, in that sense. He may have to act judicially in another sense but he does not have to act judicially in the sense that he is exercising a judicial power wrongly of the Commonwealth.

CHAIR—So that discussion of the judicial power in re Polyukhovich: is that the most recent authority about what judicial power really means?

Dr Spry—That would be a recent one, yes. I would have to check with the authorities and see whether there is anything more recent.

CHAIR—This is where these two inquiries collide again—this question of what exactly judicial power means in that section of the Constitution.

Dr Spry—Yes. I think with the International Criminal Court that does raise entirely different considerations, and I would like to make submissions about that. I think that would be exercising judicial power in the relevant sense.

CHAIR—Thank you kindly for your evidence this morning.

[10.43 a.m.]

BURNSIDE, Mr Julian William Kennedy QC, Member, Victorian Bar

MANETTA, Mr John, Assisting Mr Julian Burnside QC, Victorian Bar

CHAIR—I formally advise you that these are legal proceedings of parliament and hence they warrant the same respect as though they were taking place in either house. I also ask you to be mindful of the sub judice rule in addressing issues that arise in any cases on foot; I am sure you are aware of that. In many ways, it is precisely cases on foot where these issues are in a sense becoming quite real that are going to make the weightiest evidence in a sense. So, in that way, if you could guide us through those rules we would be very grateful. If you would like to make some remarks, and then we will have questions.

Mr Burnside—Thank you. I have provided a supplementary submission which I think you have all seen, although briefly. I begin by saying I am glad you mentioned the sub judice rule because I am conscious of the fact that at the moment the full Federal Court is reserved on the appeal in Cabal. I will be quite candid and say that a number of the views I am expressing I formed because of my experience in that case, in which I had a great deal of help from John Manetta. There is a clear risk that my views are partisan. I hope that they are not. But they were in fact formed as a result of the odd circumstances of that case, and you will see the bias in it. Because the court is reserved on that, I was a little anxious when I saw an ABC fellow out there with a tape recorder. It would be most undesirable if anything said, at least in this part of the sitting, should be public, because that may seem to interfere with the process of the court.

CHAIR—Does the committee want to resolve to go in camera for the evidence of these two gentlemen because it relates to an appeal? Some of it, if it were reported publicly, might cause some—

Mr Burnside—There are two aspects. I can flag them when we get to them if you want to minimise the in camera—

Senator LUDWIG—I think the public would need to understand why we need to go in camera, because the benefit of these inquiries is that the public can gain some benefit from them and therefore they are entitled to look at the transcript. I am very loath to go into camera, broadly.

Mr Burnside—I do not think there is any difficulty with members of the public reading it. It is not a jury trial; it is a full bench appeal. But it would be highly undesirable if there were any publicity—in the sense of newspaper publicity—given to my views expressed in this forum about questions which are presently the subject of a decision which is reserved.

CHAIR—Undesirable from the point of view of the bar and the court?

Mr Burnside—I do not want the court thinking that I am having a second shot at the goals.

CHAIR—Do you want to sort that out with the court, in the sense that—

Senator LUDWIG—Unfortunately, I think you should not comment if you think there is a problem. But I do not think there is a problem if you have a shot at the court, for argument's sake.

Mr Burnside—I am not going to be having a shot at the court, just at the goals.

Senator LUDWIG—I think we do on occasion, but I try not to.

CHAIR—Go ahead and see how we go.

Mr Burnside—I would like to make a few observations to start with. There are three substantive matters dealt with in the supplementary submission which I will flag and outline very briefly, and then there are two other matters I would mention.

First of all, we would advocate the adoption of a two-tier system to resolve this difficulty about what standard of evidence is required before extradition takes place. The essential discriminating feature of the two-tier system would be that, where another country requests the extradition of a person and we have real confidence in the quality of their justice system—and I use that to mean their court system, their police system; all the way down the line—then a fast-track procedure appears to be a reasonable expedient. Where we do not have complete confidence in their justice system, then some evidence should be required. The prima facie evidence test or some equivalent seems desirable, essentially because if there is a risk that the foundation for the extradition request is flawed then, according to the theory of our system, you have to be able to test the elements which go to make up the request. That means, in effect, having evidence from witnesses who can be challenged if there is a legitimate ground for challenging them.

I think the difficulties associated with the difference between the operation of our legal system and the civil system, for example, are somewhat exaggerated. It seems to me perfectly easy to facilitate the proof in our system of the matters that would have to be proved by a civil law country. I do not think that is a great difficulty and it has happened in the past. Ultimately, the resolution of this question depends on balancing cost and delay on the one hand against the requirements of justice on the other. I agree with what Dr Spry said before: that one of the fundamental principles that we take for granted in the Australian context is that people in Australia are entitled to the benefits of a legal system which has certain fundamental qualities. Summary removal from the country is not one of them, unless the foundation for that summary removal is a matter of such confidence that we can trust the requesting country. That raises a very interesting question of the International Court of Justice where one would suppose that it can be trusted entirely, although it is a bit too early to say. I do not want to go down that track because I do not know enough about it.

The second introductory point concerns the conditions of requested persons, pending extradition. This may not be a systemic problem; it may be a problem only in Victoria. But the fact is that the Cabal case has seen Cabal—and, until recently, Passini—incarcerated in the most inhumane conditions imaginable, to the extent that they are sharing their cells with the worst criminals in this state. Even when we visit them, as their lawyers, they are subjected to strip

searches and cavity searches. They have been in those conditions for two years. I do not think it is any exaggeration to say that, even if they were convicted in Australia of the offences for which their extradition is sought, they would not suffer those conditions for that long. Yet they are not found guilty of anything in any system at the moment.

I happen to have acted for Alan Bond in the first of his trials. He did 12 months in a prison farm for knocking off a painting and then telling fibs about it. Carlos Cabal has done two years in Sirius East at Port Phillip prison, and he has not been convicted of anything at all; it is really disgraceful. It is a problem in Victoria, because we do not separate remand prisoners from convicted prisoners, and apparently the court system can do nothing about it. There has to be a solution, and the parliament is probably the only place that can provide the solution.

The third thing is a curiosity that arose, but I suspect it is not isolated, in the Cabal case. Section 19(5) of the act prohibits a requested person from adducing evidence to contradict the proposition that they committed the acts which are alleged in the statement of conduct. It sort of reinforces the no evidence principle. So the warrant says, 'Here's a warrant for arrest,' and the statement of conduct says, 'These are the things we say they did,' and the act says, 'You can't call evidence to contradict that you did those things.'

At the heart of the Cabal case was a claim of extradition objections—specifically, that there were political objections to the extradition. Proof of the political objections involved saying, 'This is a fit-up; he didn't do these things; yet the whole system is so flawed that this is being done to punish him for other things.' That ran headlong into the problem that, in order to demonstrate the political objection, you have to overcome the prohibition in section 19(5). How better to demonstrate a political objection than to show that the charges are false? How do you show that the charges are false, when you are prohibited by section 19(5) from contradicting the fact that you have done the things alleged?

At first instance, the judge said, 'No, you cannot call evidence which contradicts it, even if the purpose is to show a political objection.' That question is alive and reserved in the full court. But it is a problem which plainly enough needs a solution, unless our argument happens to prevail and the courts finds as a matter of interpretation that you can adduce evidence for the political objections—even if, by a side wind, it tends to contradict that you have been involved in the acts alleged.

CHAIR—Can I interpret you there? I beg your pardon for it. How long has this appeal been argued and on foot?

Mr Burnside—There are three stages. There is the hearing before the magistrate, which took an awfully long time. It started in July 1999 and was decided in December 1999. There is then what is called a section 21 review, where the Federal Court does again what the magistrates did and does it on the same material.

CHAIR—But a few months.

Mr Burnside—That took a few months. The appeal from the judge's decision was heard in November last year, and it is reserved still.

CHAIR—It is just that we have had some long and, at times, difficult discussions with the officials from the Attorney-General's Department about exactly this matter. You might be surprised to know that they never mentioned that there was an appeal or that there was a question reserved in a superior court on this very question. That is astonishing.

Mr Burnside—It is surprising, but perhaps it was not uppermost in their mind. I have to say that they do seem very enthusiastic to extradite him. If I can be permitted what is undoubtedly a partisan observation, it looks like a pay-back for Christopher Skase. 'There are parallels between what is alleged against Cabal and what is alleged against Skase, and we have not managed to get Skase back; so it seems like a good idea to get rid of Cabal.' That seems to be the thinking.

CHAIR—Please continue.

Mr Burnside—There are two other points that I wanted to mention—and these are not in our submission, but they arose from previous evidence given. One is the question of whether—and I think it was Mrs Kelly who raised this—Australia might be seen as a haven for war criminals. It is a curious thing that one of the longest standing treaties to which we are a party is the treaty on genocide by which, in 1950 I think, we promised the world community to enact genocide as contravening the law of Australia. We still have not done that. How that fits with the dual criminality principle of extradition in the context of Konrad Kalejs—or any other war criminal who happens to come here from the Second World War or from more recent events, in Kosovo, for example—is anyone's guess. But it does seem to be a startling thing that we are so concerned about our international obligations and yet we do not recognise genocide as an offence. There is a real question, it seems to me, whether Kalejs, if he were extradited, could be prosecuted for genocide in Latvia. It seems to me, on analysis, that probably he could not; and that seems a lamentable thing if his extradition is otherwise proper.

The final point was on the question about the separation of powers. The separation of powers was a significant question in the Cabal proceedings, at first instance and on appeal. The problem arises this way: extradition is pre-eminently a matter for the executive; it is something done by the executive, although how the executive decides to do it may involve a judicial process. But it is undoubtedly something done by the government of the day as a matter of agreement between states. The difficulty that the separation of powers gives rise to in connection with extradition is this: under the present act, the magistrate is not sitting as a magistrate when he or she hears the extradition request. The magistrate is sitting as persona designata and therefore is not exercising the judicial power of the Commonwealth. It is precisely because of the separation of powers problem that the persona designata provisions exist in the act.

The difficulty arises at the next stage because, if you are dissatisfied with the magistrate's decision that you are an extraditable person, the next recourse is, under section 21, to the Federal Court. The process in the Federal Court is a very curious thing. It is called an appeal but it is not an appeal in the orthodox sense, and the judge is confined to looking at the material that was before the magistrate. In every possible way, the job that the judge does is the same job that the magistrate did. The judge does not look to see whether the magistrate made errors of law or errors of procedure or took into account evidence that should not have been taken into account. So it is not a judicial review in the orthodox sense.

The judge, on the other hand, is not allowed to receive additional evidence or to do anything beyond what the magistrate did. It is awfully difficult to see how that task—identical in every respect with the magistrate's task—is not also an administrative rather than a judicial task. How can it be properly said that, if the job is done by the magistrate, it is the administrative power of the Commonwealth being exercised? And when the judge does the same thing, how can it be said that that is the judicial power of the Commonwealth so as to avoid the problem of separation of powers? Once again, that is a question which is reserved before the full court—

Senator MASON—It cannot be both.

Mr Burnside—It cannot be both, no. Well, that is not quite right. Courts of the Commonwealth can perform administrative acts which are necessary ancillaries to the judicial power. But, where you have the same job being done by two different people—and when I say 'the same', I mean 'identical in every possible way'—it is very difficult to see how, on one hand, it is the administrative power of the government and, on the other, it is the judicial power of the Commonwealth.

There is an interesting line of thinking in the cases on this area called the 'chameleon doctrine'. The chameleon doctrine says, 'A power can transform from administrative to judicial, depending on the identity of the person exercising it.' But if the chameleon doctrine is taken too far then the engineers case, which is the classical foundation of the separation of powers doctrine, simply loses all meaning. You simply say, 'Well, if it is a judge, it is judicial power and so the problem goes away, and it cannot possibly lead to that conclusion.' So there is a problem, and the problem, I suspect, calls for a solution along the lines of altering the nature of the section 21 review, which would resolve the problem and would resolve other problems associated with extradition.

CHAIR—Thank you. We shall go now to questions.

Senator MASON—Gentlemen, you mentioned a two-tier system and, in a sense, that would perhaps alleviate some of our concerns about Australian nationals being extradited to countries that we are not too confident about. That is a great idea, and I understand that; and we perhaps rejoice in that observation. But what concerns us is that politically, you see, that is difficult; there are diplomatic and political problems with that. Do you understand that there would be political and diplomatic issues with respect to differentiating between countries and their capacity to dispense justice?

Mr Burnside—Absolutely. We advert to that very problem in the submission, in that part. Clearly, there are diplomatic problems associated with it. I guess the question is this. Which is more important to us: the proper administration of justice, or protecting the delicacies of diplomacy? They are not commensurate values, and I do not know what the right answer is.

Senator MASON—Once again, those issues conjoin in our discussion on the International Criminal Court, as you can well imagine.

Mr Burnside—I am not sure that the problem is so intense in relation to that.

Senator MASON—It is not as intense.

Mr Burnside—Because the International Court is very likely to have an impeccable administrative structure. So, if a request comes from it, you can be pretty confident, I suspect, that it will be a request that is justified by any standard.

Senator MASON—Hang around for the next hearings. I take your point about holding people on remand with hardened criminals; and that is an argument, in a sense, for expediting extradition. I understand that, because that is at a peculiarity of our court system and our penal system. But, once again, that is something the committee will have to take note of; but of course that will not change our deliberations with respect to the nature of justice in extradition.

Mr Burnside—Yes. There is probably an easy solution. Let me not overstate the nature of the problem. It is probably confined to Victoria—because in Victoria, unlike other states, we no longer have separate facilities for remand prisoners and convicted prisoners. The International Covenant on Civil and Political Rights says that you have to distinguish between remand prisoners and convicted prisoners, and the Extradition Act provides in the same way.

The problem is that in Victoria, having privatised the prison system, it is apparently not deemed efficient to provide separate facilities, and they do not exist in Victoria. So a Victorian magistrate cannot really do very much except send the person to a place like Port Phillip prison, with all that that entails. The solution may be to provide, in the minister, an overriding discretion or power to say, 'It is unacceptable in Victoria to have people holed up in Sirius East, so I will move that person to a suitable prison in Adelaide or to an immigration detention centre, or to some other facility that is regarded as providing circumstances appropriate to the conditions of a person whose extradition is sought.'

What is striking about the Cabal case, since this point has been taken to court in different ways half a dozen times at least, is that no judge, however sympathetic to the problem, was able to provide a solution. That ultimately has got to come down to a difficulty in the act, dealing with the reality of conditions in Victoria.

Senator MASON—As the chairman pointed out, we thank you very much for pointing out the potential constitutional problem about exercising judicial administrative functions, because it has not really been brought to our attention, certainly not in that detail. It really will colour our deliberations, I am sure.

CHAIR—It is funny how little you get from the Attorney-General's Department, isn't it?

Senator MASON—Finally, you mentioned that under section 19(5) it is not possible to provide evidence contradicting submissions seeking extradition, even where the matter being raised is one of political bias and so forth. So it even goes further than that. As Dr Spry said, how would you do it in any case? In other words, not even 'can't you' but, even if you could, how would you? It is very difficult.

Mr Burnside—Yes, it is difficult. It was done in the Cabal case. There was a great deal of evidence led at different levels of generality about the operation of the system in Mexico. Justice French, I think, quite rightly said that the standard of evidence that you require on matters like that has to be conditioned to the realities of the occasion on which the evidence is required. However, he baulked at receiving, for example, reports from Amnesty International

and similar human rights bodies, which were all to one object: they all said that the judicial system in Mexico is terribly flawed, the judges are not independent of government, the government uses the courts to punish its opponents, and so on. He was not prepared to accept evidence of that sort as probative at all.

Senator MASON—When we get to it, the International Criminal Court, in fact, will have to make deliberations about 'unable and unwilling' in that exact context, and that is going to be the issue. They cannot, in fact, draw jurisdiction unless they make a decision that a particular country is 'unwilling or unable' to prosecute certain individuals. In my view—and we will get to it later—it is highly political and highly tendentious, that particular point.

Mr Burnside—The fact that it is disjunctive, unwilling or unable is probably the saviour—because, if they have not done it, it looks like they are unwilling. If you had to prove 'unwilling and unable', that would be very difficult.

Senator COONEY—Extradition is an executive act. Can parliament make laws about it? Could the Australian parliament make laws about extradition that contain provisions that say that somebody at least ought to look at whether or not it is a fair thing to send people overseas from here?

Mr Burnside—Yes; and there is no real difficulty with providing a judicial review of that executive or administrative deliberation. In fact, it is done all the time. The whole AAT and ADJR structures are predicated on the proposition that administrative decisions can properly be the subject of judicial review by people who are exercising the judicial power of the Commonwealth.

Senator COONEY—In the bar's submission—I think it is in the section on separation of powers—you talk about the section 16 decision. I take it that what is meant there is that there can be a review of the decision by the Attorney-General's Department, in effect, which is expressed through the Minister for Justice—and that that can be appealed off to the Federal Court and then off to the High Court. You mention Mr Cabal: had the bar thought of how that might run for someone who was not well resourced? Probably you were in here before when I was talking about the proverbial backpacker who is accused in Sweden or Germany, say, of some drug crime. Have you thought about how much that would affect him or her, and how much that would cost him or her?

Mr Burnside—Our legal system does not cater well for people of limited means. Extradition is just another example of that problem.

Senator COONEY—Say they get acquitted: who pays for the fare back?

Mr Burnside—I have no idea. I assume the requesting state does—because you cannot imagine the requested person putting his hand in his pocket, and I cannot see why Australia should do it. I suppose it is the requesting country.

Senator COONEY—You say that the Victorian bar also believes that further consultation should be conducted in consultation with the Attorney-General's Department and the various bar associations, and it may be that such an inquiry would be 'an appropriate matter for

reference to the Australian Law Reform Commission'. That concentrates on the executive arm. Can you see any part for parliamentarians such as ourselves in this, to try in some way to pass laws that manifest Australian citizenship and the benefits that might give someone? Or do you think this is a matter for the Law Reform Commission to instruct the Attorney-General's Department for executive action to be taken? How would the bar see that?

Mr Burnside—I have no idea how the bar would see it. If I understand your idea, it is only a short step back from a bill of rights. Personally, I happen to think a bill of rights is a pretty good idea.

Senator COONEY—No, it is not a bill of rights. This is specific to this issue.

Mr Burnside—I understand, but you are talking about the rights of citizens.

Senator COONEY—I put my question very badly to you. We have heard evidence that civil law countries in particular are very jealous about extraditing their citizens; that seems to be the effect of it, in any event. They try them locally. But there is there a manifestation on their part of some willingness to put some score under the concept of citizenship: they are not going to let their citizens be surrendered up. In the system that we operate in Australia at the moment, that is not quite so apparent. I took it from the bar's submission that the bar thinks it is a reasonable position, as is.

Mr Burnside—It is difficult to see why you should apply different standards to citizens or nationals of other countries who happen to be in Australia. The question is whether Australia distinguishes between people who have citizenship and those who happen simply to live here. I am not enthusiastic about the idea of distinguishing in that way.

Senator COONEY—What I am really asking you is why these civil law countries do it. Has the bar ever thought about that?

Mr Burnside—I simply do not know—and whether other people at the bar have thought about it I cannot say. Can I just point out the difficulties if you follow it through? Let us suppose you say that citizens get a natural advantage, and so we will distinguish between requests to extradite citizens of Australia, as opposed to requests to extradite others. You then have to deal with this problem—

Senator COONEY—That is badly put. That is what I am saying. I am saying that, as an Australian citizen, surely you are entitled to protection from your government. You have committed yourself to your government; so why shouldn't the government commit itself to you? If you are a resident, you have not committed yourself to Australia—because you are here and you have not taken out citizenship. Can you follow that?

Mr Burnside—I can understand the rationale of the distinction; it is just that I do not agree with it as a distinction, and I think it leads to problems further down the line. Let us suppose you have, say, a Mexican here who is not a citizen, and his extradition is sought by Germany. Do you say that Mexico has a greater right to get a Mexican out than Germany does, and neither of them has as great a right to get an Australian out? These are distinctions that involve all sorts of value judgments.

Senator COONEY—What are you simply saying is that—and I keep coming back to the backpacker—if you have these underresourced people who are going to be extradited to another country, Australia should at least say that there is at least some evidence that justifies us taking this extreme step of sending a young person back to Germany or wherever it is, or to Mexico. I am not interested so much in the Mexicans and what have you. We must have some rights as Australian citizens in Australia, surely, rather than just to simply say, as seems to be being said, 'Because a country in Europe or Asia or somewhere has a drug trial, we ought to send them back on the say so of a person over there—no matter how full of integrity that person may be—without an Australian at least running his or her eye over it.

Mr Burnside—I understand, and I think it is the sort of proposition that I would be inclined to go along with, if I could see the way it would play out. The devil would be in the detail. You can change your example subtly by saying, for example, that the citizen was in fact born in the requesting country, came out here and got citizenship 10 minutes ago and, on a trip back home got involved in some terrible crime, and now they want to extradite them. Does that person get additional protection simply because they have taken out citizenship? That is not so easily answered.

Senator COONEY—All I am saying is that surely, in this year of the centenary, to be an Australian citizen must mean something. If what we are going to do is simply to say, 'This is a great system; we can trust the other countries; we will send people back on their say so; and anyhow the Attorney-General or the Minister for Justice will run his or her eye over it, and you can go off to the Federal Court anyhow and spend your money,' and just let it go that way, there seems to be a gap in what it means to be a citizen. I think that is all I am saying.

Mr Burnside—I think that what Australian citizens ought to be entitled to expect is effective justice. If the requesting country is one that we confidently believe will give effective justice, then I have fewer reservations about allowing the extradition to go forward just exactly the same as for a non-national.

Senator COONEY—You would say, 'Trust the baby-sitters; all baby-sitters are going to look after our children. We can go out and trust them all'?

Mr Burnside—I have seen some of those horror films, and so I am not sure that I would trust all the baby-sitters.

Mrs DE-ANNE KELLY—I would like to make an observation first, if I could. You mention the case of Mr Cabal in Sirius East. Certainly, the situation there is peculiar to the Victorian justice system; so I guess that is probably not something we should go into. But it does raise this question: if Victoria, which sees itself very much as the most progressive state in Australia—I simply come from North Queensland—has a justice system and a privatised prison system that is described as 'harsh' here for remand prisoners, what then can Australian nationals expect if they are extradited to some country with a questionable justice system? You raise the very point that concerns us, by raising Sirius East. You open your submission with a quote from Mr Gummow and you go on to say that the question is to strike a balance. America has a far more stringent extradition system than we do: is the American system unbalanced?

Mr Burnside—I do not have a sufficiently detailed understanding of it to answer that.

Mrs DE-ANNE KELLY—Is it a haven for war criminals?

Mr Burnside—America?

Mrs DE-ANNE KELLY—Yes.

Mr Burnside—I do not think so, but then they have enacted genocide as part of their laws and have been willing, from relatively early times, to extradite people accused of war crimes.

Mrs DE-ANNE KELLY—I gather from your submission in your opening remarks where you have said that, if there was confidence in the justice system in the country to which someone was to be extradited, it should be fast-tracked; and that, if we lacked confidence, it should perhaps be a prima facie case. From a legal point of view, that sounds very fair and balanced. However, from the point of view of exporting to many of our neighbours, there could well be a question of diplomacy. Coming from an area where we export virtually everything we produce, I would be disappointed if we differentiated and then created a foreign affairs difficulty. How do you propose that we overcome that, were we to pick up on your suggestions?

Mr Burnside—I would come down on the side of requiring prima facie evidence; and the additional cost and delay associated with that is the price you pay for not disturbing diplomatic regulations.

Senator LUDWIG—Doesn't that mean that your fellow in Sirius stays there longer, as a consequence?

Mr Burnside—In Victoria, it would or could have that consequence. I could say that it may be that Cabal is in a special category, because of the enthusiasm of—

Senator LUDWIG—I understand that. I am using that as a terrible example.

Mr Burnside—Yes. Of course, at the outer edges it would test to the utmost a person's willingness to contest the system, and they might have to decide whether they would not be better off to go back and face whatever is facing them in the requesting country rather than to sit in Sirius East in those circumstances. But you see, you cannot have both. You cannot have a system which operates fairly, so as to ensure that extraditions are fair and honest, and have that quickly. Justice does not seem to work quickly.

Senator LUDWIG—No, unfortunately.

Mr Burnside—If a person is a requested person and, for some reason, it is thought essential to keep them in custody—and that is not universal—then that is the result.

CHAIR—Thank you very kindly, gentlemen. You have given very interesting evidence.

Resolved (on motion by **Senator Mason**):

That submission No 16.1 from the Victorian Bar and No. 17.1 from Dr Ian Spry be received as evidence to the committee's inquiry into extradition and be authorised for publication.

Resolved (on motion by **Senator Mason):**

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

Committee adjourned at 11.20 a.m.