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JOINT COMMITTEE ON TREATIES

Monday, 27 May 2002

Members: Ms Julie Bishop *(Chair)*, Mr Wilkie *(Deputy Chair)*, Senators Bartlett, Cooney, Ludwig, Mason, McGauran, Schacht and Tchen and Mr Adams, Mr Baldwin, Mr Bartlett, Mr Ciobo, Mr Martyn Evans, Mr King and Mr Scott

Senators and members in attendance: Senators Schacht and Tchen and Mr Adams, Ms Julie Bishop, Mr Ciobo, Mr Martyn Evans, Mr King, Mr Scott and Mr Wilkie

Terms of reference for the inquiry:

Treaties tabled on 12 March 2002.

WITNESSES

Committee met at 10.03 a.m.

ALDERSON, Dr Karl John Richard, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

HOLLAND, Mr Keith Colin, Assistant Secretary, Security Law and Justice Branch, Attorney-General's Department

WILLING, Ms Annette Maree, Principal Legal Officer, Security Law and Justice Branch, Attorney-General's Department

SCOTT, Mr Peter Guinn, Executive Officer, International Law and Transnational Crime Section, Department of Foreign Affairs and Trade

CHAIR—I declare open this sixth meeting of the Joint Standing Committee on Treaties. Today, as part of our ongoing review of Australia's international treaty obligations, the committee will take further evidence concerning the International Convention for Suppression of Terrorist Bombings, one of 13 treaties tabled in parliament on 12 March 2002. I welcome the witnesses. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We had some evidence on the last occasion about this matter, but do you wish to make some introductory remarks before we proceed to questions?

Mr Holland—Thank you. First of all, I would like to apologise for not having been here on the 15th to assist the committee in its deliberations. I trust that, with the assistance of Dr Alderson and the further assistance of Mr Scott, we will be able to clear up some of the concerns the committee had. By way of introduction, I will deal with a couple of issues that might assist with some of the concerns the committee had. I will do that in the context of the purpose of the legislation and how it fits in, in particular, with the suite of terrorism bills that are currently before the parliament.

Prior to September 11, the approach of the international community in dealing with terrorism was to build up a comprehensive legal regime to deal with terrorist activity and to do that by sending a message to would-be terrorists: 'If we are not able to stop you from doing what you are doing, then the international community will do everything in its power to cooperate with each other to see that you are found and that you are prosecuted and, if guilty, that you are punished.' This particular convention should be seen in that context. It was one of the suite of conventions which the United Nations had tasked the Working Group of the Sixth Committee of the United Nations to develop. The purpose of this convention was to provide a platform from which the international community could rely upon offences created by this convention as a basis for mutual assistance, extradition and cooperation between law enforcement agencies and prosecuting agencies, in dealing with those who had committed offences.

The need for this convention was seen in the Australian context. We have in fact played a very significant role in developing this convention and finalising it, given some of the issues that arose in its drafting, which I think Mr Scott referred to in his evidence on the 15th. We saw

this as a necessary instrument that would complement our extradition and mutual assistance legal regime. Whilst we have a fairly comprehensive one, as you would be aware, that is not the case with many other jurisdictions. So for Australia this was seen as an opportunity to further enhance the international community's ability to deal with terrorist activity.

In terms of its relationship with the suite of terrorism laws, which was raised on the 15th, specifically in answer to the question 'What would happen if changes were made to those laws?' the answer is nothing. This legislation was being developed prior to September 11. It was intended that this was the form that it would take, and it is a stand-alone piece of legislation that is aimed at implementing this convention. Of course, after September 11, through Security Council Resolution 1373, all states parties were urged to sign up to and become a party to these conventions. We were, as I say, in the process of doing that. This is the logical corollary of that activity. So in terms of its relationship to the others, it is part of the government's overall response to the events of September 11, but it is a piece of legislation that is structured primarily to deal with international elements—to deal with those circumstances that may arise relating to the need for mutual assistance and extradition. Having said that, I invite Dr Alderson to deal with a couple of the other issues that arose on the 15th.

CHAIR—Thank you.

Dr Alderson—In the course of the hearing on the 15th a number of issues were identified about which further information was requested from the department. I have identified four where that question arose, and I will quickly work through them now. The first was a question as to whether the proscribed organisations provisions that are contained in other parts of the terrorism package were required—something that the Commonwealth had to enact—under these treaties. The answer to that is no. The government has put forward the policy arguments for proscribed organisations provisions, but they are not part of the set of provisions that implement the requirements under either the bombing or the financing convention.

The second question that arose was: what would be the situation if a person might have committed both a state offence, say arson, and a Commonwealth offence under these new terrorist bombings provisions? The answer to that is that both offences would apply, and there is a specific provision in the terrorist bombings bill stating that it does not oust the operation of any other Commonwealth, state or territory law. In fact, there is a quite deliberate intent to allow state law to operate and, in essence, to take on an administrative level precedence where charges are being selected. That is reflected in the provision of the bill requiring the Attorney-General's consent to a prosecution, and it provides that one of the things the Attorney-General is to take account of is whether the person may have also committed a state or territory offence.

I might say that the issue of a particular course of conduct involving both the Commonwealth and a state or territory offence is a very common one under our federal system of criminal law. For example, in the drug trafficking area there will frequently be a situation where a person may have committed both a Commonwealth drug importation offence and a state drug dealing offence. There are various arrangements between Commonwealth and state police prosecutors and so forth, as to how to proceed with those matters.

The remaining two issues concerned the question of the fault elements applying to different elements of the terrorist bombing offences. Two questions were raised. One was whether it was

a departure from the treaty to provide for recklessness to be the fault element for the physical element of the device as an explosive or other lethal device, given that the word 'intentionally' is used in the treaty at the opening of the description of what should be in the offence. The department's reading of the treaty and the basis on which these provisions were framed was that the word 'intentionally' in the relevant provision of the treaty attaches to the opening physical element of the offence—that is, intentionally delivers, places, discharges or detonates a device—and leaves open the fault element to attach to the other physical elements of the offence.

The other consideration—I have been involved in reflecting a number of treaties into Commonwealth law—is the question of the scope to frame legislation in a way that is reasonably appropriate to reflect the treaty but where there is a discretion as to the exact fault element to be used. Generally, the selection of fault element—in this case, recklessness—is designed to be consistent with the way that Australian law works generally in the criminal law area, including under the Commonwealth Criminal Code. The standard position is that the prosecution must prove that a person intends their conduct and is knowing or reckless as to circumstances arising or a result occurring from conduct. The term 'recklessness' is defined in the Criminal Code and requires a person to be aware of a substantial risk of a state of affairs arising and being unjustified in taking the risk.

The final question that has arisen on that issue of appropriate fault elements is the fact that strict liability has been attached to paragraph (c) of each of the two offences—that is, that the device is delivered, placed, discharged et cetera in a public place, government facility and so forth. The argument in terms of consistency with the treaty is the one that I have already put in terms of recklessness: the treaty leaves open that adaptation of the wording of the treaty to the way that offences are framed in Australian law.

The policy rationale for the use of strict liability for an element like that is that the heart of the culpability in what someone has done is that the person has intentionally delivered a device, they are reckless as to whether it is an explosive device and the person intends to cause death, serious harm or serious economic loss. Fault has to be proven for all of these elements and between them clearly involve an action which I think would generally be accepted as a pretty heinous thing to do and something deserving of punishment.

The question of that extra link to the place of public use or government facility is something that a person may well not have in mind—that is, the objective of destruction in the placing of a bomb et cetera is the harmful thing. The fact that it is linked to public use or a government facility is more of a jurisdictional question that brings in the treaty and brings in an area of Commonwealth responsibility rather than the traditional areas of state law.

There was a specific question from Senator Cooney as to whether a similar approach had ever been taken in another Commonwealth offence carrying such a heavy penalty. The answer to that is yes. The specific example is section 71.2 of the Criminal Code which arose from a comparable position to this one—that is, those provisions in division 71 implement the convention on the safety of United Nations and associated personnel. Those provisions are about murder of UN or associated personnel and apply strict liability to the question of whether the person was a UN person engaged in UN activity. That is a comparable jurisdictional element.

CHAIR—Does that also carry the penalty of life imprisonment?

Dr Alderson—That carries life imprisonment, yes. The final comment I would make is that these questions of appropriate fault element and the reasoning for including them were of significant interest also to the Senate Legal and Constitutional Legislation Committee. The department provided a written answer to that committee on those issues which goes into some more detail than I have given in my verbal answer. We have prepared an extract of that and I would propose to table that for this committee.

CHAIR—Could you clarify what that is? It is a response by the Attorney-General's Department to the Senate committee on what specific issue?

Dr Alderson—Yes, on the issue of the selection of the fault elements in the terrorist bombings offences in this bill, and the reasons for recklessness in the first instance, strict liability in the second and how that relates to the treaty.

CHAIR—Thank you. Do you have anything further to add?

Dr Alderson—No.

CHAIR—In relation to that Senate committee, were there any other recommendations in relation to the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002?

Dr Alderson—No. The committee made no recommendations for amendments to that bill.

CHAIR—Could you clarify one other matter. Your first point was about the proscribed organisation provision. You said it will not impact on this. Are you saying that however that proscribed organisation provision pans out, it will not impact on this legislation?

Dr Alderson—That is correct. It will not impact on this legislation and however that pans out would not preclude Australia acceding to this treaty on the basis of this bill.

CHAIR—Whether we had the proscribed organisation provision or did not in the other legislation, it will not make any difference to the implementation of this legislation?

Dr Alderson—That is correct.

Mr ADAMS—So there is no proscription in this treaty?

Mr Holland—No.

Dr Alderson—No, there is no proscription required or provided for under this treaty.

Mr ADAMS—And intent is the main point that has to be proven or is one of the points? There has to be intent for a terrorist act?

Dr Alderson—Again, there has been considerable debate about the fault elements and the use of strict and absolute liability in the Security Legislation Amendment (Terrorism) Bill 2002. A lot of those issues do not arise in the same way in the terrorist bombings bill. In the Security Legislation Amendment (Terrorism) Bill there are provisions requiring a defendant to prove absence of recklessness rather than the prosecution proving recklessness. That approach is not contained in the terrorist bombings bill, which has a more traditional style where, for the different elements, the requirement is on the prosecution.

Mr MARTYN EVANS—I think part of the difficulty that some of us had last time in understanding the full impact of this is that we all know terrorism when we see it on CNN, but the question then is: how do you define it in law? You know it when you see it, but how do you actually come to grips with that and differentiate it from equally heinous things in many ways, where people can use explosives or other material to cause economic loss and loss of human life?

The difficulties seem to be that in many ways these treaties are so broadly drafted that there is no attempt to come to grips with that problem. I think that is what caused a certain amount of concern on the part of some members last time as well, which you have not really addressed in some of your remarks to date. I wonder whether you could perhaps go back over some of that territory and reassure us a little. If you look back to September 11, almost all of the states in the world could have seized jurisdiction on that given the number of people who were employed in the World Trade Centre. Most countries had victims of that, if you like. That is the only requirement in some of these for people to seize jurisdiction. How do we address some of those aspects of the matter in terms of reassuring us about our position in international law?

CHAIR—Are you also looking at the definitional issues of what is a terrorist attack?

Mr MARTYN EVANS—Yes, which are incredibly vague. It is easy for us to agree on it in retrospect, but knowing what we are defining in law is another question since the definitions in the treaty seem incredibly broad.

Dr Alderson—Certainly. I will make some remarks and then invite Mr Holland to comment from the perspective of his involvement in the negotiation of a number of treaties and the difficulties that have been faced there. In terms of Australian domestic law, the approach taken in both the treaties and the bills is that it has proven impossible to come up with a concept of a terrorist. So the focus is on the actions that are undertaken and the seriousness of those actions. In the terrorist bombings bill, the focus is on the seriousness of placement, explosion et cetera of a device causing death.

CHAIR—So it is the consequence of it?

Dr Alderson—It is the consequence. It is the seriousness of the consequence that brings it within the notion of terrorism.

Mr ADAMS—Because the act here is very broad, isn't it? Blowing up anything could be defined as a terrorist act, if I recall.

Dr Alderson—That part of it is the broader part. The point where it becomes narrowest and has the most specific focus is when you get to the intended consequence of the action in terms of causing death, serious harm or extensive destruction. I guess that approach—

Mr ADAMS—But that might not be a terrorist act, might it? That is what we are trying to get to, I think—the terrorist act, and defining that in some way.

CHAIR—And the outcome might not be intended. You could have a consequence that you could never have dreamt would occur.

Dr Alderson—Under the bill, you have to be aware of a substantial risk that that consequence will occur because of the way the definition of 'recklessness' works. In the other bills there is a definition of 'terrorist act', and that definition has obviously been the subject of considerable discussion and recommendations on the part of the Senate committee that the government is examining. In the Security Legislation Amendment (Terrorism) Bill there are these two elements of the nature of the act and the harm that causes and also the motivation—the political, ideological, or religious cause.

The bill is an attempt to reflect the approach that has been agreed on internationally in this area—that terrorism will be known by the seriousness of its consequences and that, in implementation of the offence, those questions about whether it is an appropriate situation for a particular offence to be used would be taken into account in decisions by police about which charges to lay and also in decisions by prosecutors.

Mr Holland—Mr Scott actually drew on some of the experience that we have both had in dealing with negotiations in the work of the Working Group of the Sixth Committee of the United Nations where this particular treaty was drafted. We have worked closely over a couple of years in the development, in that same committee, of the financing convention and we have been working again on the development of a comprehensive convention to outlaw terrorism. As Mr Scott said on the 15th, one of the difficulties is that we have not been able, as an international community, to reach agreement on what is a terrorist or what is a terrorist offence.

There is one group—and this is simplifying it dramatically—who believes that you need to define a terrorist offence and what terrorism is. There is another group that says, 'It is far too difficult to do that for not only ideological or political reasons but because of the different legal systems.' Therefore, what we should do in focusing on an international response—and I want to emphasise that; that is what this particular convention is all about: responding internationally—we focus on activity rather than on some ideological concept. What distinguishes the approach here as to the approach in the terrorism bill is that in the terrorism bill we are actually focusing on how we deal with it domestically—how we would deal with terrorism offences, terrorist acts, in the Australian context.

The purpose of these conventions is to establish, as I said earlier, the platform that would allow us to cooperate with and get other countries to cooperate with us in getting hold of those who would engage in this sort of activity. That is the distinction and that is the basis on which we have worked. Indeed, as an indication of just how difficult this is, our negotiations on the comprehensive convention are stymied at this stage because of the very difficulty that you have

alluded to in trying to come to some sort of a definition, an understanding, of just what that activity is.

CHAIR—So it is really trying to separate the notion between what is a terrorist act and what is a terrorist.

Mr Holland—What you do as opposed to what you are.

CHAIR—Because if one commits a terrorist act, is one not a terrorist?

Mr Holland—We try not to get into that. As you will notice, the bill—and the convention is even called that.

CHAIR—Is that where some of the fundamental issues lie? We are not trying to define what is a terrorist; we are trying to define what is a terrorist act.

Mr Holland—That is right—what they are doing.

Mr MARTYN EVANS—I can see how that translates into the domestic legislation. That is one aspect of it and I think that we can adequately, within the parliament and the community, come to grips with that ultimately to our satisfaction. There will be bumps in the highway down that path, but I think that you can see a way through that. The issues probably arise more in the context of the fact that we are then a party to an international treaty and we will be subject not just to our domestic legislation but to what others view an interpretation of the treaty to be and, therefore, how they apply that in relation to seeking things from us, because it is not only our domestic legislation that matters in this context. That is one thing that we can control domestically, obviously. The other issue is that by being party to this treaty we then expose ourselves to international proceedings where others impose their definitions of these things. Is that not the case?

Mr Holland—It is not entirely the case, because there is a discretion. I think that the far end of that extreme that you would be referring to would be a request for extradition purposes. The convention and the legislation specifically reserve the power to Australia to decide whether or not it will assist in that regard. But there is, nevertheless, an obligation placed on Australia, as we want it placed on other countries, that if for some reason you say, 'Well, I won't let you have Bill Smith,' then if you are satisfied that, under your own legislation, this person has committed an offence, you should prosecute here. But again, that will still be subject to the normal checks and balances through the prosecution policy of the Commonwealth and the Attorney-General's agreement et cetera.

Mr BRUCE SCOTT—I was really interested in the intent to commit. I think that is one of the areas that I am not absolutely happy with, because I think, as my colleagues here have said, it is not only perhaps the way we would see that intent; it is how other countries who are signatories to this treaty would see the intent. I think article 5 is the most difficult area to define, in that it applies to offences 'in particular where they are intended or calculated to provoke a state of terror'. That is the one that I have the most difficulty with. We know what an act of terror is—we have been talking about it for the last half-hour. We see that after the event—but

describing, or even trying to determine, what was intended or calculated to provoke an act of terror in the general public, I think that is the difficulty.

Mr Holland—I will respond generally and my colleagues might want to follow up. Again, that goes back to the issue of other countries trying to get somebody in Australia for activities committed in their own country. That discretion exists with us. But if you then transpose it to an Australian being in that foreign country, that is always going to be a problem regardless of this convention. If you go to a foreign country, you are subject to the laws of those countries and there is not a lot that we can do about that. You have to understand that when you go. Taking it back to the domestic context and handing somebody over, I would go back to what I said earlier to Mr Evans that, in fact, there is that discretion there.

Mr P. Scott—In relation to article 5 that you referred to, article 5 is a provision which basically states that a country cannot provide for a justification for committing the offence. So it is actually the other way around. This is not about the intent to commit the offence; this is about the fact that there is no excuse for carrying out the offence.

In relation to the offence itself, I would suggest that if you look at the elements of the offence, both as they are portrayed here in the convention and then again as they are portrayed in the bill, it actually is not as vague as it might at first seem. You are talking about the placing of an explosive or other lethal device in a place of public use—a state or government facility, a public transportation system or an infrastructure facility. It is talking about the placement of the lethal devices in specific places of a public character. In that sense, even though an element of motivation—terroristic or otherwise—is only referred to in article 5 in the sense of 'there shall not be an excuse for doing such a thing', that public focus of the commission of the act does import the seriousness and the intent to cover what would be definable among a group of like-minded states as a terroristic intent.

Mr KING—Looking at 72.3 and article 2, it seemed to me that the events of September 11 would not be covered by this provision. Is that correct?

Mr P. Scott—In relation to the convention itself, it is certainly our opinion that the convention would in fact accommodate the use of an aircraft as an explosive device.

Mr KING—Why do you say that?

Mr P. Scott—Because the definition of 'explosive or other lethal device' is 'an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage ...' On that definition alone, an aircraft full of fuel has the capability to cause death, serious bodily injury or substantial material damage when used in the context of the offence in article 2.

Mr KING—That may be so, although I would have doubts that an aeroplane could be described in ordinary language as an explosive or lethal device. Let us assume that is the case. What about (c)? It was not a public place, a government facility, a public transportation system or an infrastructure facility?

Mr P. Scott—I believe it was a place of public use inasmuch as the World Trade Centre contains several public areas, including a restaurant, public access areas, a shopping mall—

Mr MARTYN EVANS—And a subway station.

Mr P. Scott—And a subway station.

Mr KING—But it only covers those parts of the building that are accessible to the public. What was bombed was the top part of the building.

Mr P. Scott—Obviously one would need to carry a hypothetical prosecution through to its conclusion to determine whether this convention would or would not apply to a particular situation. But certainly it is the view of the Australian government and also most other government delegations present at the terrorism negotiations in New York that this convention would indeed have covered the attacks of September 11.

Mr KING—Let me put it another way: it is arguable, isn't it?

Mr P. Scott—In relation to an attack using an aircraft or an attack on an aircraft, there are other instruments in the international regime covering terrorism that deal with the hijacking of aircraft and attacks on civil aviation. To the extent that this attack may not have come under the terrorist bombing convention, there are other conventions which deal with attacks on civil aviation.

Mr KING—Yes, that is right, but what I have said is correct, isn't it, in relation to this convention?

Mr P. Scott—I do not accept that it is correct.

Mr KING—You do not accept that it is arguable?

Mr P. Scott—In the sense that anything is hypothetical, I guess it is arguable. But, as I said, it has certainly been the opinion of the representatives of the different countries who attended terrorism negotiations that this convention should in fact apply to that situation. Given that, in terms of a treaty interpretation, the opinion of legal experts of states forms part of the interpretation of that particular instrument, that would strongly suggest that this instrument is intended to apply in those circumstances.

Mr KING—I have got no doubt that when they framed it, prior to September 11, had they foreseen the possibility of such an event they would have framed it differently.

CHAIR—Covered the field.

Mr KING—But it has not been done, and it just raised a query about the utility of this convention. Can I pass on to another topic—

CHAIR—Before you do, Peter, could I ask one question arising from what Mr Scott said in answer to you. You said the aircraft would be considered an explosive or other lethal device. If you have a look at the definition of 'explosive or other lethal device', 3(a), under article 1, says it is 'an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage'. It seems to be stretching it to have an aircraft come under that definition. But you mentioned a fuel-laden aircraft, and 3(b) says a weapon or device 'that is designed, or has the capability, to cause death ... through the release, dissemination or impact of toxic chemicals, biological agents or toxins ...' Is that where we say an aircraft fully laden with fuel becomes an explosive or lethal device?

Mr P. Scott—I believe it could apply to both. Certainly if it were not to come under (a) it would very simply come under (b).

CHAIR—Do you really think they were intending by those definitions to refer to an aircraft fully laden with fuel?

Mr P. Scott—I think they were intending to apply as broad a definition as possible to accommodate the use of implements to hand that would have the effect of causing either death or injury or the extensive damage to public property that is provided for in the offence itself. Again, as I raised in the evidence in the first hearing, it is also understood by the same experts who have been attending the terrorism negotiations in New York that 3(b) would include the posting of biological material such as anthrax in the mail.

CHAIR—I can understand that.

Mr P. Scott—The intent is to be as broadly applicable as possible. I agree with you that the September 11 situation would come under (b), but arguably also under (a).

Mr MARTYN EVANS—So would driving a car through the front doors of Parliament House, and there is precedent for that. Isn't that also the same?

Mr P. Scott—Yes.

Mr Holland—But that particular example that you used definitely would not come under this because there is not that international element that is required. As Mr Scott was saying—and I think Mr Adams alluded to this earlier—yes, these definitions are drawn fairly broadly because in trying to cover the activity you clearly will not be able to cover everything that might possibly arise. I would be amazed if any one of the negotiators thought of an aeroplane at the time that this convention was drafted.

Mr KING—No. That is the point.

Mr Holland—But having actually been in New York three weeks after the event with the groups of people that Peter was referring to, this was obviously a very big subject for discussion and there was no-one that we spoke to across the broad range of countries who had any doubts about the fact that this convention would cover this.

CHAIR—I can understand that and I can understand that post September 11 everybody would be wanting to say. 'Thank goodness this covers that scenario.' But I am not sure that it does. Mr Scott, you said that you agreed with me that an aircraft fully laden with fuel would come under (a) and (b), I am not sure that it actually would, if one wanted to take a legal scalpel to this.

Mr WILKIE—For example, if you had a fully laden fuel tanker and you had run that into a building and it detonated, I do not think that would be covered here either, not under these definitions.

Mr P. Scott—I guess all we can say is that in our opinion it would, because once you take an implement such as a fuel tanker full of fuel and you use that as a bomb—that is, you drive it into a public place with the intent to cause extensive damage and you then detonate it—and thereby cause extensive damage to that public place or death or injury, with that intent, then that would come within the context of this convention. It has become a weapon through your use of the implement.

CHAIR—I understand once you get to article 2.1, where you have got 'intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use ...' That all makes sense. But then you have to go back to what is an explosive or other 'lethal' device? Perhaps it is the word 'lethal' that is the concern: it has to be a lethal device per se. Anyway, it is a definitional problem, I think. Mr King, I am sorry, I interrupted you.

Mr KING—It may be that the answer to this problem is that a similar attack on, say, the Grollo building in Melbourne or Australia Square in Sydney would be covered by other legislation.

CHAIR—I guess that is our question: does this convention cover September 11? I think that was one of the first questions we asked at our last meeting: was the convention still considered adequate post September 11?

Dr Alderson—There is one brief comment I would make. The discussion about whether an aircraft is covered would seem to turn in the case of (a) on whether you read the words 'or device' as being qualified by the words 'explosive or incendiary weapon'. So the view that has been taken that it does encompass an aircraft, I assume, would be based on a reading that 'or device' was a separate limb distinct from 'explosive or incendiary weapon'.

CHAIR—And then it is picked up as 'lethal device'. Elsewhere it is referred to as a lethal device.

Mr WILKIE—If there is such argument around this table about the definition, wouldn't it make sense to actually tidy it up so it clarified the point rather than go back and forth discussing the differences about little pedantic parts of it? Wouldn't it be better to modify that to make it clear?

CHAIR—Read your points about device: 'device that is designed to cause death'. That is not an aeroplane.

Dr Alderson—Or has the capability.

CHAIR—Or has the capability? Has the capability to cause death? Well, if it crashes it does.

Mr P. Scott—Indeed. In relation to any weapon or device designed to cause death, if you look at the individual elements of that, as we are doing here, and determine whether an aircraft's original intent or the fuelling of an aircraft was intended to cause death—

CHAIR—Whether it is designed to.

Mr P. Scott—In relation to the point that you raised, Madam Chair, in paragraph 3(b) of article 1, that we are talking about a device that has the capability to cause death, I think undeniably an aircraft laden with fuel has that capability.

CHAIR—Should it crash.

Mr P. Scott—Should it crash or it should it be crashed. I think that, frankly, within the context of the convention and in particular the intent behind it, once an aircraft is overpowered by an individual who deliberately flies that aircraft into a building, with the aircraft fully laden with fuel with a deliberate intent that that fuel create damage to the building in addition to the crash, as happened on September 11, that very firmly falls within the scope of this convention. That is certainly the government's perspective and that of the legal experts within the bureaucracy within Australia. It is also the opinion of the legal experts who negotiate these instruments. And because a treaty interpretation is in part determined by the opinion of the legal experts of nation states, that, to me anyway, renders this unequivocal.

If, in relation to the operation of this treaty as an international instrument of cooperation, there is some question as to whether the legislation is drawn broadly enough to encompass this intent, then that is a separate question. But in relation to whether accession to this convention would enable us in the future to respond to requests for cooperation or would enable us to rely on an obligation for another state to cooperate with us in relation to a September 11 type of incident, the answer is a firm yes.

CHAIR—The question in my mind is if this convention had been drafted post September 11 would it be worded this way?

Mr P. Scott—It is difficult to talk in terms of hypotheticals, but for instance one of the contexts of the drafting of this instrument could have been seen to be the bombing of the US federal building in Oklahoma. Again, the bomb was a truck with a mixture of two otherwise innocent materials deliberately designed to destroy that building. The otherwise innocent materials brought into combination created a bomb and the truck created the delivery device. Again, the definition would not specify whether the delivery device be a truck, an aircraft or some other non-militaristic utility. It is simply drawn broadly enough to determine that anything that is capable of delivering that degree of destruction when used with that intent in a public place comes within this convention.

Mr BRUCE SCOTT—How would these conventions apply in the case of the pilot who deliberately flew that aircraft into the Pirelli building in Milan where people were killed? How

would that case be dealt with under these conventions? He deliberately flew an aircraft laden with fuel into the Pirelli building in Milan. There were people killed. How would that be viewed? If that was not an Italian—it could have been somebody of another nationality—how would that be dealt with under these conventions? Could you give me a steer on that?

Mr P. Scott—It really depends on whether the country—Italy in this case—required international cooperation, whether it needed to seek the extradition of somebody involved in that offence. As soon as there was somebody else involved in that offence requiring extradition, the question starts to become whether this was an organised attack against this particular building, and the inferences suddenly start to be drawn that maybe it was a more serious incident than was otherwise considered. But if there is no need to seek extradition or mutual assistance from another country, this convention does not really come into play.

Mr BRUCE SCOTT—But had it been other than a national, an Italian, pilot?

Mr P. Scott—If the pilot had been from another country, again the convention would not be brought into use unless Italy needed to seek evidence from another country in relation to a prosecution of a further individual. In the absence of anybody else to prosecute, the matter ends there with respect to this convention. As soon as you start putting into play the fact that there is somebody else out there who needs to be prosecuted, and then there is another country from which we need evidence and from which we might need to extradite a further individual, the seriousness of the incident as a planned, organised event begins to escalate its significance and consequently one would say, 'Yes, this convention probably should apply.' All of these are hypotheticals again; it is very difficult to draw them.

Mr MARTYN EVANS—But other states can seek the extradition of the perpetrator if one of their nationals had been killed in the building. Doesn't it also work the other way around? It is not only the extradition to Italy, say, in this case of other nationals in other countries. Isn't it also the case that if another national had been injured or killed in the process, they could seek the extradition of the perpetrator from Italy?

Mr P. Scott—The convention is very clear in not actually specifying that if the victim of the attack is a national of your country you can seek extradition. It is whether the attack was against your country. That is article 6, paragraph 2(a). So it is if the attack is against that national. Once again, yes, that is a voluntary ground for establishing jurisdiction, but there are a number of issues to raise there. One is would the country want to do that if the country in which the attack took place is already thoroughly dealing with the matter? Secondly, there would need to be somebody to prosecute. So in the case of the Pirelli incident we have been discussing, if there were nobody else involved in that particular incident there is no prosecution that can be derived. To work the hypothetical through to make this convention apply, the incidents just need by their own nature to become increasingly serious. And then you need to factor in whether or not the country in which the incident occurred or the countries which have the most direct interest in relation to that attack are in fact themselves exercising their jurisdiction. If they are not, then, yes, maybe it is appropriate for a country which can establish a jurisdiction through some other method to do so. But the question would arise: why would they do so if the country concerned, that is, the country in which the incident took place, is in fact pursuing the matter themselves?

Mr KING—I will just make a comment on your earlier point about the Oklahoma bombing. I think a miscegenation of dangerous fuels is quite different from an ordinary aeroplane or a car loaded with fuel. I doubt that the manufacturer would describe it as a 'lethal device'. However, can I take you to a couple of points in 72.3. I do not understand why you have the word 'intentionally' in (a). I think that is unnecessary having regard to the fact that you have (d) 'the person intends to cause death or serious harm'. I think Mr Scott may have inferentially raised this point, and I agree with him. The problem with repeating 'intentionally' in (a)—and then you have got it in (b) as well, in '... the person is reckless as to that fact'—is that it starts to turn in upon itself the offence and you are having to prove intention and recklessness with respect to different facts which, at the end of the day, you ought not to have to do, having regard to the fact that it is really the intention to cause death or serious harm by the acts that are described in (a), (b) and (c) that is the nub of the offence, if you look at article 2 of the convention. So I would be interested in your comments as to why the word 'intentionally' and the words 'person is reckless as to that fact' are in (a) and (b) and what role they play.

Dr Alderson—The answer to that is that under, the Criminal Code and consistent with common law, fault attaches not to an offence in its entirety but to each element of the offence—each element of conduct, circumstance or result. So, if no fault elements were stated in these provisions, the Criminal Code—and, before the Criminal Code existed, the common law—would supply an appropriate fault element to each of the physical elements separately and in fact would supply a different one to the different paragraphs. I guess you would have to separately show, in relation to the fact of having delivered or placed a device, that that was done intentionally, and that, separately, what you intended was to cause extensive destruction, et cetera. I guess they are distinct things and it would be possible to intend one without intending the other.

Under the Criminal Code you would not actually have to write these in because in fact, other than the strict liability for (c), these are what the Criminal Code and the common law would automatically supply. They have been written in essentially to make it easier to read the bill so that, rather than having to refer to the Criminal Code, you can see what the fault element is in the provision itself.

In terms of the appropriateness of having intention for 'delivers, places, discharges or detonates the device', that would probably be the easiest element of the offence for a prosecution to prove in any case. If you are talking about someone's conduct, unless they are, say, suffering a severe psychological illness or something like that people always intend their conduct. The questions of fault become more tricky when you are asking, 'Were you aware that this result would come from your actions?' But proving that someone intends their conduct tends to be more straightforward.

If no fault were required for that at all—so strict liability were applied on (a)—that would be a matter that would be, say, likely to draw significant criticism from the Senate scrutiny of bills committee as punishing somebody for an action that they had not intended.

Mr KING—I do not think you have addressed (b). It seems to me that (b) extends the definition of 'explosive' or other lethal device beyond what was contemplated certainly by the framers of the convention.

The other issue I have is: what happens to the person who gives the directions? Suppose Osama bin Laden is sitting over there in Afghanistan and somebody in Adelaide blows up the Parliament House. Osama bin Laden would not be guilty of any offence under 72.3 because he caused it to be delivered, et cetera. He did not actually deliver it.

Dr Alderson—Those situations are covered by the ancillary liability provisions in the Criminal Code, both by the complicity provision—that you have common purpose; that you aid and abet—and by a particular provision in section 11.3 of the Criminal Code. That essentially provides that if you have fault—that is, you intend something to happen and you procure another person to actually carry it out but you do not carry it out yourself—you are taken to have carried it out for the purpose of the offence and you are punishable by the maximum penalty for that offence. So there is always a decision to be made. There are other areas where separate provisions, specifically about directing, are included in the legislation, but the approach here is the approach that is usually taken, which is that they are caught by those general provisions for those other situations.

Mr KING—Do you provide for an attempt, as set out in article 2(2)?

Dr Alderson—Yes, attempt is covered by section 11.1 of the Criminal Code.

Mr KING—But you do not have a separate provision as set out in this convention under division 72?

Dr Alderson—No. Almost all of these conventions have those other provisions about attempt and so forth. It used to be that when Commonwealth law was drafted some more of these separate things would be put in. The problem is that they would often end up being worded slightly differently. So in terms of efficient prosecutions, having one standard provision that has been carefully worked out and that then attaches to every other offence has been considered to be a better approach.

Mr WILKIE—There has been some talk of negotiations with the states within Australia. I think South Australia has expressed a desire to be party to the convention. What about the other states? Have they seen any problems?

Mr P. Scott—I believe that in the *National Interest Analysis* an attachment on the consultation with states has been included. I believe that indicates that no state or territory has objected to Australia's accession to the convention.

Mr WILKIE—They have not objected, but have they stated any criticisms or any areas for improvement?

Mr P. Scott—That would be in relation to the legislation perhaps, but certainly the Department of Foreign Affairs and Trade is not aware of any proposal by the states or territories for possible amendments to the convention on terrorist bombings. We are engaged in consultations with states and territories in relation to the comprehensive convention against terrorism, which is currently still in the process of being negotiated. The meeting of the Commonwealth-State Standing Committee on Treaties is taking place in Adelaide, I think on Wednesday of this week. That is an item on the agenda. In relation to terrorist bombings, I do

not believe there have been proposals by states and territories—certainly not to my knowledge—that would suggest or recommend an amendment to the convention.

Mr WILKIE—Obviously life imprisonment is the maximum penalty in the legislation. Do you know if state criminal law in the various states has different or lesser penalties for major damage of public infrastructure? I will give a couple of examples so that you have something to work on. In Western Australia a few years ago we had an individual decide that he did not like the prison system, so he decided to try to blow up one of the regional prisons. We had a guy who did not like the fact that woodchipping was going on in Bunbury, so he decided to detonate a device at the woodchipping plant and caused extensive damage. Would they receive a lesser penalty if they were prosecuted under state legislation, or would the state then turn around and say, 'We could in fact have them dealt with under this legislation'?

Dr Alderson—It is certainly true that a particular action by a person might come within various state offences and they would have varying penalties. The maximum penalties in state law tend to be for murder, obviously life; for manslaughter, 25 years; and for serious harm to a person, 15 years. So there is a range of penalties for different state offences. There is the question of the international connection in the bill, but if you have a situation where in fact the bill also applies then the provision for the Attorney-General's consent to a prosecution under this provision comes into play. There has been an expressed intention that where something comes within a state offence that should be the primary recourse. So the Commonwealth Attorney-General would say, 'Well, really, we are talking about something that I do not consider to be terrorist, that comes within a state offence, so I do not consent to a prosecution under these provisions.' Obviously that would be a decision made case by case, but I think that is the understanding of how it would play out.

Mr ADAMS—What protects the Australian citizen from having the Attorney-General, who might want to make the offence a terrorist act, up the ante?

Dr Alderson—The primary protection would be not to engage in an act that came within all of the elements of the offence. Beyond that, I guess the other processes that come into play are the decisions by police about what is an appropriate charge to lay. The disadvantages for a state in attempting to go the route of drawing on a Commonwealth offence are that, because of the fact that this has these links to the treaties, there are a number of extra elements that you would have to prove in comparison to proving a state damage offence or a state grievous harm offence. So it would be creating an extra burden in terms of the prosecution.

There are also issues for the states about putting something in the Commonwealth's domain. If they are acting to maintain law and order in their own jurisdiction, they do not necessarily move quickly to put something in the Commonwealth's domain. Then there are also decisions at the prosecution level about whether something—a particular charge for a particular offence—is not an appropriate matter to prosecute. They are the procedures that would come into play.

Mr ADAMS—But it is all so broad that people can use the law in that process to build an argument. I think that Mr Wilkie used something on woodchips, or a woodchip pile—an international link—but I was using an industrial dispute that involved an overseas ship where a firecracker went into a drum of petrol and all the consequences of that, or whatever. A

government under pressure to solve an industrial dispute can up the ante on domestic politics and can use the case 'this is a terrorist act'.

Mr CIOBO—You still need to satisfy—

Mr ADAMS—Sure, but the situation was that it may have been somebody that was on the picket line that had come off a boat. There is a whole proposition there that this is very broad and leaves it open for, in my opinion, a whole range of opportunities to have things used more broadly than what is probably the intent of those who drafted it.

Mr P. Scott—The incident that you were describing is in the context of an industrial dispute involving a foreign vessel in an Australian port and something is done that causes that boat to explode, or part of the boat to explode and damage is caused to the boat or injury or death is caused to civilians. To the extent that this convention is relevant—that is, the convention as a treaty that we are proposing to accede to—it would be if another state was either going to prosecute it itself, in which case we could assert our primary jurisdiction and they would generally accept that—or if we held the offenders in Australia, they would need to accept that—or, secondly, if we needed assistance from foreign countries in relation to this particular incident. But really, from the Australian domestic law enforcement perspective, this is just one more offence in the range of domestic offences that the prosecution authorities would have the choice to bring against the individuals concerned.

As Dr Alderson has pointed out, if they decided that they wanted to choose this one for some sort of political reason, they have created several additional burdens for themselves to no great advantage. What the prosecution would normally seek to do is to choose the offence that is easiest for them to bring a successful action in relation to. From then on, the safeguards that you have, I guess, are the general safeguards that we have in the criminal justice system. An offence of that nature would be, presumably, prosecuted before a jury if it were not subject to a guilty plea, and then all the safeguards that pertained to an open, public trial and a trial by jury, with the consequence that whatever motivation you may have had in bringing a meaningless offence—an offence that just did not apply to that particular situation—would be completely lost, because you would be struggling to make that offence, and consequently the advantage that you may have perceived would not really be there. I think that those are the kinds of discretions that would be exercised by police, by prosecutors and by Attorneys-General in determining whether to bring a prosecution under this particular offence provision. They are the safeguards that would prevent malicious prosecution trying to politicise what was otherwise a non-political act.

Mr ADAMS—Thank you.

Senator SCHACHT—I apologise. I was stuck down at the Senate estimates. I just want to ask a couple of questions that may have already been asked. You will straighten me out if I do that. As I understand it, if this particular bill that we are dealing with—the amendment to the Criminal Code Act 1995—did not pass, for whatever reason, did not proceed through the parliament, that still would not affect our ability to accede to the convention itself, the antiterrorism convention?

Mr Holland—I am sorry, are you referring to the suite of terrorism legislation, or are you referring to this bill itself?

Senator SCHACHT—This bill, in my briefing notes—the particular one, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002. If this individual bill, which is part of a package of bills—about which somewhere it is still being decided what we do in the parliament—did not carry, was withdrawn or was defeated in the parliament, would that affect the ability of the Australian government to accede to the antiterrorism convention?

Mr P. Scott—It would affect our ability to accede to the terrorist bombing convention, yes.

Senator SCHACHT—Sorry, the bombing convention. We could still sign it, but we might not be able to carry it out to the level that the convention would expect us to carry it out?

Mr P. Scott—There is a difference between signature and accession.

Senator SCHACHT—Accession.

Mr P. Scott—The convention is—

Senator SCHACHT—I am after accession right now, because accession is where it becomes active.

Mr P. Scott—We would need to seek the advice of the Attorney-General's Department that all of the criminal elements that are covered by this convention, and particularly all the jurisdictional elements that we are obliged to implement, are, in fact, already in place in Australia.

Senator SCHACHT—Aren't they? You cannot put a bomb in a building and blow it up without some law somewhere getting you, surely?

Mr P. Scott—The question is that the jurisdictional obligations that are provided for in the convention may not necessarily attach. These are the reasons why, in relation to these offences, we do pass a specific bill to ensure that we are completely covered. There are also the law enforcement cooperation provisions in there relating to extradition and mutual assistance. It may well be that, technically, we would be able to provide the kinds of assistance we would be obliged to provide and possibly even accept the kind of assistance that we would want to have in the event of an offence committed in Australia. But the reason that we pass this specific bill is to make that absolutely certain.

Senator SCHACHT—I would ask you this; you may as well take it on notice back to the Attorney-General's Department. If this particular bill, which is part of a package that has been floating around, was not carried by the parliament as our accession to the terrorism treaty as of May last year, would our ability to accede be affected?

Mr P. Scott—The only final point that I would make, leaving that point, is that—

Senator SCHACHT—You cannot give me a yes or no answer at the moment?

Mr P. Scott—I can give you a no answer insofar as the government's policy in relation to this is concerned.

Senator SCHACHT—No, forget the government's policy. I just want to know what happens if we do not carry this particular bill—not the whole package; just this bill. Will the United Nations say, 'Hang on, you might sign'—the minister puts his thumb print and the seal on it from Australia—'but this does not matter, because you have not carried that bill. It has not been carried. Your accession is not workable. Therefore, you have not met all the obligations and you are in limbo.' That is what I want to know—a simple answer.

Dr Alderson—We will also take it on notice.

Senator SCHACHT—Why do we not know that now for this hearing? This debate has been around for a while.

Mr KING—Can I suggest that the answer to that is resolution 1373, which actually requires our country to enforce this legislation.

Senator SCHACHT—Yes. That comes to the next questions. We do have laws in this country where, if you do put a bomb in a post office, a building or wherever, and you get caught, no matter who you are—

CHAIR—It is an offence.

Senator SCHACHT—It is an offence. And if you are found guilty, you go to jail.

Dr Alderson—To pick up on a point that Mr Scott made, I think the major deficiency is that, yes, there are state offences about harm, but state criminal laws have extremely limited extraterritorial operation. This bill extends the offences, for example, to offences against Australian citizens outside Australia, which is something that state law does not do. I would identify that as a key area.

Senator SCHACHT—Which section is that in this bill?

Dr Alderson—This is in 72.4, relating to the jurisdictional requirement.

Senator SCHACHT—But if the person is an Australian citizen and does a terrorist act outside Australia, this makes it absolutely clear that we have an obligation, if we capture him in Australia, or if he is caught overseas, to extradite him back here.

Dr Alderson—That is right.

Senator SCHACHT—You are saying that at the moment it is not clear that, if this bill was not carried, we could extradite someone back from overseas, even though we have got clear-cut evidence that they blew something up.

Dr Alderson—Because under our federal system, in the main, we rely on state laws for harm to people and property damage, and those laws do not apply outside those states.

CHAIR—It is a state jurisdictional matter.

Senator SCHACHT—From the perspective of this particular issue, are you telling me that for 100 years of Federation we could not extradite someone back to Australia if they blew something up and they were an Australian citizen? Are you telling me that if they did it in Australia and fled the country they could not be extradited back?

Dr Alderson—This has always been a fundamental difference between the Commonwealth law systems of Australia and England and the European approach. The traditional approach in common law systems was that criminal laws did not apply outside that jurisdiction. Now we are gradually moving away from that. Also as a consequence of our federal system, the states have very limited capacity to have laws operating outside those states.

CHAIR—You are putting up a very good case for passing this legislation, Senator.

Senator SCHACHT—Mr Scott just interjected about the Skase case. If Skase had been a terrorist—I can say this under privilege; he is a financial terrorist, you might say, but he is now dead, so even though I have privilege he still could not sue me anyway.

CHAIR—I think you have covered all bases.

Senator SCHACHT—I have covered all bases. If Mr Skase had carried out a terrorist act in Australia and fled overseas to Spain without this piece of legislation, are you saying that we would still have the same problem extraditing him from Spain to Australia to stand trial if he blew up the Oodnagalahbi post office because he was supporting the flat earth revolutionary society?

Dr Alderson—If it is committed in Australia, that is within state law. But if it is committed outside Australia, that is what is not. Even with our national crimes at sea scheme—

Senator SCHACHT—If he joined the Basques in northern Spain, became a member of ETA and blew up the Guggenheim Museum in Bilbao as an Australian citizen, which is a pretty significant act, wouldn't the Spaniards, if they caught him, put him on trial in Spain for a terrorist act?

Dr Alderson—They may well do so, but in terms of the way this works that is the deficiency in state offences about property damage and harm to persons.

Senator SCHACHT—But Spain is now a democracy. It is a constitutional monarchy. If there was clear-cut evidence that as an Australian citizen he blew up the museum, wouldn't they put him on trial in Spain first?

Dr Alderson—They may well do so.

Senator SCHACHT—May well do so! There would be a riot in Spain if they did not.

Dr Alderson—This is not premised on the basis that no country will ever prosecute someone.

Senator SCHACHT—I feel like I am slowly going under in quicksand in relation to commonsense.

Mr P. Scott—In relation to the situation you are referring to, if an Australian citizen blows up a museum in Spain, the Spanish authorities—

Senator SCHACHT—Do not send this to the Spanish ambassador. He will probably get worried.

Mr P. Scott—If they capture that person, the Spanish authorities would naturally prosecute him. If the Spanish authorities needed evidence because the offence was planned in Australia and they needed us to provide them with evidence to that effect or if there were other individuals in Australia who were conspirators to that bombing which Spain needed to extradite, the absence of this convention could inhibit that. Hypothetically speaking, if we did not have a treaty of extradition with Spain and we did not have a treaty of mutual assistance with Spain, without this convention Spain's capacity to get that assistance from us to prosecute that individual in Spain could be limited. This is because several European, and particularly eastern European, countries rely upon there being a treaty in existence on extradition or on mutual assistance to provide that kind of cooperation. It might seem difficult to understand from our perspective, but if an Australian citizen has committed an offence and that country wishes that Australian citizen to be returned to their country to face prosecution they may actually be inhibited from seeking that extradition on the pure basis that no treaty exists between Australia and that country.

What this treaty does, amongst other things, is provide that treaty basis for that degree of cooperation. So it is not so much always that the offences we are talking about here are not already criminal offences in the various jurisdictions or that states are somehow reluctant to investigate or prosecute them; it is that the apparatus for the transnational cooperation is often an impediment, and this treaty intends to diminish that impediment.

Senator SCHACHT—I presume Spain has ratified it and is about to accede—it is a constitutional monarchy, a democracy—so we should not have any problem with them. If they have signed the treaty, they accept that this will override any difficulties we have discovered with Mr Skase about extradition. That would all be overcome. They would have to accept their responsibilities either way—that is, if we wanted to extradite back to Australia a Spaniard who committed an act in Australia, and vice versa. That is correct, isn't it?

CHAIR—Subject to article 12, which I was going to come to later. Article 12 is quite interesting.

Senator SCHACHT—The next point I want to raise is that it is okay with a country like Spain, the European community and all the western democracies. Whatever their processes, I can see how it can work well to overcome those technical legal deficiencies. But what happens if Iraq accedes to the treaty and then finds that there is a Kurd in Australia who they believe is

part of the PKK, which has been blowing up a few things from time to time in Iraq and Turkey, et cetera? They say, 'Well, here's the evidence.' It might be trumped up. We might not be able to check it, but under this treaty he can be extradited. They can claim extradition for him.

Mr P. Scott—As a matter of fact, we are not under an obligation to extradite an individual from Australia to a country where we believe that person would suffer persecution, but we are under an obligation—

Senator SCHACHT—No, stop there. Who determines that test that we believe that they would suffer persecution?

Mr P. Scott—We do.

Senator SCHACHT—Who is 'we'?

Mr P. Scott—The Australian government.

Senator SCHACHT—But who ultimately has to sign a document on that? Is it the Attorney-General?

Mr P. Scott—I believe so, yes.

Mr Holland—Madam Chair, we do have from the department an expert on extradition, Annette Willing, if you are willing to hear some evidence from her.

Senator SCHACHT—Again we go back from having a clear-cut piece of black-and-white law to where the Attorney-General has to make a judgment to say that we believe that this person will not get a fair trial or whatever the reason is. When he or she makes that decision, is that a tabled instrument in the parliament?

Ms Willing—This convention basically points out that extradition will be subject to the conditions provided by the law of the requested state. The normal safeguards and provisions of the Extradition Act would apply to any extraditions under this convention. So it would be the normal regime that applies under the Extradition Act. The Attorney's decision is subject to administrative decision, judicial review and review by courts.

Senator SCHACHT—So the so-called Kurdish terrorist who either Turkey or Iraq want to get their hands on has a whole series of processes back in Australia that can make the operation of this particular amending act not as simple as we are being told. He can appeal it all the way through.

Mr P. Scott—As Annette pointed out, that is the situation in relation to any extradition. In respect of this convention, the additional safeguard that attaches to ensuring that there is a prosecution is that, in the event that Australia cannot extradite this person, we are obliged to prosecute that person. Therefore, the person is prosecuted one way or the other if—

Senator SCHACHT—Relying on evidence provided by Saddam Hussein or the Turkish government, which might be a bit biased.

Mr P. Scott—That evidence would obviously be subject to the Australian laws of evidence and would be subject to the Australian evidentiary processes of an adversarial trial by jury.

Senator SCHACHT—So when the Attorney-General refuses to grant the extradition from Australia to, say, Iraq or Turkey of a Kurd because we do not think they are going to get justice, would we then be required to conduct the trial in Australia or is that still subject to judgment by the Attorney-General, who says, 'Well, I have weighed this up and I don't think we will conduct a trial'?

Mr P. Scott—I can tell you that the convention itself applies the law of the country in which the person is present. The case is submitted to the prosecutorial authorities. If the prosecutorial authorities—the police, the Director of Public Prosecutions and so on—determine that there is no case to answer, then there is no prosecution. The obligation is simply that that individual is placed into the same kinds of investigative processes that would otherwise apply.

Senator SCHACHT—Doesn't that happen now? You put this act up and, when you started explaining it, it seemed pretty black and white: it would overcome a deficiency in state law and extradition would be made easier and so on. Now, as you ask a few more questions, it gets a bit blurred again. I come back to the first question: if this piece of legislation—which is part of the overall package and I do not think it is the one that most of us have a real concern about—were not carried, would international Christianity, motherhood, sisterhood and everything else collapse around our ears? No!

Mr P. Scott—But we would not be able to accede to the convention.

Senator SCHACHT—Why would we not be able to accede?

Mr P. Scott—Because, for instance, if our obligations were not framed in Australian domestic law—to prosecute an individual who committed a crime overseas—and were not able to be met, we would be in breach of our international obligation.

Senator SCHACHT—So they would not let us accede or, if we did accede, they would chuck us out?

Mr P. Scott—The point is that were we to accede without being able to implement the convention fully and we were to come to a situation where a country sought an extradition from Australia that we could not accept, and so our consequent obligation was to prosecute that person but our law prevented us from doing so because we had not passed a bill that provided for that, then we would be in breach of the treaty and, as a consequence, the country concerned could bring a complaint against Australia.

Senator SCHACHT—So if Iraq signed, it could bring a complaint against Australia?

Mr P. Scott—If Iraq were able to demonstrate that Australia was in breach of its international obligation under the convention to Iraq, yes, it could.

Senator SCHACHT—But we could still sign until some country took us on to say that we had breached it and had not carried it out in a particular case?

Mr P. Scott—Technically, yes; we can accede to this.

Senator SCHACHT—That is what I thought. We can accede even without this legislation being carried?

Mr P. Scott—We can, but that accession would be in many respects meaningless.

Senator SCHACHT—Well, it would certainly be challengeable.

Mr P. Scott—Yes.

Senator SCHACHT—But it would only be challengeable if a case arose where someone saw that we could not carry out the obligations of extradition either way?

Mr P. Scott—It could be drawn to the attention of the international community in the context of the United Nations in the absence of a complaint that we had acceded to an instrument that we could not implement. That of itself is a breach of the law of treaties. But a country would not go to the trouble of actually bringing an action against Australia in an international forum unless it believed that its rights were somehow being impeded by Australia's lack of capacity to implement the convention.

Senator SCHACHT—I asked the secretariat before about the countries that have already signed but may not necessarily have acceded. Are any of them noted for not having a democratic and transparent system of justice, with the separation of state and court?

CHAIR—Of those who have acceded, or of those who have signed?

Senator SCHACHT—First of all, of those who have signed and then those who have now acceded. Do we run into some usual suspects that have signed and then acceded whom we would say are not democratic in one form or another and do not have a proper transparent independent system of justice?

Mr P. Scott—There are states that have ratified the convention whose respect for human rights—

Senator SCHACHT—Is not good?

Mr P. Scott—is under question in both international fora and in Australia in particular.

Senator SCHACHT—Can I ask a question on another tack, about the extradition in this particular act—not in the other acts in the package that we have discussed previously at other hearings? I always find it best to use an anecdote that makes it easier to explain than to read the law. During the 1980s—and I have used this example before—I made a regular financial contribution on a monthly basis to the African National Congress. The money was sent off and

transferred to their headquarters outside of South Africa. There is no doubt that, if I were asked, I could not guarantee absolutely that the money was used purely for peaceful purposes. It may have ended up in their guerilla subsidiary organisation called the Spear of the Nation, I think it was.

CHAIR—You are just hoping there is a limitation of actions on this, are you?

Senator SCHACHT—Yes. I thought that they had justification to carry out bombing acts against the military in South Africa, in view of the position with apartheid and the oppression that was going on. If they did do it, I would not have been upset, so long as they did not use it against civilians. But they basically blew up police stations, I understand—or tried to, not very successfully. If the apartheid government were still in power and found out about an Australian like me or another international citizen who had been providing funds to the ANC, could it say, 'We have caught three of them bombing the Johannesburg post office or military camp. Five soldiers were killed. It is a terrorist act. We can trace back these connections. We want this person extradited'? Is that, under this act, an obligation? If I had an unfriendly Attorney-General in Australia, might he say, 'Schacht, you're for the high jump. Head off. Take him off to South Africa'?

Dr Alderson—As a first step, in the factual situation you outlined, the part of the package most applicable would be the financing of terrorism.

Senator SCHACHT—I know. I understand that.

CHAIR—We are still to see that.

Senator SCHACHT—We are still to see that. That is my really big concern. In relation to this particular bill we are dealing with, can you assure me that if this were carried by itself and the other four bills were not, an Australian citizen who did something like what I just described could not be got at by a non-democratic regime such as South Africa's was?

Dr Alderson—In the specific context of financing, the question you raise would not be caught by this bill.

CHAIR—As there are no further questions, we thank you very much for your time and for giving evidence before the committee this morning.

Resolved (on motion by **Mr Wilkie**):

That this committee receive as evidence and include in its records as an exhibit for the inquiry into treaties tabled on 12 March the document received from Dr Alderson.

Mr KING—Could I see a copy of it, please?

Resolved (on motion by **Mr Evans**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 11.34 a.m.