HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: International Transfer of Prisoners Bill 1996

CANBERRA

Thursday, 6 February 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Members:

Mr Andrews (Chair)

Mr Andrew
Mr Barresi
Mrs Elizabeth Grace
Mr Hatton
Mr Kerr
Mr McClelland
Mr Melham
Mr Mutch
Mr Randall
Mr Sinclair
Dr Southcott
Mr Tony Smith
Mr Kelvin Thomson

Matter referred to the committee:

International Transfer of Prisoners Bill 1996.

WITNESSES

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

International Transfer of Prisoners Bill 1996

CANBERRA

Thursday, 6 February 1997

Present

Mr Andrews (Chair)

Mr Barresi	Mrs Elizabeth Grace
Mr McClelland	Mr Mutch
Mr Tony Smith	Mr Randall
Mr Kelvin Thomson	

The committee met at 10.33 a.m.

Mr Kelvin Thomson took the chair.

ACTING CHAIR—I declare open this inquiry into the International Transfer of Prisoners Bill 1996 and welcome witnesses, members of the public and others present at this meeting of the committee.

Last Friday the committee had the opportunity to visit Parklea Correctional Centre. We received evidence from a prisoner who is a foreign national. Later that day the committee took evidence from organisations and individuals including the Council for Civil Liberties, the Human Rights and Equal Opportunity Commission, the International Commission of Jurists and the mother of a young Australian man serving a 40-year sentence in a Thai gaol. The clear message from the evidence which the committee received in Sydney is that there is strong support for the bill and for Australia to be party to the international transfer of prisoners on both humanitarian and rehabilitative grounds.

Today the committee is intending to discuss some of the issues raised during the inquiry with officers of the government departments with prime responsibility for matters which are the subject of this bill.

HAMILTON, Mr Robert, Assistant Secretary, Consular Branch, Department of Foreign Affairs and Trade, RG Casey Building, John McEwen Crescent, Barton, Australian Capital Territory 0221

SMITH, Mr Paul, Director, Consular Policy, Department of Foreign Affairs and Trade, RG Casey Building, John McEwen Crescent, Barton, Australian Capital Territory 0221

WEBSTER, Mr Mark Bryant, Consular Operations, Department of Foreign Affairs and Trade, RG Casey Building, John McEwen Crescent, Barton, Australian Capital Territory 0221

ACTING CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the proceedings are legal proceedings of the parliament and warrant the same respect as the proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received your department's submission. Members of the committee have had the opportunity to have a look at that, but I would invite you at this stage to make some introductory remarks.

Mr Hamilton—Thank you for the opportunity for the Department of Foreign Affairs and Trade to appear before the committee this morning. The matter of the international transfer of prisoners is of great importance to the consular branch of the department. We provide consular services to Australians in prison overseas, a function which we perform through our diplomatic and consular missions. For some, notably our embassy in Bangkok, where we have our largest prison population overseas, assisting Australians in gaol is a major preoccupation but one to which we are committed.

We do not discriminate between prisoners on the basis of the crime that they have or are alleged to have committed. It is not our role to pass judgment on an offender. That is done by the courts. Our duty is to help Australians in need in accordance with government policy and within the rules laid down by the Vienna Convention on Consular Relations, international practice and the laws of the land in which the prisoner is held.

The Department of Foreign Affairs and Trade has for many years been a strong advocate of Australia becoming a party to arrangements for the international transfer of prisoners. Prisoner transfers are now a relatively common form of international cooperation and we are in danger of appearing laggards in this regard when compared with other countries with similar legal and human rights traditions.

Officers of this department have first-hand knowledge of the problems encountered by Australian prisoners in foreign gaols. We also have first-hand experience of the problems which their families back home in Australia encounter.

The Department of Foreign Affairs and Trade has several reasons for supporting the introduction of prisoner transfer arrangements. They include particularly humanitarian concerns. Foreigners in alien prison systems face difficulties not always met by locals. Foreigners can face language barriers, alienation from local culture, religious intolerance, climatic, health and dietary problems, and questionable standards of health care.

We also have a pressing need to alleviate the suffering which their situation can bring to their families

in Australia. It has to be borne in mind that a gaol sentence for an Australian overseas can be a very great burden for the family back home. Emotional and financial problems are often very much greater than would have been faced if the prisoner were detained in Australia.

There is also the question of rehabilitation. The rehabilitative function of a prison sentence is thought to depend heavily on the support and encouragement that a prisoner receives from his or her family and, more generally, from the community. This is clearly limited when a prisoner is held overseas where, in most cases, there is minimal contact with families and friends.

Additionally, many prisons overseas provide no rehabilitation programs at all to their inmates. Nor, often, do they provide the range of counselling, educational, vocational or social services which in Australia are considered so important to the rehabilitative process.

In broader terms, if Australia becomes a party to international prisoner transfer arrangements, this would remove a potential source of irritation in bilateral relations. Amongst other things, it would reduce the scope for criticism of the treatment of Australians in foreign gaols, criticism which can appear condescending to foreign governments and which can create international misunderstandings and ill will.

The significant reduction in number of Australians in foreign prisons would also have beneficial resource implications for the department through freeing consular staff for other duties. Several countries are known to be keen to conclude prisoner transfer arrangements with Australia. Within DFAT we, too, are keen to move in that direction. We would be very pleased to answer to the best of our ability any questions that the committee might have for us.

Mr McCLELLAND—I note that the introduction to your paper talks about the role of consular obligations through our embassies abroad to assist prisoners, no matter what they have been arrested for. I draw to your attention that last Friday we took evidence from a Ms Garnett, whose son had been arrested in Thailand. I am not sure if you are familiar with that case.

In summary, Ms Garnett expressed concerns as to the lack of assistance she believes her son received from the embassy in Thailand. In particular, she alleged, among other things, that his defence lawyers were not able to communicate to him in English, that he did not understand the progress of the proceedings and that he had not been advised of what his appeal rights were consequent upon the conclusion of the hearing. I thought it appropriate to put those matters to you so that we could get your comments as to the procedures and as to the circumstances of her son.

Mr Hamilton—Yes, I am certainly aware of the case of Mr Garnett. I have a general understanding of the comments that his mother made to you last week. The whole issue of the consular role overseas is a matter that is before a Senate committee at the moment, as I am sure you are aware. There is an awful lot of discussion that could take place on exactly what it is that we do.

What we do for prisoners is try and ensure that they have legal representation. One of the things we do is give them a list of lawyers who we believe may be able to assist them. We do not choose a lawyer for them, nor do we pay for a lawyer for them. We regard that choice as the responsibility of the prisoner.

In the case of Mr Garnett, it is my understanding that on quite a number of occasions he has quite specifically, including in writing, commended the efforts of the embassy in Bangkok. I think there is a slight inconsistency between his mother's comments and his own comments in Bangkok.

The legal systems of other countries of course are their own, and questions such as whether individuals are entitled to a word-by-word translation of the sort of standard that one might ideally hope for are matters that are determined by foreign legal systems. It may well be the case that he did not understand every word that took place in the court, but I am not aware that his entitlements under Thai law were not met.

The government policies do not now include—and to the best of my knowledge they never have—impeccable translation services for all Australians in foreign court systems. I am not aware that anybody is thinking of moving in that particular direction. The Senate committee's report, of course, remains to be seen.

We certainly did not provide him with those facilities. He would have been given a list—I have no doubt whatsoever—and he certainly had legal representation. It is my understanding that he was adequately financially secure to pay for the legal representation that he needed. If he was unhappy with it, he was in a position to change it. Is there anything else you would like to know?

Mr McCLELLAND—Ms Garnett indicated that she had had some problems obtaining information from the embassy. On further questioning she said, 'I'm not speaking of the embassy. I'm speaking about Foreign Affairs in Canberra.' What is the policy of the embassies and/or DFAT in communicating with families here? Would they in the normal course of events communicate what was happening to the prisoner overseas?

Mr Hamilton—Yes, we do, subject to the provisions of the Privacy Act. I am not sure who the primary contact was in the case of Mr Garnett. My recollection is that it was somebody other than the mother. There may, therefore, be a problem. We ask who the family would like and who the prisoner would like to be their primary contact point. We have learned over many years that if you speak to many people they all compare notes afterwards and conclude that they were all told something different and therefore we are somehow being untruthful to one or more of them. So we work on one contact unless the family is separated or there is a good reason for having more than one contact.

In this particular case, the contact was designated not by us but by the family. We will have passed all of the information to that particular contact person. It is then to that particular person to inform what may be dozens of members of the family of what is going on. Passing on information does not mean that we provide transcripts of court hearings or anything like that. We do not do that.

Ours is a welfare role. We pass on information essentially to do with welfare and a court hearing taking place. But we cannot begin to provide transcripts or advice of how things are going or necessarily comment on the way things are going. These are just legal processes happening outside Australia. We report their existence to the family and keep them informed of welfare issues.

Mr BARRESI—I want to stick with the Garnett case for one question and then move on to

something else. Mrs Garnett made the comment that some countries, in particular their embassies, provide extraordinary services from the point of view of the prisoners actually released. Once again, it is second-hand evidence on her behalf, so I take it as qualified evidence. Apparently the Saudi Arabian government got involved in having a prisoner released who had a lower conviction. Is that possible? If so, how does that take place?

Mr Hamilton—Let us talk simply in the Thai context. A policy was introduced some years ago and it has been continued until now. The Australian government provides support for pardon applications for prisoners. This is a global policy, but it has most application in Thailand. The government here will provide formal support for Australian prisoners in foreign prisons, particularly Thailand, in certain circumstances which are quite clearly defined and are well known to the prisoners, especially in Thailand. We have had some success with that.

But the pardon is delivered by the king; it is the king's prerogative to pardon people. He never says why he has chosen a particular person. When we look at his record of pardons, it is not entirely clear why an individual has been chosen as opposed to another individual. But we have had quite a number of Australians released in the last few years under the royal prerogative of pardon in Thailand. Whether there is a causal connection between that and the support of the Australian government cannot be proven, but there does appear to be one.

We are actively engaged in trying to help prisoners. But we have criteria that have to be met about when a particular prisoner would be supported for a pardon. Off the top of my head, I would say that Mr Garnett would not yet meet those criteria. I may be wrong on that. I think he has only been in for about three or four years. I do not think that, given the quantity of heroin he was convicted of possessing and trafficking, he would yet meet our criteria. But others there do. We have quite a number who are being supported actively at the moment. So we are engaged in that.

Mr BARRESI—I will move on to something else.

Mr Hamilton—We have with us today Mark Webster, who is the consul in Bangkok. I have asked him to come along today just in case the committee wanted to talk to him. He has dealt with Mr Garnett, for example, on many occasions. He knows the Thai prison system reasonably well. If you would like to ask him questions, he is here. But he knows not so much about the policy issues as the practicalities of the Thai prison system.

Mr McCLELLAND—Mrs Garnett suggested that a foreign embassy, not an Australian one, had facilitated the transfer of funds to result in this other prisoner receiving a pardon. Would you consider that to be an appropriate or inappropriate role for a foreign consular office to become involved in?

Mr Hamilton—If I infer from that what you might be implying, I think it would be an inappropriate role for us. We transfer funds in certain circumstances for entirely legitimate purposes, such as the welfare of people. We transfer funds from families to individuals not just in prison but in other circumstances where there is good reason to do so. We would not wish to do otherwise.

Mr RANDALL—Mrs Garnett had been reasonably critical, but Mr Garnett had been, even in writing,

rather supportive of the embassy there. He is not in a very good position to be critical. I imagine he would be hoping that his mother would be brokering his case at home. In the position he is in, he is probably trying to endear himself with the local embassy rather than upset them. I can understand her comment. Perhaps the Thai consul could comment on that.

Mr Hamilton—I take the point. I have not noticed a reluctance on the part of people with whom we deal overseas to criticise us if ever they feel like it. It is done sometimes fairly and sometimes unfairly. In the case of Mr Garnett, I am not aware of any particular problems that we have created for him. Indeed, we facilitated his marriage recently in a Thai prison. Quite a lot has happened in his case. It is a rather long and complicated case. It has certainly engaged the embassy a great deal. Perhaps Mr Webster could add some other comments.

Mr RANDALL—Has Mr Webster seen comments by Mrs Garnett as they apply to you or your consul?

Mr Webster—Yes. I have heard comments that she has made to this committee.

Mr RANDALL—Do you have a comment to make on that?

Mr Webster—My experience is with Mr Garnett in a Bangkok prison. I had known him for about 2½ years and saw him on a regular basis. He has criticised us from time to time. He had commented on several occasions how much the embassy has assisted not only him but other prisoners in Thai prisons. For example, we had to do a lot of work for him to do his correspondence course for university. It also took a lot of work to arrange a marriage in prison. A lot of resources were put into that for him, for which he was very grateful.

Mr RANDALL—So you reject Mrs Garnett's criticism of you?

Mr Webster—Yes.

Mr BARRESI—One thing we are looking at with this bill is at what point a prisoner is transferred. A comment has been made about appeals taking place in the country of sentencing. Mrs Garnett said that if that took place in Thailand, her son would be in prison for over 150 years because of the convoluted nature of appeals. In some cases, if he appeals and loses the appeal, he could actually have a sentence far worse than the original sentence. More broadly speaking, would you agree that there may be situations in some countries where exhausting the appeal process prior to a prisoner being eligible for transfer back to Australia would create problems for us?

Mr Hamilton—Yes. There is a point in there. The question is really whether somebody chooses to go down the route of an appeal or not. To add a prisoner transfer arrangement gives them an alternative. It may not be the best possible alternative because it does not solve the problem of an appeal. But there is a potential difficulty there, yes.

Mr TONY SMITH—I want to take you up on some comments you made which basically echo what Mr Randall said. You said that there seemed to be a contrast between what Mrs Garnett said and what the

prisoner said and wrote.

Mr Hamilton—Yes. I believe so.

Mr TONY SMITH—Do you have those things there?

Mr Hamilton—I understand that he wrote to the Senate inquiry and made positive comments about our role.

Mr TONY SMITH—In what circumstances was that? Was he invited to write? How did that come about?

Mr Hamilton—The Senate inquiry sought public submissions. Mr Webster may know whether all prisoners in Bangkok were individually invited. We did not write or suggest to Australian prisoners around the world that they put in submissions. Our prisoners in Thailand follow developments in Australia fairly closely. They would have known that this was taking place. I imagine that it was a matter of some discussion there. Mr Garnett, for reasons of his own, chose to write a letter or whatever he did.

Mr TONY SMITH—So you did not become aware of those comments until they became public knowledge through the Senate inquiry?

Mr Hamilton—I am not entirely sure exactly how we became aware of them. Somebody in Canberra seems to have learnt of it from the committee. Two prisoners apparently in Bangkok put in submissions. One was Mr Garnett, who put in positive comments. Another prisoner put in negative comments. I am not entirely sure how we learnt about it. The embassy was told by Canberra, I gather. We learnt in Canberra, apparently.

Mr TONY SMITH—The facilitation for putting in those sort of submissions and comments would have been from his own resources. He would not have had assistance from the embassy to do so?

Mr Hamilton—No. Not at all.

Mr TONY SMITH—In terms of his writing it out and posting it.

Mr Hamilton—Yes.

Mr TONY SMITH—A little later there seemed to be a comment by a former consul which contrasted with that. You said there were criticisms. You were saying on the one hand that there were some positives. You were then conceding that there were some criticisms by him.

Mr Hamilton—Perhaps Mr Webster, if he can recall, could say what some of the criticisms were. I do not know.

Mr Webster—We visit the prisoners in Bangkok prisons monthly. There are three prisons in Bangkok. We go out and physically see the prisoners to check on their welfare and to see whether there are any needs. Mr Garnett commented on his frustration at times in the perceived delay in our actioning some of

his requests. But that was more in dealing with the Thai bureaucracy rather than specific complaints about us. It was just his frustration and the delays in whatever requests he may have had at the time.

Mr TONY SMITH—Apparently some witnesses expressed concerns that prisoners transferred from Australia may be released for political reasons before they have served their full term. I am reminded of Dominique Prieur and Alain Mafart, the two terrorists in New Zealand about whom arrangements were made to put them on an island. They were quickly relieved of the balance of their sentences and sent home as heroes. Can you understand the sense of that concern? Can you say whether it could possibly impair the whole process?

Mr Hamilton—Personally, I can understand it absolutely. But it is really not a consular issue. While I would have personal views on it, I do not have official views. These things become a matter of exactly what the agreements reached contain and whether individual countries live up to their obligations under those agreements. Perhaps the Attorney-General's Department might comment more fully on that.

Mr RANDALL—We were told that Bangkok holds the largest number of Australian prisoners. This may be a naive question—you will tell me if it is—but obviously all of these people would want to come back to Australia. Would that be the case?

Mr Webster—That is most definitely the case. Prisoners are very keen to transfer back to Australia. Having said that, there are some foreign prisoners in Thai prisons. Their countries have prisoner transfer agreements. They may wish to stay in a Thai prison.

Mr RANDALL—Can you understand the reaction of the Australian public? Let us say that there were roughly 40 prisoners in Thailand—you might be able to give me more accurate figures—and they were transferred back to Australia. They committed their crimes in Thailand under Thai law. I am not sure of the exact figure that people bandy around these days about how much it costs to have a person in prison in Australia. However, it is one-way traffic. Can you understand the Australian people who say that these people committed a crime overseas yet they want to come back to what is seen as a Rolls Royce prison system here as compared with Thailand? You cannot imagine Thai prisoners in Australia, if there are any, wanting to go back to Thailand for exactly the same reasons. Do you accept that there may be a criticism of that? If so, is it justified? Perhaps could you give even a personal opinion on whether we are obliged to take back somebody who has committed a crime under a foreign country's law. It is a pretty wide-ranging question.

Mr Hamilton—I will take the generality of that. Yes, I agree. There will be undoubtedly a perception of that sort. From our perspective, that does not undermine the reasons we think it would be a good idea to have such arrangements. From the work I did on this and the little I know about prisoner transfers, it seems to me that there is at least a possibility that more people will leave Australia than will come in, though that remains to be seen. In terms of Thailand, we have roughly 21 prisoners there at the moment. Not all of them would be eligible to be returned to Australia because the various criteria that are established have to be met and they have to want to anyway. The numbers flowing back to Australia will not be huge. We do not have all that many prisoners overseas to start with.

Mr RANDALL—Could you give me a ballpark figure.

Mr Hamilton—There are about 150 that we know of. That covers everybody. A lot of those people will not want to be returned to Australia necessarily. Some of them are short-term prisoners. By the time the processes of getting transferred back were entered into, they would have been released anyway. They are not long-term, major criminals. That is the total number of prisoners. It is just not such a huge number. So it will be partly a question of the perception of this. I agree with your hypothesis about that perception. People will see it that way.

Mr RANDALL—Are any of you qualified to give us a rough estimate of the cost of housekeeping a prisoner in Australian gaols at the moment?

Mr Hamilton—We are not qualified to give it, but I have read it. My understanding is that it is in the order of $40,000 to $50,000. The Attorney-General's Department may have a correct figure for that.

Mr BARRESI—I know you say that the Senate committee is looking into it, but I am concerned that full translation services do not appear to be available for Australians overseas. I would have thought that one of the obligations is to our own nationals, regardless of what crime they may have committed. Translation is just a basic human right so that they know exactly what they have got themselves into.

There is also a primary contact issue. In this case, primary contact seems to be exclusive contact rather than primary contact. For a mother or a father not to be able to have that level of information from the embassy is appalling. It may be out of your hands, but there seems to be a loophole there that needs to be addressed.

You started your comments by saying that there are countries overseas engaging in prisoner exchange and that we will fall behind the times unless we do. One issue raised in the inquiry last week by a number of legal representatives was knowledge of what prisoners are getting themselves into if they consent. Can you tell me to your best knowledge some of the practices of overseas countries in informing prisoners of their rights and of the type of prison they are going to prior to giving that consent.

Mr Hamilton—I do not know for a fact what the best practice on this is. I could certainly speculate. I would expect to be roughly in the ballpark.

Mr BARRESI—Is there a notion that you could identify?

Mr Hamilton—No. I would rather not. It would probably turn out to be wrong. The best practice in this would be that a prisoner was informed of exactly what the process meant. They were given the best possible advice on what sort of prison system they were going back to, if they did not know that from previous experience. That is fraught with difficulties. We were thinking about this in the department earlier. It is very difficult.

For example, on my reading of it, the bill allows that once a prisoner is transferred back into Australia, that prisoner can be moved around within the prison system. Any advice that we might give to a prisoner about what Goulburn gaol is like might turn out to be wrong if they were then transferred to Wagga. Immediately what they had been told would cease to be correct. It would be very difficult to give them

meaningful, detailed advice that they could relate to. It might be factually correct, but it does not mean they can understand in a meaningful way precisely what it is like to be in Goulburn gaol if you have not been in Goulburn gaol. It is quite different from a Bangkok prison and, no doubt, many others.

To describe it accurately so that they can understand what their day-to-day regime would be like would be difficult. I gather that there are institutions around that try to do that sort of thing. Perhaps they would be better at it than we would because we are not all that expert on all Australians prisons. But we could have a go at the legal implications, within limits. We could try to make it clear to a prisoner what they were doing so that their entitlement under Australian law was understood or at least explained. We could explain their entitlement under the legal system they were leaving so that they knew where they were. We are aware of people who have been transferred in and out of places other than Australia who have regretted their decision afterwards. I do not think there would be any way that we could avoid that ever happening, where somebody would wish they had not made the transfer. But we could certainly attempt to explain to them the legal ramifications of their transfer.

ACTING CHAIR—We are expecting to hear from two other departments this morning. At this point, we might thank you for your contribution and attendance today and move on.

[11.10 a.m.]

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

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

CHAIR—Although the committee does not require you to give evidence under oath, I advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission of January 1997. Are there any introductory remarks would you like to make in relation to that?

Mr Vardos—We do not wish to make a formal statement in addition to our submission. In our submission, we have tried to reflect the view that we see ourselves as not a lead agency in this matter but one providing a supporting role for the implementation of the provisions of the legislation. The number of people that we think we will be involved with is small. That will enable us to have close consultation on a case by case basis with our colleagues in the Attorney-General's Department.

CHAIR—I presume that the department had some role to play in the development of the bill. Can you elucidate on that.

Mr Vardos—That predated my arrival in this position. I will ask my colleague to elucidate.

Mr Job—There was consultation between our organisations. Essentially, it was to ensure that those persons who would come within the scope of the legislation administered by our portfolio were accommodated either in terms of consideration for deportation or consideration for entry where they were not citizens. That has been reflected to our satisfaction in the draft legislation, whereby referral and consent of the Minister for Immigration and Multicultural Affairs is required in cases where people are not citizens of Australia wishing to be returned to Australia under the scheme. There will also be an association with those cases that come within our deportation provisions, should they be removed from Australia, and those persons who are not permanent residents of Australia but who are held in our prisons for crimes committed whilst they were temporarily or unlawfully in Australia.

CHAIR—Clause 57 requires the minister to give consent to decisions made under the bill which affect a prisoner who is not an Australian citizen. Your submission states this:

> The primary consideration of the Minister, when considering whether to agree to the transfer of a prisoner under the Bill, will be his obligations under the Migration and the Citizenship Acts.

Can you tell me why it is necessary for the Minister for Immigration and Multicultural Affairs to be required to give his or her consent rather than, for example, the minister simply advising the Attorney-General of any

relevant considerations pertaining to the matter?

Mr Job—There are lawful requirements to be met under the Migration Act in terms of persons coming to Australia. If they do have a return visa which would enable them to re-enter Australia, they may well come within the scope of 'good character' consideration. There is an obligation on the minister to consider that factor under the character provisions of the Migration Act. Section 501 specifically refers to those provisions whereby the minister can cancel a visa where the person is not of good character or where there may be a threat to the community if that person were to enter and remain in Australia.

CHAIR—But the person coming back is a person being transferred back to a prison in Australia; it is not a person being let loose in the general community.

Mr Job—At that time that is correct, but what the minister would be looking at would be the longer term aspects. If a person, after completing that sentence, was released in the community, is there a concern for the community wellbeing? Is there a concern that criminal activity could occur again? Those types of issues are ones that the minister or minister's delegates would have to look at.

CHAIR—Is not the mere fact that a person has been convicted of an offence or offences overseas and has been imprisoned for those offences evidence of bad character?

Mr Job—There are a number of considerations that would be taken into account in terms of those discretionary provisions of the minister. They would include such considerations as the ties with Australia, the family composition in Australia and the seriousness of the crimes committed. There are a number of factors that we would take into account. Those considerations are considered, assessed and evaluated in terms of the people we are removing from Australia under the deportation provisions or in terms of cancelling the visas of people who we have concluded are not of good character and could be a risk to the Australian community.

CHAIR—Do I understand you to be suggesting that, if it is judged that a person is not of good character, it would be unlikely that the minister's consent would be given?

Mr Job—I would not like to comment on the likelihood of that. However, it is a possibility that a person who comes within the scope of the transfer of prisoners scheme and a person whose visa is cancelled may not be approved for re-entry to Australia by the minister on the basis of an assessment of character under section 501 of the Migration Act provisions.

CHAIR—If this clause were not in the bill, what would be the effect?

Mr Job—There are several factors that could occur. Firstly, people would be brought into Australia to serve their sentence in an Australian institution. At the end of that time, they would then be considered for their continued stay after completing their sentence. It cannot be excluded from consideration that the person could then be subject to removal from Australia. You would have the situation of a person being brought to Australia to serve a sentence and then being removed from Australia once they have completed their sentence.

Mr Vardos—There is another dimension to this line of argument. Had those prisoners offended in Australia with a permanent resident visa, for example, once the custodial sentence was served, they would be deported.

CHAIR—Yes, but there are other considerations behind this bill. To put it in summary form, it is a humanitarian consideration that motivates the introduction of the legislation. How do we balance up that humanitarian consideration? Let us take a hypothetical situation that we have an agreement with Thailand where, on any reasonable assessment, prison conditions are appalling and probably do not meet what would generally be regarded as human rights standards in some cases. Are we to say that the possibility of this person being deported—if this person came back to Australia—after serving the prison sentence should outweigh any humanitarian considerations that we have?

Mr Vardos—Our department deals with many cases where there are compelling and compassionate circumstances that have to be taken into account when considering the case, whatever it may be. I have no doubt that that situation will also arise under this bill which willl require consideration on a case by case basis. I cannot say what would hold sway at the end of the day.

CHAIR—The thrust of the legislation requires consent from four parties: the prisoner concerned, the minister in government in the foreign country, the Attorney-General of the Commonwealth and the Attorney-General of the state or territory concerned. Clause 57 seems to provide, over and above the consent of three ministers and the prisoner concerned, a veto over the operation of the legislation in any particular case. The question is: is that veto justifiable?

Mr Job—The importance of that provision in this legislation is to ensure that the requirements under the Migration Act are taken into account. After working with colleagues in the Attorney-General's Department, I would expect that in such cases all those factors would be taken into account in the same way that all factors are taken into account in every individual case. We find every individual case is quite different. The conclusion will be based on the weighing up of all the factors involved in that particular circumstance at that time and deciding what action should be taken.

CHAIR—Is it not a fact that the statutory obligation on the minister for immigration arises from the Migration Act and the citizenship act and the matters that can be taken into account by the minister for immigration are only matters pursuant to that legislation. What I am asking is why this provision should not be reworded so that the minister for immigration would advise the Attorney-General of any relevant factors and the Attorney-General, taking into account the Migration Act, the citizenship act, the advice of the minister for immigration and other humanitarian considerations, would weigh up all those factors. Presumably he would give some considerable weight to what the minister for immigration has advised. I am asking why we do not have that scheme rather than one which provides a veto for the minister for immigration. The fact is that what he or she takes into account is, by statutory definition, limited.

Mr Job—The way the wording is currently shown reflects the fact that the Migration Act is still the legislation which determines who can and who cannot stay in Australia and who will be permitted to remain in Australia. That has always been viewed as the overarching legislation which determines that. I think the wording which currently exists in the proposed legislation meets that objective. If you were to go to the

advice line, we would then be going against the principle that has consistently applied that the Migration Act is the determining legislation for who will enter and who will be required to depart Australia and the conditions under which they should enter Australia.

CHAIR—Yes, I understand the argument.

Mr BARRESI—It is stated in the submission that there are 1,300 or so prisoners in Australia liable to be part of this prisoner exchange program. You say that there are 360 prisoners liable for deportation. I would have thought the whole 1,300 would have been liable for deportation.

Mr Job—The differences relate to the scope of our migration legislation. In terms of deportation, we are interested in people who have committed a crime within the first 10 years of their residence in Australia and for which they have been sentenced to a period of at least 12 months in prison. So all of those who have been given lesser sentences or who have committed crimes beyond the 10 years statutory provision would not come within the scope of our concerns or interests in terms of deportation.

They do come within the terms of possible consideration for visa cancellation on character grounds, but in terms of what we were looking at in that figure, it is the people who come within the deportation provisions and those persons who are temporarily in Australia and who are serving sentences in Australian prisons or institutions. There is a major difference in the two areas of interest.

Mr RANDALL—If somebody has a criminal record, they cannot be eligible for Australian citizenship?

Mr Job—Good character is a consideration. It is one of a number of considerations for the grant of citizenship.

Mr Vardos—Character checks are undertaken before people are granted a visa to enter Australia.

Mr RANDALL—Can I give you the hypothetical situation of somebody coming to Australia and peddling in drugs or something and being put in gaol for half a dozen years. That person can technically qualify for Australian citizenship, can they not?

Mr Job—They could apply for Australian citizenship, but there is still the question of whether or not a person is of good character, which is a factor that is significant in the consideration for the grant of Australian citizenship.

Mr RANDALL—There could be a slight loophole to give somebody the opportunity, unless it was formalised, to qualify to apply for Australian citizenship once they had done their time.

Mr Job—I am not an expert in the citizenship field and I am not familiar with the weighting given to particular character considerations in the grant of citizenship, but it is an important consideration. A person who has recently served or is currently serving a term of imprisonment would, I suspect, have great difficulties meeting that character requirement for the grant of citizenship.

Mr RANDALL—Could this loophole not be closed? The prisoner might have found God or gotten married while they were here or something and the minister involved would say, 'This person has turned the corner. They have qualified in terms of time. They can now apply for Australian citizenship and have a good chance of getting it.' I am just saying that it is an opportunity

Mr Job—In general terms, the practice appears to be more one of, if the person has committed a crime and it has been determined that we would not order the deportation of that person, that person being released into the community, whatever the release terms that exist for their particular case. If they did apply for citizenship at that time, in general I suspect that they would not be approved until such time as they could demonstrate to the satisfaction of the decision maker that they are in fact now of good character.

Mr RANDALL—It beats coming in by a boat, does it not? You could come in and be a felon and do all the things I said and become a changed person. We know that a lot of them get married in gaol. Some of them have even fathered children while they are in gaol somehow and find that they behave themselves when they get out and they qualify to stay. It could happen, could it not?

Mr Job—In the hypothetical situation you are presenting, the important factor for us is to look at each individual case in its entirety—how long they have been in Australia, the nature of the crime, the criminal record or history that might have occurred, the family connections here and the age of the person when the crime was committed. A number of factors are taken into account. At the end of the time we decide whether the person's deportation be ordered or whether the person not be deported from Australia.

Mr RANDALL—I think I have made my point and you have made yours. The last thing I want to raise is the matter of dual citizenship. Could they not use this to come back to an Australian gaol?

Mr Job—Our view is that, if the person is an Australian citizen, the person is an Australian citizen. What we would be interested in looking at in the context of this discussion is whether or not they could have lost their Australian citizenship by way of taking out another citizenship. There is no obligation on other countries to advise us if they do take out citizenship of another country. It is possible that they have held an Australian document showing their citizenship and in the interim taken out the citizenship of another country. That is a factor we would be concerned about. Generally speaking, if the person is a dual citizen, by law of the other country, we would treat them as an Australian citizen.

Mr BARRESI—We had a submission last week from, I think, Mr Marsden. He made a comment about Aboriginals that have been taken away from Australia as children. The classic example is the Australian in the USA, James Savage. His Australian citizenship has been supplanted by an American citizenship without his adult consent. What would be your view about someone like Savage being eligible for transfer to Australia?

Mr Job—Without having gone into the background of the case in detail, there are options for people to apply to come to Australia where they have lost their Australian citizenship. In the first instance, they can apply under the normal migration provisions and return to Australia. There is also the opportunity for them to apply under the resident returning visa category, if they are to come back to Australia.

Once the person has lost their Australian citizenship, generally it is lost. There are provisions included in the legislation for resumption of citizenship. The only other comment is that I believe there is the likelihood of a council being formed to consider questions of citizenship generally, and issues of that nature may be on the agenda for the council's consideration.

CHAIR—The suggestion was made by the Human Rights and Equal Opportunity Commission at the hearings last week that clause 13 of the bill should be extended. Clause 13 states:

> A prisoner (other than a Tribunal prisoner) is eligible for transfer to Australia from a transfer country under the Act if the prisoner:
>
> (a) is an Australian citizen; or
>
> (b) is permitted to travel to, enter and remain in Australia indefinitely pursuant to the *Migration Act 1958* and has community ties with a State or Territory.

The suggestion made by Mr Sidoti was that there should be a third subclause. His suggestion was along the lines of 'an Aboriginal or Torres Strait islander who had been removed from Australia as a child'. That is not the exact suggestion, but that is the thrust of what he was suggesting.

I am not being exclusive about this, but let us take the case of an Aboriginal or Torres Strait Islander who has been removed from Australia as a child and has therefore lost citizenship of this country. It would probably be arguable that that person has no community ties with Australia if we are talking about somebody who is, say, in their twenties or thirties. Why shouldn't a person in that category be eligible to apply for transfer?

Mr Job—I do not think that it would be appropriate for us to comment on whether or not such a person should or should not be eligible to apply for transfer.

CHAIR—Can I ask the question more specifically? Why should the act provide that a person in that category should be eligible to apply for transfer?

Mr Job—I think it gets back to part B of that subsection, where it refers to the authority to come to Australia—or be in Australia. It relates back to the earlier comments that I made with regards to the Migration Act legislation that the person has a legal right to be in Australia. If they do not have a legal right to be in Australia, there is that potential conflict between the legislation. If the person is eligible for entry to Australia under those provisions or visas can be provided for persons under those conditions, then certainly they would be considered for them.

CHAIR—So the effect of that is that, if a prisoner overseas were a person who fell into this category, the only way for them to become eligible for transfer would be to first apply for a visa to come to Australia. Doesn't that person then fall into jeopardy of having to meet your character test and being a prisoner? Let us take Mr Savage in Florida at the moment. What about someone in that situation who has been convicted—I do not recall exactly the precise determination of the crime there, but homicide of some form or another, as I recall—and is in prison for it? That person strikes me as probably not likely to meet your good character test and, therefore, is going to be excluded.

Mr Job—I think it would be presumptuous of us at this time to try to anticipate what an outcome in that particular case would be. I think it is a case where all the facts have to be considered, and the minister, in undertaking that consideration, would do so in terms of the migration legislation.

CHAIR—But what I am saying to you is that that is a luxury we do not have, because what we have got to put in place or recommend is a scheme which is presumably going to cover the circumstances fairly. I understand your answer saying, 'Well, we can't determine any particular case without seeing the facts of it,' but it is a question about whether the scheme is one which is going to be fair. Isn't there some unfairness in a scheme which basically places a person in jeopardy because they are not going to meet your threshold test in the first place and, therefore, they are not going to qualify for eligibility? Why shouldn't that person qualify for eligibility and then be judged according to a whole range of matters that might be taken into consideration?

Mr Vardos—Mr Chairman, you are making a very good point. It is an exception that I do not think we are qualified to comment on. It is a complicated situation. We can, if you wish—

Mr RANDALL—Who is qualified?

Mr Vardos—We can pursue the matter for you, if you wish, and come up with some answers. Would Attorney-General's be—

CHAIR—Attorney-General's have been carefully listening to the question. They have had more time to think about it, so we will find out soon.

Mr Vardos—I think we are probably getting out of our depth on this issue. We can pursue it, if you have a specific issue that you would like us to address.

CHAIR—These hearings are not to finally determine; they are an opportunity to tease out issues that have been raised with us. What we are interested in is your expression as you see the matter. We have got to weigh that up, ultimately, as to the arguments one way and the other. So, if that is as far as you can take it, that is fine. This is not a contest to come up with the right answers right now, it is an attempt to do it.

Mr Vardos—Thank you.

Mr BARRESI—Can I clarify one thing that maybe escaped me. Is what you are saying that the Migration Act would supersede this bill in terms of who is eligible to come into Australia unless there are changes to the Migration Act itself?

Mr Job—I think what we are saying is that under the provisions for Australian citizens within the scope of the intended legislation there is no difficulty. It is only Australian citizens who have that automatic right of entry to Australia. All other persons who are not Australian citizens—

Mr BARRESI—Such as a spouse of an Australian citizen.

Mr Job—Would have to meet the provisions of the Migration Act. That right of residence in Australia applies to people who are Australian citizens. All other persons who are not Australian citizens have to comply with the provisions of the migration legislation.

CHAIR—As there are no other questions from any other committee members, I thank you for both your submission and for coming today and discussing it with us. It has been quite useful in terms of our deliberations.

[11.41 a.m.]

KELLEHER, Ms Maureen Rosemary, Principal Government Lawyer, Criminal Justice Branch, Criminal Law Division, Attorney-General's Department, Robert Garran Offices, Barton, Australian Capital Territory 2614

MEANEY, Mr Christopher William, Assistant Secretary, International Branch, Criminal Law Division, Robert Garran Offices, Barton, Australian Capital Territory 2601

WILLING, Ms Annette Maree, Senior Government Lawyer, International Branch, Criminal Law Division, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600

CHAIR—I welcome the officials from the Attorney-General's Department.

Mr Meaney—Mr Chairman, at the outset could I explain that my branch has had the principal responsibility for developing this legislation. Ms Willing and I are both in the International Branch and have worked on the legislation. Ms Kelleher is actually in the area of the Criminal Justice Branch that deals with federal prisoners and prisoner matters generally. She has kindly offered to come along today to be part of our team to talk about some of the more detailed issues in relation to what it means to be treated as a federal prisoner, remissions, paroles, head sentences, non-parole periods and that sort of thing if the committee wishes to pursue that sort of area.

CHAIR—Thank you, Mr Meaney. 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 itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We are in receipt of your submission of 13 January and the details. I understand that a list of further matters that have been raised with the committee has been faxed to you, of which we perhaps could have some more detailed response. Before dealing with that, are there any introductory comments you would like to make?

Mr Meaney—Yes, just a brief statement. We welcome the opportunity to appear before the committee today. We consider that the bill establishes a practical and effective mechanism for the transfer of prisoners. The bill reflects the requirements of international regimes in which Australia would participate. In this context it is important to remember that there is already well established practice at the international level in relation to prisoner transfers. Many other countries have been participating in prisoner transfers for a number of years. The Council of Europe Convention on the Transfer of Sentenced Persons is the central international document in this area. It has 27 state parties, and countries which have entered into bilateral agreements have tended to closely follow the requirements and procedures set out in that Convention.

The bill is therefore premised on Australia eventually becoming party to that Convention. There are obvious advantages in terms of cost-effectiveness, scope and time in becoming party to such a central multilateral convention rather than attempting to negotiate individual bilateral treaties. In any event, we consider bilateral treaties would probably closely reflect the Council of Europe Convention. For this reason we consider that bilateral treaties will be negotiated only with particular countries who are not party to the

Council of Europe Convention or who do not participate in the Commonwealth scheme for the transfer of convicted persons.

The bill is based on strong humanitarian and social considerations and is the outcome of a cooperative, lengthy and detailed consultation process with the states and territories. This consultation process has included discussion of many of the issues which have arisen in submissions and in evidence already given to the committee.

I would like to take a few minutes, if the committee agrees, to clarify what seems to have been an issue of some concern—namely, that relating to dual criminality. From my reading of the submissions and transcript of evidence there appears to have been some misunderstanding about the dual criminality issue and the underlying purpose of the legislation. The purpose of the legislation is to enable prisoners to be transferred to their home countries to complete serving sentences which were imposed in other countries—I emphasise: to complete serving sentences which were imposed in other countries. These transfers will take place in accordance with agreements reached with other countries. This necessarily involves mutual trust and respect for the criminal justice systems of other countries.

Dual criminality is an internationally recognised requirement of international prisoner transfers. It is a condition, for example, for transfer in the Council of Europe Convention. Many countries—including Thailand, the United States, Canada and the United Kingdom—adopt the dual criminality requirement in practice.

The dual criminality issue was discussed at length in the working group set up by the Standing Committee of Attorneys-General. We recognise that arguments can be made both ways. On the one hand, arguments opposing the dual criminality requirement are that it would be unfair and inappropriate in light of the scheme's humanitarian arguments. For example, consider an Australian national who has been imprisoned for behaviour in a Moslem country where that behaviour would not have constituted an offence if committed in Australia. It is seen to be unfair if such a person would not benefit from the legislation; whereas other prisoners—such as murderers, rapists et cetera—could be returned to Australia under the legislation.

In support of the dual criminality requirement, it has been said that there would be a certain oddity about persons serving time in prison in Australia for conduct which would not be considered an offence if committed in Australia. Of course, one could argue against this that, although they would still be required to serve their sentence, at least they would still be near family and friends and have access to rehabilitation programs. Whatever our views on the merits or otherwise of the dual criminality requirement, it seems to be relatively well entrenched in current international practice on international prisoner transfers.

However, although the Council of Europe Convention and most bilateral treaties require dual criminality to be established, it is not a requirement of the Commonwealth scheme. There may, therefore, be some flexibility on the issue in relation to transfers with countries participating in the Commonwealth scheme. The approach adopted in the bill was in recognition of this, as well as the arguments against a strict dual criminality requirement. We believe that the approach adopted in the bill represents a balance of views and is the best solution in all the circumstances. It enables flexibility on the matter.

The bill provides in clauses 14(1)(b), 14(2)(b), 15 (1)(b) and 15(2)(b) that dual criminality is a condition for transfer. However, this is subject to clauses 14(3) and 15(3), which provide that the Attorney-General may determine that the condition need not be satisfied in a particular prisoner's case. Dual criminality, therefore, is not a strict and absolute requirement.

Whether dual criminality will be required in a particular case will depend on the particular prisoner transfer agreement with the other country. For example, if the transfer is being conducted pursuant to the Council of Europe Convention, dual criminality would have to be satisfied. There is nothing Australia can do about this. However, it should be recognised that the parties to the Council of Europe Convention are largely similar in socioeconomic terms to Australia. So the difficulties that have been foreshadowed by other representatives before the committee are unlikely to arise.

If the transfer takes place under the Commonwealth scheme, the Attorney-General would be able to decide that dual criminality need not be satisfied. So of course the legislation needs to take account of two different approaches. Similarly, the transfer could take place under a bilateral agreement which does not require dual criminality to be satisfied. This is of course depending on the agreement of the other party to the bilateral agreement.

The approach in the bill therefore will enable Australia to become party to the Council of Europe Convention while at the same time enabling some flexibility in order to ensure that Australians imprisoned in other countries for conduct which would not constitute an offence in Australia are not totally excluded from the scheme. I hope this clarifies the matter for the committee. We are, of course, happy to answer any questions that the committee may have on this issue or any other issues.

Mr MUTCH—The dual criminality issue disturbs me because, although people like John Dowd have strongly advocated that it should not be strict, my concern is that if we want to enter into bilateral relations or bilateral transfer agreements with some countries, they just would not have a bar of it. They would see the clauses you quoted as a loophole to any arrangement. We have really got to make an assessment on whether or not these countries would wish to enter an agreement with a country like ours where, if we take their prisoners, we can then say, 'You don't have to serve out the sentence.' But the alternative to that is that if you have—

Mr Meaney—Can I just interrupt there? There is no question in relation to dual criminality, as was postulated by one of the other witnesses to this committee, that merely because we do not like the offence we can then mitigate the sentence entirely. That is not proposed under the scheme, and I think it is totally erroneous if the committee is of that view. I think the example was given by Mr Anderson in relation to a person convicted of the possession of alcohol in an Islamic regime. The approach taken by this legislation is that the person is to be transferred after sentencing under due court process. When the person comes back, there are alternatives set out in the legislation for how that sentence is to be served.

But let us not be under any misapprehension: there is not a wide mandate to vary the sentence because we do not like the law, we do not like the particular sentence that was handed down or we take the view that in Australia that sentence would be unjust. The idea is that it is as proximate as possible to the sentence that has been imposed. So, the notion that has been put forward by Mr Anderson that, somehow or other, if a person came back for an offence like the alcohol offence we could just say, 'Well, we don't like

the offence, therefore the person doesn't have to serve any sentence,' is not an option. If they were to come back under an agreement they would have to serve it, the advantage to them being that they would serve it here, in Australia, with the support and the infrastructure that goes with being close to relatives and all the rehabilitative and humanitarian things that have been discussed before the committee.

But there is no suggestion that we are able to stand somehow or other in judgment of the appropriateness of laws in other people's legal systems. I cannot stress that too strongly, because it seems to me that Mr Justice Dowd, for example, in his evidence before the committee, was very strongly of the view that we certainly do not want to be releasing prisoners from Australia to other countries where the sentences are not imposed. If we are not prepared to put up with that, what on earth would make anybody think that another country is prepared to put up with it? There must be respect for the sovereignty of the laws that have been imposed. I think that is something of a red herring, and I think it is a matter that the committee needs to be well aware is not an option that is open.

Mr BARRESI—Of course, that works the other way. It is not just simply a sentence that may not be imposed here. You also do not want it the other way in that, say, a five-year sentence here in Australia is equivalent to an arm being cut off overseas.

Mr Meaney—Exactly. This gets to questions of appeals and so forth, but the proper forum for deciding what the sentence ought to be and whether or not due process is taken out is the forum of the court where the sentence is imposed. The whole business about appeals and sentences and all that is there. The fundamental approach in the legislation is that, once a person is sentenced, barring very few exceptions—there are still a few exceptions where, for example, questions of later fresh evidence and those sorts of things arise—in the normal course of events when the trial is completed we, in recognition of what the sentence is, undertake to enforce that sentence in Australia. To the best of our ability we will make it the same. There are technical difficulties in relation to head sentences, non-parole, what remissions flow and all of those sorts of things. We can talk about the consequences of that, but basically the idea is it should be as close as possible to the sentence that was imposed, and there is no review by any Australian court.

Mr BARRESI—But you said there is an element of conversion possible. You implied there would be some element of conversion. Who would have that power? Is that at ministerial discretion?

Mr Meaney—The Attorney-General, yes, will determine. This is where we get into the technicalities. It is not a broad mandate. The idea and the general nature of the scheme is that, as I said earlier, we cannot present a general broad discretion to the Attorney-General to do whatever he likes with prisoners when they come back here unless we are prepared to have exactly the same broad discretion given to prisoners that we send overseas. It cuts both ways. This is basically like any other commercial arrangement: you sit down and you negotiate what the terms of it are.

Here, the Attorney-General has a discretion to do it, but that is mainly to deal with technicalities. The sentence that is imposed and usually reported in a court is the head sentence: 'So-and-so gets 20 years for drug trafficking,' or something. Under our systems a non-parole period is usually set, although in some circumstances that is not set. It is really the non-parole period that is the most relevant in the sense that the completion of the non-parole period is the point beyond which the person can expect to be out in the

community again. That is the bit they really focus on.

It may well be that in jurisdictions overseas they set head sentences and they do not set non-parole periods. They may have totally different systems. For example, in Thailand it might be that when you are sentenced to 40 years the normal circumstance is that you will be granted, not by virtue of remissions, parole or a non-parole period but by virtue of an expectation that you will be given a pardon, a release after 20 years. It will vary on the nature of the legal system of each country. That is the sort of area in which the Attorney-General has a discretion—to try and get, as close as is possible, the same sort of result in Australia as would occur overseas. All we are doing is having the prisoner here rather than in the other country, or vice versa.

Mr BARRESI—Justice Dowd was very sceptical—he cited Hong Kong—of future regimes fulfilling an agreement. What confidence can we have that a future regime in one of these overseas countries will fulfil an agreement with us?

Mr Meaney—With the greatest respect, if you went down the line that Justice Dowd argued we would have no international agreements and we would have no relations with any countries because we basically could not trust anybody. With the greatest respect, I think the logical consequence of that argument is: could we really trust anybody in this room? I do not think that is right.

Firstly, a proposition that he put just in terms of continuity in Australia—that is, that agreements entered into by one government are not honoured by the next—I think is by and large fallacious in any event. I have not heard of any treaties, for example, being abrogated by this government after being entered into by the previous government. If there are, they would be few and far between compared to the vast number that are negotiated.

I think it is the normal course of international business that you have to rely on. There are no absolute guarantees, but the sanction, of course, is that if we have an agreement to do certain things with other countries and we have a case where they do not honour that—they do something different or they subvert it—then we just do not do business with them any more. It is a fact of life. There will be countries, for example, that we just would not contemplate having prisoner agreements with. A threshold test before we actually have a prisoner agreement is some confidence in the other parties.

Mr TONY SMITH—My question relates to clause 107 of your submission and turns on an area that we discussed when we had a preliminary discussion in December on clauses 48 and 49—in particular clause 49—of the bill. In the last sentence of your submission, you say of clause 107:

. . . this does not preclude the possibility of a later review of the conviction or sentence in the light of fresh evidence (as provided for in clauses 48 and 49).

I might have missed it, but I cannot see any reference to fresh evidence in clause 49. Am I right in assuming that, or have I missed something?

Mr Meaney—Whilst the words ‘fresh evidence’ are not actually used, they are the usual

circumstances whereby a pardon, amnesty or commutation of sentence are granted. Section 49(2)(b) states:

> . . . the prisoner's conviction has been quashed or otherwise nullified or that the prisoner has been pardoned or granted amnesty or commutation of sentence of imprisonment under the law of the transfer country.

That would include circumstances where there had been some due process taken in the other country which would pick up circumstances like fresh evidence, which is the most common.

Mr TONY SMITH—There might also be bias with regard to the tribunal. It might be uncovered some years later that the judge was related to the complainant or that there was a wrongful admission of evidence or various other matters. What I am saying is that it all turns on what the foreign tribunal or foreign executive decides, does it not?

Mr Meaney—Yes, it is according to the foreign system of law.

Mr TONY SMITH—So somebody could come out and confess that they committed the crime but the foreign states might decline to act on that confession. It is not necessarily something that cannot happen. We frequently have in this country people confessing to crimes and the executive not accepting the confession and the Attorney declining to act. What protection does that give to the prisoner in our country? How can his rights be enforced if we turn on the whims or caprices—if that is the right term—of the executive or tribunal of another country?

Mr Meaney—They are the ones that impose the sentence. It is their jurisdiction that the person is under. If we accept a prisoner from that country, I am sure they will say that we must honour their jurisdiction. It is not a question of whether we like it, whether we think we can do it better or whether we think they have it wrong. The point is that we are not in the business of absolute justice. We are not in the business of sitting in judgment on other people's legal systems. We are in the business under this legislation of enforcing sentences. The central question is not the justice of the foreign legal system but whether or not there is a humanitarian benefit to the prisoner to serve the sentence here rather than there.

Mr TONY SMITH—Isn't that the problem? It is not too hypothetical to imagine a prisoner languishing here, wrongfully convicted of an offence but who cannot do a thing about it. There has to be some discretion.

Mr Meaney—I do not think so. I think there must be respect for the sovereignty of the laws of the other country, and that is a matter for the sovereignty of the laws of the other country. The short answer is that they will not send people to us. They will say, 'You will not respect our sovereignty; you will not get any prisoners from us. Your Australians can rot in our prisons.' Clearly our courts and our systems will be unable to do anything if they are not within our jurisdiction.

Mr TONY SMITH—Surely that would not be the case if you had a dual acknowledgment and you specifically allowed for a situation that could occur in that fashion.

Mr Meaney—Quite frankly, I suggest that the Australian government will not countenance a foreign

court sitting in judgment on the courts of this country. Conversely, another country will not countenance the reverse. It is just not feasible in a sovereignty sense to do that.

Mr TONY SMITH—Yet the whole notion of this process is, in effect, a cooperative relationship between the countries.

Mr Meaney—While respecting the sovereignty.

Mr TONY SMITH—Yes, but what happens if there is a coup, the government is tossed out and is found to be absolutely correct as the judge is related to the complainant? Where do we go from there?

Mr Meaney—Your hypothesis is that one corrupt regime is replaced by another corrupt regime. The short answer is that, if we do not have an agreement, the person that is in prison in that country will not get any benefit out of it anyway. Quite frankly, I think some witnesses have been patronising to suggest that the Australian legal system is somehow or another so inherently better that we can make judgments about how good other people's legal systems are.

Mr TONY SMITH—I understand where you are coming from, but you are saying that if there is a palpable injustice we have to sit back and keep the fellow in prison and that, while the evidence is overwhelming and the executive or tribunal might decline to act at the request of the attorney in that country, we have to put up with it.

Mr Meaney—There is a dual benefit provision in section 49(1). There are possibilities to enable you to raise the issue here. It is legally possible. We would imagine that they would be few and far between. What you have to realise is that, if there is going to be any fallout, you can prevent the injustice in the instant case if you want to make that your cause, but your agreement is likely to go west and everybody else who might benefit from it will not be able to do so.

Mr TONY SMITH—Why do you say 49(1) could permit some derogation from what you have been saying?

Mr Meaney—Just on the words of it. The section states:

During the period in which a sentence of imprisonment is served in Australia by a prisoner transferred to Australia under this Act, the prisoner may be pardoned or granted any amnesty or commutation of sentence of imprisonment that could be granted under Australian law if the sentence of imprisonment had been imposed for an offence against an Australian law.

Mr TONY SMITH—But that does not go to conviction.

Mr Meaney—This is about sentenced persons. The best you are going to get out of it is relief of a sentence. You are not going to get a sentence quashed or a complete pardon where the record is completely vitiated. You get the consequences.

Mr TONY SMITH—So you are saying that, if there is a power to pardon under Australian law

consistent with that power under the foreign law, that power could be exercised—

Mr Meaney—And consistent with your agreement. This legislation is part of a scheme which will have state legislation, bilateral agreements and multilateral agreements, so you will have to look at your agreement too. I have a feeling that most countries will not do business on the basis of our overturning their convictions.

Mr BARRESI—So the agreements will be very specific between Australia and another country.

Mr Meaney—For example, with the one that we propose to have between Australia and Thailand, we would be very specific about circumstances in which certain things could happen.

Mr MUTCH—Do you have any examples of bilateral agreements which Australia has nothing to do with, particularly between countries with very dissimilar cultures? Do you have any examples of those that are working or have worked over a period of time, or are we trying to break new ground here?

Mr Meaney—No, there is a Canadian-Thai one and there is also a UK-Thai one.

Mr MUTCH—Have they have been going for some time, and do they seem to be working reasonably well?

Mr Meaney—The Canadian-Thai one is relatively recent but you have to start somewhere. The Council of Europe Convention is the biggest thing, and it is mainly the European countries that have experience.

Mr MUTCH—How long has the UK-Thai one been going for?

CHAIR—We have a copy of the United States-Thai agreement, which was signed on 29 October 1982. We have not been able to obtain a copy of the Canadian-Thai agreement.

Mr Meaney—The UK act was apparently enacted in 1984, so it has been around for a while. We do not have a lot of information about that. A concern was raised by one of the members earlier about how all of this is going to be seen as being soft on crime and that it is all one-way traffic. I will focus on that for a minute. The point was made that, if there are 20 people in the Thai prisons, they might all want to come back to Australia but nobody wants to go to Thailand. Let's not kid ourselves that our gaols are the best in the world. There might not be a lot of people wanting to go to Thailand; but if you get anybody from a Nordic country or Germany—most European countries—they are going to be more than happy to go back there. The ratio of prisoners is almost eight or nine to one in terms of Australians overseas versus those here. So we have no reason to believe that Australian prisons are so flash that everybody is going to want to stay here and other people are going to want to come in. I cannot really imagine why Australians serving time in European countries necessarily would want to come back to Australia.

CHAIR—Can we take up the matters that you wanted to comment upon in policy terms generally.

Mr Meaney—Just very quickly: there was an issue with the immigration people about the case of Moore/Savage—

CHAIR—Clause 13 or 14?

Mr Meaney—Yes. At the moment where it says, 'Must get the consent,' the immigration legislation overrides this legislation and will continue to override this legislation. So, quite frankly, whilst it is presentational, all that that provision does is reflect the fact. If the person is not entitled to come into Australia, and that entitlement at the end of the day really is determined in accordance with the Migration Act by the minister for immigration, then the person will not come in. So the question of whether we change it to say, 'The minister for immigration consents; you cannot do it without consent or whether there is advice,' is really not addressing the substance of it. The essential substance is that it cannot happen unless you comply with the migration legislation.

The question that was raised in relation to Moore/Savage by the Human Rights and Equal Opportunities Commission was whether or not there ought to be a right of entry to persons of Aboriginal and Torres Strait Islander extraction who had been removed from their natural parents at birth, had gone overseas and were subsequently convicted—whether they ought to have a right to come back to Australia. Mr Chairman, your questioning of the immigration people before us highlighted the flaw in the fact that, without some sort of special provision, it is unlikely that they would be able to get back in. They are just not going to satisfy the good character test; there is a catch-22 sort of complication in there.

The problem I have is accepting the recommendation as proposed by HREOC. What we seem to have is a right for a class of persons—Aboriginal and Torres Strait Islanders—who have been convicted of offences overseas to return to Australia but no general right of getting back into Australia under the Migration Act for, if you like, law-abiding persons of the same extraction who might have been in the same class. That seems to me to be an absurdity—that prisoners, persons convicted of some sort of an offence who belong to a particular class, can get back into Australia but law-abiding citizens who may belong to the same class and be of good character have to go through the general hoops.

I do not have any concluded view on this, but it seems to me that, if you want to place persons of Aboriginal and Torres Strait Islander extraction who were removed from their parents at birth and have gone overseas in some sort of special class, that class should be given a status under the Migration Act; it should not be restricted to prisoners. It seems to be socially wrong that somehow or other law-abiding citizens cannot get back into Australia but people who have been convicted of offences can.

CHAIR—I also put to Mr Sidoti that it seemed to me that even if you accepted his argument the restriction to Aboriginal and Torres Strait Islanders was an unnecessary restriction—that is, if people have been removed from this country, why should we specify one known race? To take a situation as known, there was the Gillespie case, in which children were removed from Australia, and there are other cases. There are those sorts of situations where you are not dealing with an Aboriginal and Torres Strait Islander child or children. It seems to me to be unfair to simply specify Aboriginal and Torres Strait Islander children when there could well be other children who have been removed.

Mr Meaney—But, again, the same sort of argument goes: why are we singling out those that have

been convicted of offences when the law-abiding part of that particular class does not get any special treatment? Whether or not you get into Australia in the first place is going to be determined by the Migration Act. I think that really is a Migration Act matter—to look at whether or not the class of, if you like, citizen could be expanded, that there are certain other people who have rights or some other mechanism arrived at to give them a right to come back into Australia.

CHAIR—I understand that. Going back to clause 57—

Mr Meaney—There is a misapprehension I think running around in relation to Moore Savage. Moore Savage is in fact, to the best of our information, an Australian citizen. Whilst he is being used in this example—and there can be people in that class—he is in fact, to the best of our knowledge, still an Australian citizen. My understanding is that even dual citizens are often put to an election once they reach an age of majority. Unless you actually elect to revoke a citizenship, it follows you. So my understanding is that, whilst Moore Savage has lived most of his life in the United States, he has never revoked his Australian citizenship. There is no record of him taking out US citizenship. So, therefore, the advice from Immigration is that he is still an Australian citizen. Just for the record, Mr Justice Dowd seemed to think that Mr Skase was a Spanish citizen. To the best of our knowledge, he also is still an Australian citizen.

CHAIR—On clause 57—just so I am clear—I understand you to be saying that, in relation to the suggestion of changing that to 'the minister for immigration advising' rather than 'giving consent', at the end of the process it is irrelevant or it does not mean much because the minister would still have to exercise his obligations under the Migration Act. If he advised the Attorney-General that under the Migration Act a particular prisoner would not be granted entry into Australia, even if the Attorney-General decided to allow the entry, the minister for immigration's decision would override that of the Attorney-General's.

Mr Meaney—That is right.

CHAIR—Is that what you are saying?

Mr Meaney—Yes.

CHAIR—Therefore, to change clause 57 in the way in which I explored with officers of the immigration department would simply be circular and would not lead us anywhere.

Mr Meaney—It says at the moment, 'Without the consent,' and you can have a formal consent. To put it on the basis of advice: if the minister for immigration advised the Attorney-General, 'I do not propose to grant entry to X,' the Attorney-General could then go ahead and say, 'I'm going to transfer him,' and sign the papers. But once they get to the barrier, the immigration people will not let them in. I think the consent actually reflects the appropriate relationship between the Migration Act and this proposed piece of legislation.

CHAIR—I just wanted to clearly understand the argument. Were there any other matters arising out of this morning's session that you wish to take up before we go back to some detail?

Mr Meaney—No, they were the main ones.

Mr BARRESI—Can I just ask one question before we get into the technical aspects. One of the submissions we received last week talked about the comparison between overseas gaols and Australia gaols. In the agreements we come up with, is it envisaged that we will actually specify the gaol to which a person will be transferred and would that be of comparable standard to the one they were at? If a person was in a maximum security prison in Thailand, they wouldn't go to a farm prison in rural Victoria?

Mr Meaney—My understanding is that that would probably not be set out in the agreement in the sense of the treaty arrangement with the other country. We have a regulation making power at section 58 that sort of says, 'The things that must be specified.' If you like, you can proscribe certain things that must be drawn to the prisoner's attention. I think there would be a negotiation, and this goes to this notice question as well.

Firstly, the negotiation has to be with the particular state under our arrangement, because all prisons are state. We have to give an indication of where they might go and what sorts of circumstances they might be in. All of that would then, as well as being agreed, need to be given to the prisoner in advance so that he knows what he is signing himself up for. That is the way we would propose to do this. This picks up Justice Evatt's point about appropriate information, notice and that sort of thing.

We would anticipate that the consent actually given by the prisoner would be an informed consent based on specifics of where they are likely to be—not only the condition of the prison but also the physical location. If you want to be close to your family and they are in rural Victoria, near the South Australian border for example, you do not want to be stuck in a prison in downtown Melbourne, out at Coburg. That does not get you very far because you are still going to get very intermittent visits. A lot of factors would be involved in that.

You mentioned the type of prison. There has been a lot of discussion about prison conditions. We would not be taking conditions into account in the sense of trying to get a parity of conditions because, hopefully, we do not have conditions that are of the parity of some prisons we have discussed.

I think the general nature would have to be that there are still security welfare issues in relation to the general Australian population. Clearly, if a person is in a maximum security prison overseas, they are of a violent disposition or something like that, and they would at the very least go to the sort of place they might have been incarcerated in in Australia. It may well go to whether or not the state or the Commonwealth is prepared to agree that the person come here. If they are of such an inherently violent character that they have to be kept in solitary confinement or something, there does not seem to be enough benefit to anybody to bring them back. The benefit to them is outweighed by perhaps the danger to the general public. These are the sorts of things that need to be considered on an individual transfer basis, I think.

Mr BARRESI—It was mentioned a couple of times in terms of this legislation that there needs to be an annual review. I think Kevin as chairman suggested that perhaps a review would simply be a tabling in parliament of progress. From the department's perspective, how is it actually envisaged that that will take place, if at all?

Mr Meaney—In accordance with the general proposition of any new initiative being reviewed—we

had not really turned our mind to how it would be—reviewing something on an annual basis does not help much if you are looking at traffic of maybe 15 or 20 cases a year. We have to report on the operations of the legislation we administer, and because it is under the Attorney-General's portfolio there would be a statement in part of the annual report as to what was going on.

The sort of report that I understood the Council of Civil Liberties to be talking about was an analysis of the particular decisions, around whether or not there was some injustice or whatever it might be. I am not too sure about how far you can go on that without an invasion of privacy. If you have a statistical class that is very small and you are talking about the exigencies of cases, I am not sure what sorts of dangers there are in terms of identifying somebody. You call them A in the report, but everybody knows who they are because there have been only one or two cases of it.

It is certainly not unreasonable in our view for the operation of the legislation to be reviewed, perhaps three years after it came into force. That is a fairly standard thing. The review is often times undertaken by the committee that made the initial inquiry—not on the basis of being an annual review because I am not sure annual reviews get you that far. There is enough time in three years after operation to have some statistical base. You have got some info that you can go on to see how it is working. Three years is a fair sort of run.

If the committee at that time thinks it would like to have another look at it after another three years, that is a matter for the committee to decide at the time. We would see that sort of general review, combined with an inclusion of perhaps a report annually in the annual report of the Attorney-General's Department, being our preferred position. That is, of course, a matter for the committee.

CHAIR—Let us go back to the question about prison conditions. Whilst I understand what you are saying about not specifying precise conditions because it is probably impossible to do that, would we require that any country to which prisoners transfer meet the United Nations minimum standards for prisoners?

Mr Meaney—I read with interest the debate that seemed to ensue about that. I think I am a little on the side of the view that was put that in some ways this is very paternalistic. If a fully informed, adult prisoner makes a decision that he wants to go back to his home country, which might be in South-East Asia or Latin America, because of all sorts of reasons that have nothing to do with the prison conditions but social infrastructure, family and that sort of thing, it just seems to me to be a bit paternalistic to be suggesting that, under this legislation, the Attorney-General is in a better position to make that judgment than the prisoner. If the prisoner has full information about what they are letting themselves in for and still say, 'I would prefer to be there than here,' I do not think the legislation should prohibit that.

CHAIR—Should the information provided to the prisoner indicate in those circumstances where there is a belief on the part of Australian authorities that the conditions will not meet the United Nations minimum standards?

Mr Meaney—That could be the sort of consideration given to the proscriptions set out in the regulations about perhaps mandatory material that must be drawn to the prisoner's attention before he gives consent. I guess the debate there would be twofold. In some of the reports done by, say, international bodies

that specialise in these things—I hesitate to say it—there can be a tone of self-righteousness about the prison conditions. That tone may be offensive to the country you are trying to do business with.

Whilst international bodies may have as their principal purpose an objective analysis of what prisons are like, the real world is that we may still want to continue to do business with other countries. Sending out official government notices saying, basically, 'Your country's prison system is the pits and we don't recommend that anybody go there, not even if you are a national of the country,' might be just a little beyond the pale. I have not really thought through that. Maybe it is that some sort of proscription about the minimum information that ought to be provided to the prisoner could very easily be included in the regulations. At this stage I have not really gone through all the processes you would need to go through to work out what that ought to be.

CHAIR—I ask you about the situation of the Northern Territory. As I understand it, the Northern Territory was the jurisdiction which initiated this in the first place and are now indicating that they are not going to have any part to play in it. We may have to seek some further information from the Northern Territory as to why they have changed their mind. What concerns me more are the ramifications of that. That is, are we then left in a situation where if you are a prisoner in any other state or territory in Australia that signs up you can become eligible for transfer or, vice versa, if you are a prisoner overseas and it just happens to be that the Northern Territory is your usual place of residence in Australia you are not eligible for transfer to Australia but you would otherwise be. Can you comment on those matters?

Mr Meaney—The matter was on the agenda for the Standing Committee of Attorneys-General for most of the 1980s, I think. Then it dropped off because at that time the then Attorney-General, Lionel Bowen, took the view that it was all or nothing—all states were in it or they were not—and he was not prepared to negotiate with other countries on the basis that there are some bits of Australia that are not participating in the scheme.

You are correct to say that it was put back on the agenda by the Northern Territory. I have no real information about what motivated that, other than to say that I understand it coincided with a change of government following an election in the Northern Territory. The Attorney has recently written, or proposes to write again, to the Northern Territory urging that they reconsider their participation in the scheme.

Not wishing to pre-empt what the Northern Territory might do, I think it really is only a matter of time before they come on. Whether it comes with a change of government further down the track or once they see how the scheme is operating, I think they will participate, providing all other Australian states and self-governing territories are participating.

Mr BARRESI—What are their reservations?

Mr Meaney—I have not heard them articulated. I was rather interested in Mr Sidoti's suggestion that there be some sort of activity by the Commonwealth to force the Northern Territory into it. I was interested to note that he was not prepared to go so far as to force states into it, though.

CHAIR—I am sorry. I did not hear what you said.

Mr Meaney—I noted that he was not prepared to go so far as to say the committee should consider forcing recalcitrant states into participating. Just on the submissions that have come before the committee, you will note that both of the states that have made submissions or appeared before the committee have indicated that agreement has been reached in SCAG, but they have not reached the stage of cabinet approval in their own states. So it is not necessarily a foregone conclusion that all states will get through that process. I think it would be pre-emptive to assume that. I noticed the irony in the fact that he was not prepared to suggest that the Foreign Affairs power be pursued as well. We do not actually support either of those. We think that, in time, everybody will come along.

I would just draw to the committee's attention on that point that it has taken quite considerable time in the standing committee to put this agreement together. There has been considerable toing-and-froing, and many of the issues that the committee has looked at, of course, have been discussed in great depth in the standing committee. It is a fairly delicately balanced arrangement that we have reached here and it is a consensual agreement. Whilst I would not exhort the committee not to make any changes to the legislation, I would point out that, if there were to be recommendations for substantive change in some sort of policy direction in relation to the bill, that could well tip the balance in terms of whether states are likely to agree or not.

In any event, if there were amendments to be proposed to the legislation—without suggesting what our stance might be on it—I think we would be obliged to go back and get agreement, or at least an indication, from the states as to their position on those amendments before they could be brought forward. So there could be a little bit of a timelag if the committee were to recommend some changes. I think we would need to go back and consult; I would not propose that we do it unilaterally.

CHAIR—I take it that the thrust of what you are saying is that it would be better to have the bill enacted, even if there are states and territories that do not participate at this stage, than not have the bill in law?

Mr Meaney—I think on balance that would be the view that we would take. I think that would be supported by the general humanitarian considerations that have been raised. If there is some reluctance about participating in the scheme, I suggest that it is probably the fear of the unknown because they are not quite sure what it is going to translate into. There are other suggestions that have been mentioned by other members that it is all going to be one-way traffic and there is going to be a lot of cost to the prison system and all sorts of things. Our view is quite the opposite. You will have noticed, for example, that Western Australia is still suggesting that they might like to revisit the agreement reached in SCAG about costs—who bears the costs of these sorts of things. There is a lot of economics driving the concerns. We do not think that is going to be realised. We think that if we can get it up and running, people will soon see that there is a benefit. The odds are that, overall, there is going to be a net outflow of people which, in an economic sense—if that is the only basis on which you want to look at it—will be a plus to the particular state and the prison system. We think it will sell itself in due course, so we would be reluctant to hold it up for an 'all or nothing' approach. If you were to do that, by the time you got the Northern Territory on I think you would find that maybe some other state would drop out, and then you would be back to square one.

CHAIR—One of the suggestions in relation to the Northern Territory if they remain outside the scheme was that it might be possible to deem Northern Territory prisoners federal prisoners and therefore

deal with it in that way. Have you looked at that possibility at all?

Mr Meaney—The scheme has been very much based on a consensus agreement. We have not seriously looked at any options of trying to override a consensus. What we are on about is trying to get agreement between all the states and territories consistent with the way that the federal system was envisaged as working. We are not looking at having fall-back proposals that seek to override that at all. We think it sells itself and, in the fullness of time, all the states and self-governing territories will see the benefit of it.

CHAIR—Are there any other general questions before we deal with the detail?

Mrs ELIZABETH GRACE—I have got one. When this all becomes reality, what sort of time frame do you envisage for the transfer to take place? Is it possible to give us an idea?

Mr Meaney—In terms of time frames, we would need to get the Commonwealth legislation in place. We would then need to have states' legislation. With the best will in the world, I do not think that process is going to take place all that quickly. In addition, we will then need to become parties to the multilateral conventions that have been mentioned and negotiate bilaterals. We would anticipate that we could readily get into the Council of Europe Convention and the Commonwealth scheme. I think we could do that fairly quickly once all the legislation was in place. Bilaterals might take a little longer. At this stage we are not proposing a heap of them, but certainly Thailand is one that would be first cab off the rank.

Having got all the framework in place, and if the states move quickly, I anticipate that that would take well in excess of 12 months or even closer to two years. That is if their legislation programs are on track. I think you are talking about the process—having got the scheme in place—from the time a prisoner made an initial inquiry to when they could expect to be transferred. Clearly we would be on a fairly heavy learning curve in the whole process. I imagine it would take some time to figure out the nuts and bolts of the first couple, particularly with the first one in each country. But that process could be readily speeded up. Once we have done one in relation to Thailand, for example, we will know more about their system and they will know more about ours. We will then be able to do it a lot more quickly the second time around. It would be similar with other sorts of countries.

Firstly, there would have to be a gathering of information. We would have to find out what sort of information we thought it reasonable the prisoner have at their disposal or have drawn to their attention in order to make an informed decision. Getting that information together for the first transfer will obviously take some time, because we would be looking at everything. There would then need to be consent. That will be a learning process not only for us but for the states and other governments or whatever. I would anticipate that, if all went well, you could probably do it in about six months. That would be for the first couple. Maybe could you do it a bit quicker later. But that is the best guess. I would not like to be held to that.

Mrs ELIZABETH GRACE—I did not know whether it would take you 12 months, five minutes or what. That gives us an idea.

Mr Meaney—All I can really do is point to the processes and say how long I think it would take.

Mrs ELIZABETH GRACE—Your guesstimate of 18 months to two years looks pretty close. That is before we can even start thinking about that.

CHAIR—In relation to clause 4(1), Mr Justice Dowd suggested that the definition of 'release on parole' should be amended to expressly exclude bail.

Mr Meaney—My colleagues have done more work on the detail than me. I will stop boring the committee with the sound of my voice and hand over to them.

Ms Willing—We think that first suggestion is probably not necessary because the whole scheme is not intended to cover bailees. One condition for transfer is that the conviction is final. If they are just on bail, they do not yet have a conviction. We also have a sentence of imprisonment. We do not think that definition is really necessary.

CHAIR—I suggest that we move through these quickly. Otherwise, we will be here all day.

Mr Meaney—Perhaps you might like to give my colleagues some indication of which ones the committee might think it worthwhile focusing on at each page. We can get back with a more fulsome written submission covering the whole lot later. If there are ones of particular concern that people think might have merit, we can run through them. Otherwise, my colleagues can quickly give you a spiel on each one as we go.

CHAIR—If you want to give us some more information, just indicate that, and we will move on. That might be the easiest way. In clauses 4(4) and 4(5), there is a suggestion that the word 'immediately' be deleted.

Ms Willing—That was inserted at the request of the Department of Immigration and Multicultural Affairs. They wanted to qualify that a bit. The reason for the welfare condition was to exclude purely financial, business type relations. We wanted it to mean some kind of personal relationship. That was the reason for that wording.

Mr BARRESI—By including it, does not the word 'immediately' create ambiguity?

Mr Meaney—The idea is to provide a temporal connection with when the person was sentenced. If somebody—leaving aside Aboriginal and Torres Strait Islander people for the moment—had been in Australia between the ages of one and five and they then went overseas for 15 years, that does not seem to be the sort of thing that we are talking about when we say close community ties. There has to be some proximity to when you go over there. That is where the idea of immediacy comes in. There must be something more than just a casual connection. I do not really see that you can have a strong tie with a country you have been out of for 15 years.

CHAIR—But would not the person's principal place of residence still be Australia, even if they had been out of the country for 15 years?

Ms Willing—It might not satisfy the immediacy requirement. That is just one of the requirements to establish community ties. It is one way they could establish community ties. If they had family here, for example, they could establish it under another part.

Mr Meaney—If they had been travelling for 15 years, it would still be the principal place of residence, because you would have had no other place that you would have been in for a longer period.

Mrs ELIZABETH GRACE—In his submission, Justice Dowd gave an example of someone who had lived in Hong Kong for 12 months, moved over to Thailand and committed an offence. His immediate place of residence was Hong Kong but he may not have wanted to be transferred back to Hong Kong. That is where the word 'immediate' was coming into it.

Mr Meaney—Perhaps we could look at that.

CHAIR—Justice Dowd also referred to a case in which he was the presiding judge. The interpretation of the word 'immediate' had been the subject of a decision. I am not sure whether you are aware of that case. It was an unreported case just recently.

Mr Meaney—I think words such as 'immediately' are a bit like 'reasonable'. They turn on the circumstances and become a question of fact.

CHAIR—That was his complaint. Some degree of certainty is difficult when you have the word 'immediately'.

Mr Meaney—Perhaps we could get further advice on that. The idea was to provide not just a general relationship with a country but some sort of proximity.

CHAIR—I think we have already dealt with clause 5(2)(a). It concerns Dresser versus the conveyancing committee.

Mr Meaney—We have the transcript.

CHAIR—We have dealt with clause 6.

Ms Willing—We have probably already discussed the clause 6 issue as well. Clause 6(3) is directed at informed consent. You then have the regulation making provisions.

Mr Meaney—In terms of clause 6(6), we think the phrases proposed by HREOC represent the other side of the coin. We do not really see that there is much substantive difference between the two. You certainly do not need both.

CHAIR—It seems to me that it is implied anyway.

Mr Meaney—It must be. I think it would be overkill if you had the provision that is already there plus this other provision. It would be a belt and braces situation.

CHAIR—We have discussed clause 8 concerns. Mr Justice Dowd has again suggested the deletion of the words 'in the opinion of the Attorney-General' as being unnecessary.

Mr Meaney—His honour has displayed, as has Professor Shearer, a dislike of unreviewable discretions, which is understandable if you are on the bench. In response to that, let me say that it is only fair to give a prisoner any information that might be available in relation to whether they are likely to be extradited from the country to which they are going. If the Attorney-General has an opinion that is not particularly based on much or because somebody told him or whatever, it is reasonable that he disclose it.

If the question is that there is a wide discretion about the Attorney-General imparting information that might not have a justifiable source, it can only be to the benefit of the person to whom it is directed. It is not to the detriment of them. If the Attorney-General can say, 'I think they are likely to be extradited. I do not have any official communication from another country, but I have this feeling from feedback I have got from other people', it seems to me reasonable that he impart that information to the prisoner before you make a decision. It should not be a question of having to account for the reasons, in an ADJR sense, why he reached that conclusion. It is different from an unreviewable discretion where the discretion is really not to provide information, which is the sort of situation where you could say that.

Ms Willing—It was decided as a matter of policy that people coming back into Australia should have community ties with a particular state or territory. 'Community ties' is defined in the definition section. We do not agree with that recommendation.

Mr Meaney—Given that the states run the prison system, we think it important that there be some community ties. Otherwise you cannot determine what prison they will go to. They must go somewhere. We have dealt with the next bit regarding Aboriginal and Torres Strait Islanders.

CHAIR—We have dealt with clauses 15(1)(b) and (2)(b). Clause 15(2)(b) uses the word 'offence'. I am not too sure why it is nebulous. I would have thought that if somebody said an offence had been committed in Australia that would be imparting a fairly specific piece of information. There was a concern about where there may be an offence in one state that is not an offence in another and whether the drafting in clause 15(2)(b) causes problems. 'An offence' means an offence in Australia. If, for example, there is an offence which is an offence in Tasmania but not in the other states of Australia, is that an offence in Australia?

Mr Meaney—That is very much a black letter law argument. I do not know, with the greatest respect to the proponent, that it leads anywhere. This talks about the dual criminality requirement. You then find at subclause 3 that the Attorney-General may determine that dual criminality be done away with. We could go through a great debate about whether it is an offence in one state or an offence in another state. However, at the end of the day, the Attorney-General has a discretion to say, as with the alcohol offence, that it is not an offence in Australia but that the person should come back. I do not know what turns on it. Whilst I accept that you could make technical arguments about it, I do not know where it actually leads or what mischief you are trying to cure.

CHAIR—Would it not be more clear if it said 'constituted an offence in an Australian state or

territory'?

Mr Meaney—You would have to include 'a law of the Commonwealth', in which case we have just covered the ballpark and you would still have the same problem. It could be an offence against a law of a state or territory. For example, it could be an offence against the law of Tasmania but not an offence against the law of Queensland. We have not actually cured the mischief that you have just identified. I am not really sure what turns on it. Having identified that you can make those sorts of arguments, I do not know where it leads you.

CHAIR—In relation to clause 15(3), Professor Shearer—I know we have dealt with this in part—suggested drafting it in an alternative form, which was that the Attorney-General may determine that the requirements of subsection (1)(b) or (2)(b) have been satisfied.

Mr Meaney—It is a different policy decision. I am not too sure, having quickly read the transcript showing what Professor Shearer was saying. I think at the end of the day he was saying that you would give the Attorney-General no discretion and say that he should not be able to dispense with dual criminality. He seemed to say that if you do not have dual criminality, the person should not come back to Australia.

That might be a very nice legal argument, but it has no social policy. It seems to me to be totally unjust if a person is serving 12 months for an alcohol offence in an Islamic country. We would be saying that just because we do not like that law—that is, we do not have a law the same—we would not let you come back to Australia. The whole point about the legislation is to enhance the social, humanitarian and rehabilitation side, which is totally ignored by getting ourselves into that sort of black letter legal argument. We very much think one of the keys to the humanitarian side is, wherever possible, the Attorney-General having a discretion to bring people back which does not satisfy dual criminality. They have to be better off here than in the country where they are.

CHAIR—I asked Professor Shearer about this. He said this:

In other words he—

that is, the Attorney-General—

can waive altogether the dual criminality requirements. I think that is the problem. It is in 15(1)(3). Whereas I would say something along the lines that the Attorney-General may determine that the requirements of subsection (1)(b) or (2)(b) have been satisfied in a particular prisoner's case.

Mr Meaney—It depends what he means by that. He is saying that that may be satisfied in that case. Is it saying that the Attorney-General's opinion of whether it is satisfied is conclusive? Therefore, there can be a legal fiction when the Attorney-General says that he, in effect, deems it to be a dual criminality offence where it is not, so as to give the flexibility? I do not think that is the way to go. You are better off being up-front and giving the discretion to dispense with it. If what he is saying is that the Attorney-General can only do things where there is dual criminality, it is unnecessarily restrictive. It is not the policy that we are seeking to implement here. Notwithstanding Professor Shearer's view, we think there are strong policy arguments why you should have a discretion and be able to have Australians transferred back to Australia where there is

no due criminality, strictly speaking.

CHAIR—I will go on and read what Professor Shearer then said. The crux of his objection is this:

I really do not think we could in all conscience as a nation be seen to be enforcing an offence which was so contrary to our own notions of what was criminal and not criminal.

That comes back to our earlier discussion.

Mr Meaney—We would say in response, using a similar phraseology, that we think it totally unconscionable to deny an Australian the opportunity to come back and serve that sentence in Australia and, therefore, force them to remain in a foreign country.

CHAIR—So it is a matter of which principle takes priority?

Mr Meaney—Exactly. We have made our choice pretty plain.

CHAIR—With regard to clause 17(4), it has been suggested that the word 'formal' be deleted following a formal request of the transfer.

Ms Willing—At that stage, it is envisaged that the Attorney-General would be making only preliminary inquiries. A formal request might follow. That is the reason why that word is in there. Clause 18 goes on to talk about a formal request for transfer.

CHAIR—So you envisage the operation of the scheme being that inquiries would be made. Even though they may be, for example, documented, that will not constitute a formal request? There would be a document that would be the formal request?

Mr Meaney—You could have inquiries, for example, without the relevant consent having been obtained from the state people or something like that. Certainly if we are going to have treaties we need some point where there is a formal request. It cannot all be informal. We may as well spell out that that is what it is.

Clause 17(5)(a) seems to be a strange one. It seems to turn on the question of the preoccupation with administrative decisions, yet again; that is, whether or not we are talking about the substantive details of a request that is known to be there or whether we are talking about the Attorney-General giving reasons for having reached that particular belief. I do not think, quite frankly, the question of how the Attorney-General reached the belief is really all that relevant in this circumstance.

It is relevant where you want to challenge a decision. If the Attorney-General reaches a belief that country A is likely to ask country B for the extradition of a particular prisoner, can he put that in? He can give his source, if he wishes. Perhaps if he does not wish to disclose his source, he does not do so. But it is information that clearly will be relevant to the applicant for transfer in relation to the decision about whether to consent. If the Attorney-General is being statutorily required to give reasons, one asks who that benefits. It

could only benefit, conceivably, if there is some sort of administrative challenge by the other party country to the decision to provide that information. This is just making some litigation nightmare out of the whole thing. Quite frankly, I do not think we need to get into that.

CHAIR—There could possibly be a benefit, depending on the reason on which the Attorney-General has based his opinion. If his opinion is based on some formal advice, that has a certain weighting. If it is based on informal advice, it has another weighting. If it is based on a 'if I were in this situation' type of thought, he may well take that course, which would have another weighting. There can be some benefit, can there not?

Mr Meaney—There can be benefits if there are reasons he wants to disclose. If it is a confidential communication that he has had, perhaps with a counterpart minister for justice or Attorney-General in another country, where he ought to know about this, I do not think he ought to be obliged to disclose it. But the prisoner ought to know about it. I know that it is only going to dry up your sources of information.

CHAIR—Clause 20, the question of whether there are substantial grounds for believing the prisoner may be subject to torture, which was HREOC.

Mr Meaney—This was mentioned by a couple of people. The first thing I would say is that, if torture were prevalent, it would be unlikely we would have an agreement with the country for a start. The state of the criminal justice system is going to be such that you are probably not going to do a deal.

The question of what constitutes torture, however, can go from mistreatment by prison staff, for example—it can be viewed as torture when a prisoner gets thumped for doing something bad—through to the more formal reins of torture. If it is known that a certain country has a fairly authoritarian regime, and in accordance with that is fairly 'law and order' strong and there is a chance that, in order to keep order, prison staff may perpetrate abuses—I am not trying to justify abuses, but abuses in the sense of harsh treatment of prisoners—that sort of information clearly needs to be made available. But, again, having regard to all the pros and cons in all of this, I do not see why that should be determinative as to whether or not a person should go back.

If they take the information that sort of says the guards are going to treat you a bit rough if you go back there—and I do not particularly want to name any countries here, but it probably does not take much to imagine authoritarian sorts of countries where it might happen—and the prisoner says, 'Yes, I know that. I've been in there before, but I'd rather be there than here,' why should we stand again in this patronising sort of mode and say, 'That's not good for you. You're better off staying here'?

As long as there is information and the information is made available and it is an informed decision, and whilst the human rights concerns are valid, I think this is a very complex decision for somebody to make. There are the cultural, ethnic and family relationship issues—a whole range of issues—of which this is one. I do not think we should be picking any one in particular and saying, 'If you don't meet that standard, you can't go.'

CHAIR—Should it be a matter which is in the regulations, though?

Mr Meaney—Yes, I think if there was information about that, or at least drawing it to people's attention, perhaps reports could be done by committees. I have had a bit of a think about this since the last time we discussed this earlier in the meeting.

Maybe rather than providing information on individual countries there is an obligation to provide the last annual report of a particular organisation that looks at prison systems generally, for example. You are not saying what our view of the particular country is, but you have a sticky label in it that is on the particular country and the people can see what it is all about. I think that sort of thing would be appropriate for the regulations.

CHAIR—There seems to be a reluctance to make any judgment about other countries.

Mr Meaney—I am just saying, depending on how harsh the judgment is, it can be counterproductive. It was not so long ago that a former Prime Minister got into big strife for using the 'R' word against a certain politician not too far from here. I guess I am pointing out that we are going to be dealing with these countries on a fairly regular basis on this sort of issue.

We can be fairly castigating of their prison systems, if we like, but we have to remember that, if we want to get somebody out of there, we have to do it with their consent. If we want to be too high handed about how good their prison systems are, the short answer is that the next time we ask for an Australian to come back here, or he or she wants to come back to Australia, they may well say no.

I am not saying we should never make any criticism, but I do not think we ought to be making it mandatory that any criticism is highlighted, put up in spotlights. The information should be available, but I think we can disguise its source just a little bit.

CHAIR—We could probably have a long philosophical debate about that, but I will not enter it. I was reminded of John Stuart Mill who said you could not in the name of freedom sell yourself into unfreedom, but we will not get into that.

Mr Meaney—These things are going to be the subject of regulations, and obviously we have not gone down to that level of detail yet, but clearly there will be public exposure of the regulations too.

CHAIR—Clause 24, replacing 'may' with the word 'shall'—that is, 'the Attorney-General may consent to a transfer'. It is suggested that, if the Attorney-General is satisfied, the wording should be 'the Attorney-General shall consent'. As a matter of technical drafting, there seems to be some validity to that.

Ms Willing—Yes, we agree with that. We will need to have a look at how that interacts with clause 10.

Mr Meaney—Clause 10 was drafted pretty late in the day and we think this might be an interaction that needs to be further addressed.

CHAIR—Could you give us any further advice you have about clause 10 and the interaction?

Mr Meaney—Yes.

CHAIR—Clauses 42 and 44—

Ms Willing—The difficulty we have with that is we think it would be incredibly difficult to try to prescribe in regulations, or whatever, how the Attorney's discretion should operate because each case is going to be so different. We are going to have different sentencing regimes in other countries. There are some limitations. Clause 43 sets out some limitations as to how the discretion should be exercised.

CHAIR—I understand the difficulty that you are alluding to, if we were to recommend that there be some future report on the operation of the legislation, would that be a matter which could be properly the subject of some report? I understand what you are saying about the difficulty of regulations, given the complexity of different systems, but it also seems that it is something that perhaps ought to be reviewed at some stage.

Mr Meaney—We would be prepared to agree to that, Mr Chairman. What we have provided here is a lot of general discretions because we are treading largely into the unknown. It may well be that you can refine that once you have a bit of experience, but we really do not want to put ourselves in a position of making it so claustrophobic that when you get a legitimate case we find out that we have so hamstrung the Attorney-General that we cannot produce a reasonable result in all the circumstances.

Perhaps we have erred a little bit on the side of administrative discretions. Say, in the context of a review after three years, we would then have some pretty hard information on how those discretions have been exercised and probably draw some principles from them.

CHAIR—Clause 45, do you want to talk about that?

Ms Kelleher—I might be able to help you with that one. Clause 45, if he is talking about the first leg of it, effectively it provides that there is no appeal in Australia against the sentence that was imposed in the other country. That provision he was referring to in his comments is under part XIIIA of the New South Wales Crimes Act and that enables where there is a pardon application, for example, for the Attorney to refer it to a Court of Criminal Appeal.

I am not too sure why we would want to go down that track when in fact the bill specifically provides that there is no review. I just do not see the connection, the need for it. One of the underlying philosophies is that what is done in the other country is what has been done and we just translate it and continue to enforce it in Australia.

CHAIR—Clause 46, the word 'relevant' be inserted before the words 'Australian law'.

Mr Meaney—We can raise that with the drafters. There is no suggestion that we are going to take irrelevant matters into consideration, so I do not know that it clarifies matters much.

CHAIR—I also note that it is in subsection 4.

Mr Meaney—Maybe we should do it as a matter of consistency.

CHAIR—But then subsection 5 to some extent relates back to, or relies upon, subsection 4.

Mr Meaney—For the clarity of consistency, or whatever, there is some benefit—

CHAIR—Perhaps you could advise us further about that, and we have dealt with your response to clause 46(6). There seems to be some concern by Mr Justice Dowd in relation to clause 47 that the words 'ceases to have effect' could have the ramification that the sentence did not remain part of the record of the person.

Mr Meaney—I think there is a difference between sentence and conviction. Basically, there is a little confusion. We are talking about the imposition of a sentence. It does not relate in any way to the record of the conviction.

Ms Kelleher—You would also need a provision to ensure that if they have actually served it somewhere else they are not therefore still liable to serve it here.

Mr BARRESI—If you migrate back, that conviction would be recorded on the application and then the minister or the department would be asking for details of the conviction. Is that right?

Mr Meaney—I guess he would be obliged to declare it. It certainly does not purport to expunge his record like a spent conviction type of scheme or anything.

CHAIR—It is trying to remove a potential double jeopardy, is it not?

Mr Meaney—A double imposition, yes.

CHAIR—Could you comment on clause 48(1)?

Mr Meaney—This is an Australian law and it seeks to have effect in Australia law. What it says is that, notwithstanding the fact that the person is outside our jurisdiction now, he can still get the benefit of any pardon, amnesty, or whatever and that, if you like, this is going to be the operative provision that will facilitate that. We cannot have a provision in our law that purports to give an operation to foreign law. To include the words 'or under the law of the transfer country' is, in our view, misconceived. We cannot pass a law here that affects the substantive law of the transfer country.

CHAIR—I understand that, but take the case of Thailand where, as I understand, from time to time remissions are given to all prisoners as a mark of respect for the king's birthday. If there is a Thai national who was convicted in Australia and sentenced to a period of imprisonment here and is transferred back to Thailand, should that prisoner be eligible for a general remission which is granted to all prisoners in Thailand or should it be that whatever the sentence was remains?

Mr Meaney—With the way we are going to treat remissions, it is the remissions in the country in

which you are located. That is provided by virtue of the law of that country, not by any law we pass. If the person is physically in Thailand and there is a remission of two weeks because of the king's birthday, that will come off automatically. That will be understood pursuant to, hopefully, a treaty we would have with Thailand that would recognise domestic remissions. But putting in Australian law a part about remissions under the law of the transfer country does not do anything. It is not by operation of this law that the person gets the benefit of the remission. It is by operation of Thai law that they get the benefit of the remission. Having a provision in our law that purports to give some sort of right pursuant to Thai law is, in my view, misjudged.

CHAIR—Is there not potentially a problem, though?

Mr BARRESI—The example that was used, Kevin, was the one about being locked in your cell, say, during a prison strike. You might have an extra one or two days deleted from your sentence if you were in an Australian prison. Does that mean that the transferred prisoner is not—

Mr Meaney—Once you are in the jurisdiction of the prison, the remissions or whatever system that applies within that prison where you physically are would apply to you. So if it were a person from outside Australia transferred to Australia and there was a prison strike at Bathurst prison, for example, they would get the benefit of the remission and that would be understood pursuant to the agreement that local remissions would apply. But there would need to be nothing in Thai law, if that person came from Thailand, to facilitate that; that is by operation of our domestic law.

Similarly, this talks about prisoners transferred from Australia. All it does is preserve certain rights under Australian law, if you like, to give a double benefit. You can get a benefit under the domestic law of the country to which you have gone, but it also preserves a right to getting a pardon or whatever under Australian law. In regards to the concern that Mr Smith had, if fresh evidence was raised in relation to a case in Australia where the person had been transferred outside of Australia, you preserve their right to then redress the balance here, because we are saying, 'This is the country where the sentence was imposed. This is the country that ought to litigate that.'

But there is no purpose in addressing in an Australian statute what the law of the other country does. The only purpose for putting it in is to give some sort of substantive right and there can be no substantive right given by an Australian law in relation to the operation of a law of a foreign country—unless you are an American perhaps.

CHAIR—Can you explain to me then, in light of that, that issue about section 49(1)? For example, if an Australian is convicted in Thailand, sentenced to a period of imprisonment in Thailand and then, subject to an agreement, comes back to Australia and a general remission is given to prisoners in Thailand, will that affect the prisoner in Australia?

Mr Meaney—It would depend on the nature of it, I think. If it were merely because of the king's birthday, therefore it was akin to the remission that you would get in Australia for a prison strike, then no. If it were a general amnesty for persons who had been in prison for 20 years or something, which occasionally might happen, and it was for all prisoners, I think they would get the benefit of that one.

CHAIR—Coming back to the king's birthday: in a country like Thailand, whilst the remission granted by the king as a mark of celebration of his birthday is not something that one could expect would occur in a certain defined way, nonetheless isn't it sufficiently part of the custom of Thailand that one can make a generalisation about it, that it is likely to occur? Why shouldn't a prisoner get the benefit of that? If one looks back historically over a period of time and says, 'On the king's birthday the likelihood is that prisoners will be granted remissions—

Mr Meaney—It would only be a small remission, I think; a couple of weeks or something.

CHAIR—Yes, but isn't that sufficiently a part of the legal culture of Thailand for us to take it into account?

Mr Meaney—No. I would characterise it more as the way in which the prison system is administered there. No systems are going to be identical. In Australia, for example, you may get remissions for a whole range of reasons. You might get remissions in Thailand for a different set of reasons. You might get them in Australia automatically by operation of statute. You might get them in Thailand because of the exercise of a royal prerogative, such as the king's birthday or whatever. But that is inherent in the way the penal system is administered.

Part of the balancing act is the sorts of remissions or whatever you might get in the Thai prison and you translate that to what you are going to get as part of the deal that you are signing up to if you come back to Australia. They are administered differently. If there was a general amnesty it would more come under the nature of section 49(2)(b). I do not purport to know a great deal about Thai culture. Maybe we are not making any friends in Thailand with a lot of references to them.

It may be, for example, that on the king's birthday there is an accepted custom that you get some minor remissions—a couple of weeks or whatever it might be. It might be that, on the accession of a new king, there is a general amnesty for persons who have been in prison for more than 20 years. We would view that as being in the nature of an amnesty or a pardon and that would then translate to somebody who had been sentenced pursuant to Thai law. But I do not think the mechanistic sorts of ones that come up are any different from, say, good behaviour in Australia, which might not apply in Thailand.

CHAIR—Presumably, though, those sorts of details would need to be provided to the prisoner.

Mr Meaney—A lot of them would be nutted out, I think, in the detail of the agreement, because you would have to have some general principles in the agreement that would go into a lot more detail than we have here. The nuts and bolts of individual cases would be in the terms of what you actually agree on in relation to that particular transfer. So I think there would be a lot more detail fleshing out all of these things.

CHAIR—In terms of the information provided to the prisoner in order to make an informed consent, the ordinary system of remissions in the country to which the prisoner is going would need to be provided as a matter of detail, whether it is a prisoner coming to Australia or a prisoner leaving Australia for wherever.

Mr Meaney—I think so, yes. I think that would be something that would be relevant. I cannot really

see it being a supervening consideration at any point. I think there are bigger issues that people ought to decide on.

CHAIR—But should it be a matter for the regulations?

Mr Meaney—Yes. In an administrative sense, it is a request by the central agency administering it here in Australia to their counterpart in the other country saying, 'Tell us what your remission system is.' I would think that that would have to be set down somewhere. It should not be that hard to get a copy of it. Once we have it translated into English, we would have it for all time.

CHAIR—In relation to clause 53, Justice Dowd was suggesting that the breadth of the delegation is far too wide and that, as a very minimum, it ought to be the Secretary to the department, but in fact his preference was simply for another minister.

Mr Meaney—That is inconsistent with Commonwealth drafting policy. The idea is to be able to permit the Attorney-General to administer the legislation through his department. So the Attorney-General must be able to delegate it to people in his department. To administer it to another minister—particularly in the circumstances the Attorney-General finds himself where he has no junior minister—would mean trying to brief the minister of another portfolio, and they are presumably busy on all their own things.

It may be a different view in New South Wales, but it used to be that in Commonwealth drafting practice there was a general delegation that the Attorney-General may delegate powers under this act. The gloss has been put on it in recent years at the insistence of the parliament that the class of person be defined. So that is why we have things like the Secretary or an officer of the Senior Executive Service in his department.

I have not heard any criticism in relation to the administration of Commonwealth legislation before that SES officers in Commonwealth departments are inappropriate to exercise delegations in relation to the administration of what are many times routine functions. Quite frankly, ministers do not these days give a general delegation of all their powers. They will specify which ones they think the department should use and which ones they want to preserve for their own—

Mr MUTCH—Justice Dowd's objection was that someone could come in from the SES, be fairly new to the job and be given a delegation that is fairly sensitive and requires discretion.

Mr Meaney—That is a matter for the Attorney-General, with the greatest respect. If the Attorney-General has confidence in a new person that they have brought in that they can do this sort of work, I do not see any reason why the Attorney-General should be denied saying, 'Okay; you do it.' Basically, if they screw up, they get the chop.

Mr BARRESI—The Attorney-General is ultimately accountable.

Mr Meaney—That is right. It is his decision to whom he is delegating. All it is saying is that it must be somebody in his department, and a senior officer at that. I have no view of what Justice Dowd thinks of

SES officers, but they tend to be senior in departments and have been around for a while.

Mrs ELIZABETH GRACE—'Level of juniorority'—that was his comment—at a 'very great level of juniorority' actually.

Mr Meaney—It may be from the dizzying heights that he is on. For those of us there, we like to think that it is a bit up the greasy pole.

CHAIR—Unless my colleagues have any further questions, I think we have exhausted Mr Justice Dowd's and others' lists.

Mr Meaney—We will still provide the committee with our thoughts in writing in relation to those amendments. If there are any other matters that the committee would like us to clarify, we are more than happy to provide something for you.

CHAIR—I thank you again for your submission and for the responses today. I thank all for their attendance today and thank Hansard. Before closing the hearing, I call upon Mrs Grace to move that the committee authorises publication of the evidence received today.

Resolved (on motion by Mrs Elizabeth Grace):

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

Committee adjourned at 1.26 p.m.