HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: International Transfer of Prisoners Bill 1996

SYDNEY

Friday, 31 January 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Members:

Mr Andrews (Chair)

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

Matters 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

BLACKTOWN

Friday, 31 January 1997

Present

Mr Andrews (Chair)

Mrs Elizabeth Grace Mr Mutch

The committee met at 9.40 a.m.

Mr Andrews took the chair.

CHAIR—I declare open this public hearing of the committee's inquiry into the International Transfer of Prisoners Bill 1996.

Resolved (on motion by Mr Andrews, seconded by Mrs Grace):

That this committee receives as evidence and authorises the publication of submissions Nos 1 to 12 and exhibit No. 1.

CHAIR—The committee appreciates the opportunity of being able to visit the Parklea Correctional Centre in that it provides some useful background information to members of the inquiry. When this bill was introduced into the federal parliament, the Attorney-General stated that there were sound humanitarian grounds for international prisoner transfers. That is one aspect which we hope we might be able to receive some evidence about today. We have the opportunity of hearing from someone who may not personally benefit from the bill but who can at least give some evidence about his situation. I would like to thank formally for the record Governor Bromfield for his assistance in arranging today's committee visit and for his courtesy and hospitality in welcoming the committee this morning.

[9.42 a.m.]

PEREIRA, Mr Victor, PO Box 6148, Blacktown, New South Wales 2148

CHAIR—Welcome. In what capacity are you appearing before the committee?

Mr Pereira—As a private citizen.

CHAIR—I should inform you that, although the committee does not require you to give evidence under oath, 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. Do you have a written submission or just a verbal presentation?

Mr Pereira—It is verbal and I will also be reading some notes if you do not mind.

CHAIR—I invite you to do so.

Mr Pereira—Of course. First of all, I would like to thank the committee for the opportunity that they are giving me to express my views on this issue. As you are probably aware, I have contacted several members of the government since 1992, in particular all the Attorneys-General around Australia on this matter.

My involvement in this issue is related to the fact that I have a strong desire to complete my sentence in my home country. I must say, however, that I am not representing only myself in this matter. Throughout the years I have also been asked to make a number of representations on behalf of a vast number of foreign inmates, mainly because many of them cannot write or read in English. I should say that I have not always been thanked for doing so.

I think it was in 1995, for instance, that I was advised by members of Mr Lavarch's office that the treaty would be introduced by the end of 1995. I related the news to everyone around me and people were elated with it. Unfortunately, in early 1996 we found out that after the election changes were made in government and that the treaty was again delayed. These foreign inmates were very upset with me, because they said that I had raised their hopes high and nothing came out of it.

On a more personal level, the delays in the treaty have had quite a devastating effect on my life. In 1992 I received a letter from the then New South Wales Attorney-General, Mr Terry Griffiths. He indicated his support for the issue. He mentioned that he would assist the Commonwealth to ensure that the treaty was passed as soon as possible. To my dismay, Mr Griffiths was replaced by Mr Pickering. Mr Pickering promptly replied to a query from me saying that he was not interested in the treaty. My parents, who were waiting for the good news, were devastated. My father had a heart attack and I escaped from prison. I was re-arrested and I am now serving the remainder of my sentence.

Mr Williams, in his address to the House, expressed quite clearly the benefits of the bill. The humanitarian and economic benefits that he referred to are certainly compelling and meritorious and have our

entire support. I would like to add two more points which I have had the opportunity to observe whilst in custody. These points are positive points for why Australia should indeed participate in the international transfer treaty.

The first point is that after speaking to many foreign inmates in prison, particularly in the remand section, I have come to the conclusion that many inmates would plead guilty to their charges, thus saving expensive trial costs, if they knew that they would be allowed to serve their sentences back home. Maybe it is fear, but I have seen people with the most damming evidence against them still choosing to go to trial—no doubt in some cases due to greedy lawyers but also out of fear of having to stay away from their families for many years.

The second point is that the longer a foreign prisoner stays in an Australian gaol the more opportunities he or she has to establish links with local criminals, regardless of the fact that he or she will be deported at the end of his or her sentence. So it is a misconception to think that, after five or 10 years in an Australian gaol, followed by deportation, a foreign prisoner can no longer harm Australia. A speedy trial followed by a quick transfer would surely suppress this problem.

There are still other points, perhaps even more tangible than the ones that I have mentioned, that are just as important as to why Australia should participate in this treaty. These are things that you really have to be imprisoned to know of—for instance, men crying when they receive news from home; the struggle that people have in here to save a few dollars every week so they can call their families overseas. They are extremely expensive phone calls. There is the food, which is quite different from many other countries where they come from. There is the language, of which they understand very little. The isolation is compounded by life in a strange country and many, many other cultural things which make life for a foreign inmate very difficult.

A point often made by the prison authorities is that we foreign inmates chose to come to this country and commit a crime and that it is only fair that we accept our responsibility, accept our mistake and accept our punishment. This is true, and I personally am the first one to admit it. However, I would like to say that two wrongs do not make one right. I believe that the longer I am away from my family and my culture the more difficult it will be for me to re-enter my society; a society where having a network of friends and family is all important.

I think it was Winston Churchill who once said that the measure of a country is taken by the way it runs its prisons. Australia is a young, modern country with a penal system which is the envy of many countries. Signing this treaty I believe would show the world that Australia is also a very humane country.

A misconception by some members of the public is that once a prisoner is returned to his country, he or she will soon be out again. That is not so, and the legislation of the treaty covers that point quite clearly. All the countries which abide by the treaty have to enforce the sentence, although a prisoner is entitled to receive local remissions or pardons, et cetera. So it is not a matter of a foreign prisoner going back to his country and being out in the streets immediately. I cannot stress how important it will be for the rehabilitation of foreign inmates to be given the opportunity to return to their countries, to be closer to their families and to watch their children grow. I therefore request that Australia adhere to the treaty as soon as

possible.

CHAIR—Thank you.

Mr Pereira—I am just getting a bit emotional about this because I have contacted the government for many years. We keep getting told, 'Yes, it is about to happen.' We keep telling our families overseas that it is about to happen, and then we get very disappointed.

CHAIR—I understand that. I am not even sure what country you are from, to be entirely frank.

Mr Pereira—I have two. I can go to Portugal or to Switzerland, so I will have to make a decision.

CHAIR—Both Portugal and Switzerland are members of the Council of Europe Convention on the Transfer of Sentenced Persons.

Mr Pereira—Yes.

CHAIR—It has been suggested to us that the likelihood of a particular prisoner wanting to make use of this legislation, if its comes into operation, depends on the prison conditions in the country to which they would be transferred. Could you comment on that in terms of your observation or discussions with other prisoners from a range of countries? Let me go a step further. It has been suggested that a prisoner might be much more likely to transfer back to certain European countries rather than to Thailand.

Mr Pereira—What you said is correct. There are inmates from developing countries from South America, for instance, who are sceptical about applying to go for the reasons that you have just mentioned. I understand that the prison conditions are far below those that they find in Australia. I have found a number of inmates in that position from China, for instance. However, I have also encountered inmates from those countries who are prepared to go because of the family links they have.

I have noticed that although most of the inmates reluctant to go are those with no family links in their country, inmates originating from developing countries are reluctant because they fear that once in their country their sentence could actually be increased. I am speaking of Malaysia, for instance. Certainly everyone I have spoken to coming from European countries or from the United States is quite willing to go.

CHAIR—Can I take you up on that reference to the United States, because the observation is often made that the standard of prison conditions in the United States is not as good as that of Australia. You are suggesting that, even though that might be the case, people would often prefer to be closer to their families.

Mr Pereira—Yes. There is also another benefit of their going. I believe the United States has a remission system in its penal system. So I think people are entitled to apply for remissions once they go home. I believe they are prepared to balance the good with the bad. I have encountered some Americans in the system, and until now there is only one whom I have spoken to who is not prepared to go for the reason that the gaols in America are particularly harsh. So he is scared of applying for transfer. The others I have spoken to are prepared to accept the place and apply for transfer.

CHAIR—If we enter into this treaty, do you think there should be a requirement that the prisoner in Australia be informed as far as is reasonably possible of the prison conditions and other conditions of what the sentence means in that country prior to giving consent?

Mr Pereira—Yes, but I think the conditions and the prison system are outside Australia's concern, so to speak. I think the inmates are contacting their embassies and querying their embassies about the points you have just made regarding remissions and conditions in gaol. Others, including me, are contacting families to find out what the conditions are exactly. And others are waiting for the first ones to go to see how it is, and then they will follow up and apply for transfer.

I say this because I think that conditions vary from country to country. I do not think it would be feasible for Australia to query gaol conditions, et cetera. What has to be done is that the inmates have to be reassured that they will not do extra time in their sentences once they go home or that they will not be re-sentenced for the same charges. As I indicated before, inmates from Malaysia, Thailand and China have expressed concerns—particularly those who have been charged with drug offences—that they could face further charges for committing those crimes, even though those crimes have been committed in Australia. So I think it is important for the inmates to know where they stand when they leave Australia in the sense of the length of sentence that they have to serve. I think that is crucial.

CHAIR—Do you have any comments about whether there should be a minimum length of sentence before this becomes operable? For example, it has been suggested to us that, if a sentence is less than a year, its transfer provisions would not apply but, if it is more than two years, there would be an opportunity to apply for transfer.

Mr Pereira—Personally I disagree with that. I have mentioned previously in my speech why I disagree with it. I believe that the longer an inmate stays here the worse it is for his rehabilitation and for his re-entry into his own country. I think Mr Williams mentioned in his speech a cut-off of six months. I think that is much more appropriate because the bureaucratic process will probably take some months anyway. So it is probably not feasible for anyone with a shorter sentence than that.

Mr MUTCH—Out of interest, how long do you have to serve?

Mr Pereira—About a year.

CHAIR—I do not have any further questions. Is there anything else you would like to add?

Mr Pereira—I have been waiting for this opportunity for so many years. Now that I am here I find it very hard to express my feelings. I can only reiterate that I miss my family very much. I believe that my best chance of rehabilitation—and I am now speaking on behalf of many other prisoners—is to be allowed to re-enter my society in a gradual way rather than just being dumped at the airport with a box and with no other resources or support.

CHAIR—We appreciate the points that you have made. We also appreciate the opportunity of speaking to you, because having the personal experience of someone makes it much more real than simply talking about clauses in a piece of legislation. So thank you very much.

Mr MUTCH—Now that it has been touched on, have you received much opposition from the prisoners that might not wish to go back to their home countries?

Mr Pereira—No. Throughout the years the only reluctance that I saw came from inmates from Asian countries. They were not opposed to the treaty. Earlier on there was some fear that the treaty would be forced on them; that it would be compulsory. But now that the media has referred to it they understand that it is a voluntary thing. Therefore I have not encountered anyone who is opposed to it. I have encountered some who are reluctant but certainly not opposed to the concept.

CHAIR—Thank you have much for appearing before the committee today. I again thank Mr Bromfield and his staff for their cooperation and hospitality.

Resolved (on motion by Mr Mutch):

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

Committee adjourned at 10.07 a.m.

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: International Transfer of Prisoners Bill 1996

SYDNEY

Friday, 31 January 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Members:

Mr Andrews (Chair)

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

Matters 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

SYDNEY

Friday, 31 January 1997

Present

Mr Andrews (Chair)

Mr Barresi	Mr McClelland
Mrs Elizabeth Grace	Mr Mutch

The committee met at 12.28 p.m.

Mr Andrews took the chair.

ANDERSON, Mr Tim, Assistant Secretary, New South Wales Council for Civil Liberties, and Member, Justice Action, PO Box 201, Glebe, New South Wales 2037

MARSDEN, Mr John Robert, President, New South Wales Council for Civil Liberties, and Member, Justice Action, PO Box 201, Glebe, New South Wales 2037

CHAIR—I declare open this public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs into the International Transfer of Prisoners Bill. I welcome the witnesses who are to appear before the committee and any members of the public who may be present. Earlier today the committee visited the Parklea Correctional Centre to take evidence from a prisoner who is a foreign national and therefore would be potentially able to make use of these provisions if they were enacted. We also had informal discussions with the prison governor.

When the bill was introduced, the Attorney-General stated that there were sound humanitarian and rehabilitative grounds for international prisoner transfers. That is one aspect that the committee is hoping to receive evidence about. Next week we will be hearing from the government about its attitude towards the bill itself. The submissions that have been made to the committee have been authorised and there are copies available for anybody who wishes to take one.

Mr Anderson—The submission to the committee is a joint submission from the New South Wales Council for Civil Liberties and Justice Action.

CHAIR—I am obliged to indicate that, although the committee does not require you to give evidence under oath, the committee 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 have your submission by way of a letter dated 7 January 1997. Would you like to make some brief opening statements?

Mr Marsden—Yes. I want to talk on the advantages of such a bill, the humanitarian and human rights principles involved. My colleague, Tim Anderson, would probably rather talk about some of the problems that may arise in relation to the bill. As I indicated to the committee secretary, unfortunately I have another commitment at 12.55 p.m.

In my experience over many years, mainly as a lawyer and a civil libertarian, I have come across the enormity of difficulties associated with persons who are not Australians who are imprisoned in Australia and with Australians who are imprisoned overseas. I have had two experiences in that regard and I have also visited a number of prisons in other countries.

The first experience I had was when I was appearing by way of an appeal in Thailand for a prisoner by the name of Tait—a fairly well known name, I am sure, in the annals of Australian international crime. Mr Tait had been convicted of drug trafficking in Thailand and had been condemned to death. I was involved in the appeal process and I went to Thailand. I should add that in appearing for Mr Tait I received an enormous amount of assistance from the Australian embassy in Thailand.

The prisons were such that Tait was sharing a cell, which was the size of a small cubicle, with 16 other persons. He was required to sleep on the ground. The standards were not up to those that we would expect in Australia. Civil Liberties holds the view that prison—the taking away of liberty—is the punishment, and that prisoners do not have to be further punished. Tait was in leg irons and arm irons which were interconnected to each other for 24 hours a day. So he slept in those.

The area that I found most difficult was that the prisoners were supplied with a minimum amount of food which was required to be supplemented by their families. In relation to the Thai prisoners, in most cases, the families were supplementing the food. In relation to the American prisoners, their food was being supplemented by the American embassy. There was some arrangement. There was no arrangement in relation to Australian prisoners. You probably have read about this on previous occasions. There has been substantial criticism of the Australian government in its failure to provide that extra food. I found that that was quite an horrific experience. I wish to qualify that, because I want to make it very clear that, whilst I found it an horrific experience, I am not suggesting that my client Tait did not have resources in Thailand whereby he could not get additional food. I am suggesting that other prisoners may not have been able to get additional food.

I also was in a state of America for another client of mine. I found that the American conditions—requiring the prisoners to be in leg horns and cuffs whenever walking anywhere—were not up to the standards that Australian human rights would expect. I also have inspected prisons in Italy, France and Spain. Again I have found that they are not up to Australian standards. There is more punishment in being locked up than just having your liberty taken from you.

My experience in relation to foreign prisoners in Australian gaols has been quite horrific. On one occasion a client—or he became a client—was arrested at the airport, allegedly bringing in some illicit substance. He was charged, could not get bail and was taken to Long Bay. He was a Thai national who spoke absolutely no English. He was in an area of the gaol where there were no translators. There was no-one to whom he could talk or express his problems. There was no-one who could tell him what his facilities were to be, what he would be eating, and no-one to whom he could express what he did not want to eat, and so on. He also had problems in relation to his religious requirements; again, he could not tell them that he had these problems.

I have found also on a number of occasions where I have appeared for persons from overseas of different religious backgrounds from the Christian or Jewish religions that they have enormous problems in the gaols, particularly in relation to eating, their ability to worship and their ability to act within the framework of their religious requirements.

We understand the difficulties one might have—and, as I have said, Tim will say something about this—when looking at the fact that some people might be imprisoned overseas for offences which are not offences in Australia. Similarly, some people might be imprisoned in Australia, particularly in some states, for offences that are not offences overseas. Be that as it may, I believe that those difficulties can be overcome in the type of legislation that you draft up. Tim has spent some time thinking about that.

I also acknowledge the problem that is associated with overseas countries where there is the death

penalty. The Australian government thus far, as far as I understand it, has always opposed Australian citizens having the death penalty imposed upon them overseas, and I had something to do in relation to that in the days of the Malaysian death penalty for Barlow and Chambers. I understand that there are those two difficulties. But in the long-term range I think obviously rehabilitation is better from the point of view of dealing with people. How do you rehabilitate someone in Thailand to come back to Australia?

There is also the question of family. While people commit crimes, they should have thought in advance about their family. But there are children growing up. Believe it or not, people who in some cases, for reasons we do not know or understand, are forced into crime still love their families and still want to be involved, and it creates enormous problems. If you are able—and I do not know whether you can—to speak to the wife of Heywood, a former Newtown footballer, an Australian prisoner in Thailand, I think she will be able to express to you the difficulties she had bringing up her children with her husband in gaol in Thailand.

Of course, there is the additional problem, which you are probably aware of, that in Asian gaols—and I just do not talk about Thailand—there is boredom to be overcome. There are no educational programs, no activities or anything in Asian gaols. Prisoners just sit there, tied up. There are lots of books to read if they can get hold of them; they can sit there and read books. But the boredom has the effect of there being the ready use and availability of drugs which are in and out of the prisons over there. There is very little policing of that in those countries. You probably have read that in many cases Australians have come back with the HIV virus as a result of the exchange of needles in those countries. That is a fairly heavy penalty.

The HIV virus in our prisons—and I think Tim would agree—is just not as high as it has been in overseas prisons. In fact, in our prisons we are lucky that it has been kept very much to a minimum. I suppose that is basically what I wanted to develop. I am happy to answer whatever questions you have.

Mr Anderson—Initially, I would just briefly agree with John's commendation of the objects of the bill and, in particular, the basis for it outlined by the Attorney-General in the second reading speech. We fully support those humanitarian, human rights and rehabilitative arguments for this bill. In many ways it replicates what the states have done already in terms of interstate transfer of prisoners.

I have a couple of brief comments to make in support of the concept of the bill. Of course, I agree with John that we would support any move which allows prisoners to be close to their family and friends. That is of ultimate concern to them and their families. It is a very important thing in terms of their maintaining some contact with the community and not being completely and utterly institutionalised.

One thing that John did not cover is that, in terms of foreign prisoners in Australian gaols, there has also been a history of disadvantage within the Australian system for foreign prisoners, and I might highlight that side of it a little. For example, at the moment there is a dispute about a deportee's access to works release, study leave and tech leave programs here. That is now in the process of being resolved. But there is a history of problems with state prison systems allowing foreign prisoners—who, if they are serving a long sentence, are generally deportees also—having access to those sorts of programs. In that sense they are doubly disadvantaged: they do not have access to their family and friends; they are also not able to access the full range of rehabilitative programs that are available to Australian prisoners. So to that extent, foreign prisoners would definitely be advantaged by being able to take advantage of repatriation.

I would add just some little reservations I have. I agree with what John was saying about the conditions in a number of overseas gaols. I would just add some reservations about us saying that all of the time foreign gaols are horrors compared to Australian gaols. There is a lot of unevenness in foreign gaols. I have visited a lot of foreign gaols; I have visited and lived in a lot of Australian gaols too. Australian gaols are enormously uneven. There are a lot of awful things to be said about Australian gaols. There are some good Australian gaols too. I just caution any attempts to generalise broadly about the conditions of Australian gaols as against foreign gaols, or to lump foreign gaols together. It is not really ever that simple, in my experience.

Just briefly on the two anomalies that we drew attention to in the submission: I support the bill's current approach to dealing with potential anomalies. I just caution what problems there may be down the track. The bill's current approach to possible anomalies is to give a large amount of discretion to the Attorney-General to deal with anomalies as they arise. That is probably necessary at this stage, because I think it is probably beyond the capacity of anyone to foresee the sorts of anomalies that may arise. There is such a huge potential for odd cases that may arise in the course of Australia's legal systems interacting with overseas legal systems that we really do not know exactly what anomalies may arise.

One example we gave was someone being in prison for alcohol offences, say, in a strict Muslim country or a Shariah law Muslim country. It would require then the intervention of the Attorney-General to bring that person back because, as it is, the bill does not allow for a person in prison for an offence which is not an offence in Australia to be brought back under the system. That would require intervention by the Attorney-General.

Similarly, and on the same sort of principle, if someone were, for example, gaoled and given a prison term which was far in excess of any maximum prison term in Australia, is there a conversion process? There is room for a conversion process in the discretionary provisions of the bill at the moment. It is not clear how that would work. Say, for example, someone was in prison for offensive language—which in this state, I think, carries a six-month gaol maximum under summary offences, doesn't it?

Mr Marsden—The way the courts are these days it may carry nothing.

Mr Anderson—But the maximum would be six months gaol. If someone came to Australia serving a sentence of two years, that in a way is in principle very similar to someone being convicted of an offence which is not an offence in Australia because it is far out of wack with what could occur in this country. You would assume then that the Attorney-General would look at arguments about a conversion of that sentence, but it is not clear how that would happen.

I do not suggest that the bill should attempt to regulate all these sorts of things because, as I said, I think the potential anomalies we may encounter are far too wide. However, I think it may be wise for the parliament to be able to review this at some time in the future. That is why we suggest that there be a process where the Attorney-General is required to report to parliament on the function of the bill and look to see how those anomalies are being dealt with.

We did allude to one example where the ministerial discretionary approach sometimes does not work

very well. That was a case of reviewing convictions. I know this is outside the brief of the committee, but I will mention it because it illustrates that there may be problems with ministerial review.

In this state, we have a provision under section 474 and various subsections of the Crimes Act which allows for review of convictions when fresh evidence comes forward. There is no such provision applicable to federal prisoners. There is, however, a history of federal prisoners and we know of three longstanding cases in which people have effectively served very long prison terms, almost all have served their whole prison term, without a proper process to have their convictions reviewed.

The process the federal law has offered is a review within the Attorney-General's office—in effect, an in camera review where the Attorney-General is sitting as an appellate court in a way and handing out decisions. In our view, it has been a very unsatisfactory process, far inferior to the process in this state—whatever else may be said in other areas of federal law. It is a real problem where ongoing chronic problems of that nature are being dealt with behind closed doors rather than through a proper and open public process.

I just say that as an example of where ministerial discretion may fall down. I do not know whether your committee may look at this issue at some time in the future. In terms of this bill, we would support the use of discretion in the bill but ask that there be a provision inserted in the bill so that the parliament is able to look at the operation of the bill fairly regularly to see if those discretionary provisions are working and if the anomalies are being ironed out or dealt with to the satisfaction of the concerned people.

CHAIR—Can I just take up that point with you, taking into account the concerns which you have raised. It seems to me that the only alternatives—but there may be others that you would like to comment on—would be for some criteria to be written into the legislation, which has the disadvantage of inflexibility in practice, or for the decision to be made not by the Attorney-General but by some possibly judicial body. That seems to have the disadvantage that, what is largely an administrative action under the bill, then takes on the framework of a judicial matter. At that stage, you are mixing up what is the simple transfer of a prisoner. You are getting into actually exercising the jurisdiction of another nation potentially. There may be other possibilities, I do not know. I am just interested in whether you have explored any others.

Mr Anderson—There are processes of that nature already in this state, for example, of converting sentences that do go on in the courts. We have not suggested any at this stage because it remains to be seen how much of that problem is going to be experienced and how the system will deal with it.

It is possible that, if there were a large number of people complaining about the way in which decisions have been taken about their sentences and their change of status—there was a large amount of discontent with the conversion of sentence, I suppose, because that is the main area we are looking at. The other one of whether the person comes or not is something that would be difficult to have a judicial function supervising. We do not suggest at this stage that there should be a judicial function.

Mr Marsden—The attorneys-general in the Commonwealth parliament have normally been persons of eminent legal background, not like in some states of this nation—some slightly north of here—where some of them have not even had legal backgrounds.

CHAIR—And south, too.

Mr Marsden—Be that as it may, the situation is that that legal background gives them objectivity that they are able to use. You have the present Attorney-General who is an eminent person as far as the legal world is concerned and who has had many positions in the legal world.

CHAIR—So I take it you are not suggesting that there should be some possibility of judicial review of the Attorney-General's exercise of his or her discretion.

Mr Marsden—No, and there will always be a judicial review through the AAT any way.

Mr McCLELLAND—On that point, do you think it is a problem that the Attorney-General of Australia, when considering to grant a transfer to a foreign prisoner, can ask the home country, if you like, what their intentions are to enforce the balance of the prison term? I think the section talks about the likely means by which they will enforce it. Is that a problem? In other words, it places the risk on the prisoner rather than any enforceable or binding contract between the two countries and/or the prisoner.

Mr Marsden—Obviously, there are going to be countries that you cannot deal with on this basis. That is something that the Attorney-General has to look at, if you are saying to me that you do not trust the Attorney-General.

If you have a dictatorship somewhere in the deep dark of South America where the prison systems are horrific, then I presume the Attorney-General would use his discretion and not transfer. Or in some Arabic countries where they chop your arm off or whatever it is for stealing on the third occasion, I do not think the Attorney-General would transfer.

Mr McCLELLAND—I suppose the crux of the question is this: how appropriate is it for the Attorney-General to make that determination, or should the risk be a risk assumed by the prisoner?

Mr Anderson—I think at the moment the bill provides for both, doesn't it? The bill does require a consent—a release, in a way—and I think that is appropriate. There are going to be some risks—maybe advantageous risks as well as disadvantageous risks. The bill does countenance that and builds in a provision where the persons are to be provided with information and make an informed decision on it. I think that is an appropriate way to deal with it.

Mr MUTCH—So that should be on a case by case basis rather than a country by country basis.

Mr Anderson—Yes, I would agree.

CHAIR—Presumably the Attorney will have a view about each country that he or she is dealing with.

Mr Anderson—I think that would be part of the Attorney's role to look at that. If they thought a gaol sentence for some drug offence here was likely to be converted into a death penalty in the other country, they would be obliged to inform the person about that as well as make their own decisions.

Mr MUTCH—I imagine that discretion would be fairly broad because, if the prisoner happened to be

a friend of the regime in the other country, it might well be that a transfer to that country was basically a release.

Mr Anderson—I think that is what happened with the French people in New Zealand.

CHAIR—Can I just pick up your point about the potential sentence in the country to which the prisoner is transferred. Should there be some obligation on the host country of the prisoner to inform the prisoner of the likely gaol conditions and prospects for the translated sentence?

Mr Anderson—I think that would be nice, but I do not know how you would put it into your bill.

CHAIR—It may not be possible to put it in the bill, but it may be something we can comment on. I am just asking for your comment.

Mr Marsden—I think it is pretty important. You have to realise that a lot of people in prisons, as you probably well know, do not have even an average level of education. That is no disrespect for those who are well above average. We all have to accept, whether we like it or not, that a lot of people are in prison not because they are bad people but because, unfortunately, their situation has forced them into crime.

Mr Anderson—I think, I might be wrong, there is a requirement in the bill to provide that sort of information, but the bill proceeds on that assumption. I am not sure exactly. Certainly, the provision of information from the government would be something we would support. If the government had intelligence on the operation of the criminal justice system as it would affect that person, I think it would be very helpful if the government had an obligation to provide that information to the person when they give their consent to the transfer.

Mr McCLELLAND—There is a section—I think proposed section 17—which talks about the likely effort by which the sentence will be enforced. I suppose that could mean the institution in which it is likely to be enforced and the conditions of that institution as well.

CHAIR—You mention the cases of Chidiac and Shepherd. Forgive my ignorance, but can you remind us of those?

Mr Anderson—Chidiac, Shepherd and Doney—there is a third one—are all drug import cases involving federal prisoners. This was the lateral example I made to illustrate—this has happened under successive governments, under Labor and current administrations—where there has been an internal process, which has been very unsatisfactory, of dealing with new evidence. In a way, that has problems that this bill does not in that the Attorney is being advised by people who either are or are seen to be sided with the prosecution in those federal drug cases. There is an apprehension of bias going on in that sort of process where the people who have substantial fresh evidence are unable to get what they see as a satisfactory rehearing of their sentence. Subsequently, for example, in Neil Chidiac's case, he is due to be released full term, having served nine years, and is continuing to pursue a review of his conviction. It is not something that arises here because this has nothing to do with appealable matters.

I just mention that by way of saying that there is a discretionary process going on there which has been most unsatisfactory but possibly which has disadvantages which this process may not have in the sense that the federal Attorney is not seen to be associated with most of these processes, except perhaps federal offenders being deported. There is an argument that if the Attorney is being advised by crown law officers who may have given advice in federal prosecutions, there may be some way in which people may feel aggrieved—for example, people who have been involved in importing drug offences and those sorts of things, which may make up a large amount of the federal people applying for this sort of facility. They may have some concerns about things going on behind closed doors and discretionary matters, particularly if the matter is delayed for a very long period of time. There may be some apprehension.

CHAIR—You spoke about a regular parliamentary review of the legislation. Would an annual report to the parliament from the Attorney-General in operation of the act—

Mr Marsden—I think the Legal and Constitutional Affairs Committee of the parliament should look at it and review it. I think the parliamentary committees are working very well, in the federal sphere anyway.

CHAIR—Particularly this one.

Mr Marsden—Generally speaking, I have given evidence before this one on many occasions and they seem to work. I think the review of them is excellent.

Mr BARRESI—This question may have been asked while I was out of the room, so I apologise if it has. You say in one paragraph of your submission:

Would the Attorney General 'translate' a foreign sentence for say, the illegal possession of alcohol, to a purely nominal sentence?

Can I imply from that that perhaps we should be prescribing what types of offences per country would be acceptable for transfer of a prisoner?

Mr Marsden—The problem is that we really consider it a joke that someone gets 12 months in gaol in Saudi Arabia because he has a bottle of whiskey with him. Therefore, we say we will not use that as a transfer because we cannot gaol him for that over here. If we had our way, as Australians, we would probably be quite happy for him to come back and let him go. We do not consider that that is that serious. But I suppose Saudi Arabia does not consider someone here who has a couple of pounds of dope or hashish in their pocket as very serious. Some other people in this country still think it is serious.

Mr Anderson—I think it would be very difficult to start trying to develop indices for each country. The simpler way might be to say, 'If there is to be a translation process, what are the appropriate penalties here?' and we can make use of a conversion process which applies under our own law.

Mr McCLELLAND—Although presumably the transferring country would write to the Attorney and say, 'What is the likely means by which the sentence will be carried out?' The Attorney-General writes back and says, 'Look, there is no crime or penalty. We would not propose to enforce a remainder of the sentence.'

That country can decide whether they would prefer to send the prisoner out of their country and not have to pay the cost of keeping them in gaol, but they have still retained the credibility or the viability of their own criminal system by having convicted that person. It may be convenient to them; it may not. It may not be such a problem.

Mr Marsden—I have a feeling—it is just a feeling because I was on the same body—that the Law Council of Australia did some work on this issue when the present Attorney was involved in an official capacity. I will go and see if I can pull it out, because I was on the same body at the time, but the Law Council of Australia did do some work on it. sandra The International Union de Advocates did some work on it. For your own information, Gary Downes, QC, of Sydney was the first Australian president of the International Union of de Advocates. He may be able to get you some material on it. Daryl Williams should know; I think it was done in his time. If I can get hold of it, I will.

Mr MUTCH—I have a question on consent. I am not sure how far we have canvassed this. Do you see any problems with the situation where the Commonwealth Attorney-General plus state Attorneys-General all have to give consent? What happens if a political issue arises here and one says, 'I am going to be tougher than you and I am not going to consent?' Do you have any comment to make about the consent requirements or would you prefer a situation where you just had one consent from the federal Attorney-General?

Mr Marsden—I would be quite happy with that. I think we could go around and abolish them.

CHAIR—But you could do that in one way. If the prisoner is coming back to Australia to a state prison, you need the consent of the state.

Mr Marsden—And you have the pigfight at the moment about the cost of state prisons, the federal prisoners in state prisons and all that.

Mr McCLELLAND—Tim, you mentioned that a lot of these prisoners would be the subject of deportation orders, presumably to be carried out at the end of their sentence. Is it therefore the case that in any event at some stage at the end of their sentence they are going to have to go back to their home country to face the music anyway?

Mr Anderson—I am not sure exactly how other legal systems deal with people who—

Mr Marsden—What you are saying is that at the end of their sentence they are going to go back anyway. If there is going to be some horrific experience when they go back, they are going to cop it anyway. There is basically a process here where you can actually appeal to the Attorney-General if you think they are going to be shot or all sorts of things done to them when they get back. My experience thus far is that if we are right about our argument, the Attorney will always.

Mr McCLELLAND—I suppose I am asking it in this context: how protective should we be of prisoners who make the request then, taking the risk of their own legal system, particularly if they are the subject of a deportation order?

Mr Marsden—I think the line you are thinking, I would agree with. I do not think you need to be that protective. If they make the request and they want to go back there and they have been well advised, so be it.

CHAIR—Thank you very much for your submission and for coming along today.

[1.05 p.m.]

EVATT, Ms Elizabeth Andreas, 67 Brown Street, Paddington, New South Wales 2021

CHAIR—Welcome. In what capacity are you appearing before the committee?

Ms Evatt—As a private citizen.

CHAIR—I am obliged to indicate that, although the committee does not require you to give evidence under oath, 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 parliament. We have received your submission, dated 17 December 1996. Would you like to make an opening statement?

Ms Evatt—Yes. I welcome this bill. I think it will be of great assistance to prisoners—whether in Australia or overseas—in helping them to return to their own community to serve sentences. My concern is that the operation of the act should be entirely compatible with international human rights standards and that the transfer of a prisoner should not create any likelihood of a breach of those standards in the country to which the prisoner is taken. Those are the principles that concern me. In my letter I raised one or two points arising from those principles.

Perhaps more broadly the problem that I see is, first of all, how the Attorney-General or the government decides which countries we shall enter into agreements with and how the attorney converts sentences; and, secondly, how the prisoner himself or herself is informed about the legal situation and about prison conditions in the other country. That last point was the one that I focused on in the letter. That is all I want to say in opening.

CHAIR—In terms of the practical application of that, is there anything more that you believe ought to be in the bill, firstly, in terms of prison conditions in other countries; and, secondly, the legal proceedings or the events surrounding the translation of the sentence from one country to another?

Ms Evatt—Under clause 6(3) a prisoner is to be advised about the legal consequences of transfer. I think the saving grace of the whole thing is that it is predicated on the request and consent of the prisoner. That is important. But to make such a request, one must be fully informed. Clause 6(3) says that the prisoner must be informed of the legal consequences of transfer. I would like to think that something might be added there, such as 'and provided with information about prison conditions.' That would be the essence of what I am saying. A prisoner may think he knows about the prison conditions in his country of transfer, but that may not be the case. If I were overseas and you asked me what the prison conditions in Australia were like and whether I would like them or not, I would have only a very general idea about that.

CHAIR—It is interesting you say that, because the evidence we had this morning from a prisoner who is a foreign national—someone who potentially would be able to make use of this legislation if it were in operation—was to the effect that prisoners were aware of prison conditions in their own countries through family or friends or the grapevine, I presume.

Ms Evatt—Then perhaps you could think about a prisoner having the opportunity to request information. How it could be provided, I do not know. But there are organisations that report on prison conditions. It may be a factor that goes into determining whether the government makes an agreement with a particular country. If they know that the prison conditions are so shocking, they may not enter into such agreements. I am worried about the situation in Rwanda; the prison conditions there are absolutely appalling. Are we going to be obliged to send a person to Rwanda under this act—assuming, of course, that they ask to be transferred? Does that apply to the tribunal prisoner? I do not think a tribunal prisoner has that option. Is that right?

CHAIR—No, a tribunal prisoner is in a different situation.

Ms Evatt—If you have seen anything on television, the conditions there are appalling. I would really be worried about sending anyone to a prison in Rwanda. That may need to be thought about.

CHAIR—As I understand it, in the case of tribunal prisoners it is in relation to transfer to Australia to pick up our obligations under the provisions relating to the War Crimes Tribunal.

Ms Evatt—We would not have to transfer someone to the tribunal? We probably do already. We are probably already obliged to do so; is that correct?

CHAIR—Yes.

Ms Evatt—The other point is whether a person who is transferred from Australia might, because of that, become subject to extradition to a third country. That would be a matter of concern, because such an extradition might put them at risk of, shall we say, capital punishment or other cruel conditions which would not apply in the country to which we sent the prisoner but might apply thereafter. Whether that is adequately covered by the fact that the prisoner requests the transfer, I do not know. Prisoners need to know quite a lot before they make these requests.

CHAIR—As I understand you, what you are hinting at is that if there were an application for a prisoner to be transferred to country A but there were, for example, a potential extradition application from country B to country A, the prisoner needs to be aware of that?

Ms Evatt—Yes, and I think that is covered where the application may already have been made. But it is when the application for extradition comes after the transfer that there is the problem. I suppose you have to rest on the fact that the prisoner requested this transfer and must be taken to be aware.

Mr McCLELLAND—Do you think that could be remedied whereby, in the section which talks about the Attorney-General requesting the likely means of carrying out the sentence in the country, there could be a provision added dealing with whether the prisoner is likely to face any other penalty?

Ms Evatt—It could be covered by that. What the previous witnesses said was important: we cannot right now anticipate a number of small problems, or maybe big ones, that arise in operation. One needs to keep the matter under review. I imagine there will not be very many cases—not hundreds of cases, anyway.

The situation will need to be watched carefully. I would like to think that all the discretions that will be exercised under the act will be exercised in a manner compatible with our international human rights obligations and that they will not at any point put a prisoner who is to be transferred—particularly out of Australia—in a situation where there is any likelihood of a violation of human rights standards.

I would like this committee to make a strong statement like that as a guiding principle to the way that the act should be implemented in practice. If it is in your report, it will be there for all time for whoever is exercising discretions and it will be there if any act of any government officer or Attorney-General comes up for judicial review as a question of legality. They will be able to look at that guiding principle to see that it was the intention that we should at all times be compatible with human rights standards and not risk a violation by a transfer. That would cover most of my concerns. I hope you would be able—I am sure that you would—to include a statement like that in your report.

Mr McCLELLAND—I suppose the dilemma there becomes how far the Attorney-General may go in causing an injustice to a prisoner who really wants to go back. Do you think the problem could be overcome if the Attorney-General or his representative, for instance, wrote to a prisoner and said that, in considering such a request, he would point out that the prisoner could obtain information regarding the prison system from, for instance, some of the organisations you write to, and he would recommend that the prisoner obtain that information before proceeding further with the request. Do you think that would be adequate?

Ms Evatt—I think the Attorney-General should have an obligation to make sure that the prisoner is fully informed and has the means of accessing the information that the prisoner needs. If the Attorney-General knows anything that might create a risk he should recommend either that the prisoner does not act or that, if the prisoner really wants a transfer, the prisoner is informed about such risks. It is not that I am saying that a person can consent to a violation of their human rights. We are talking here about the possibility of a risk that a prisoner needs to know about.

Mr MUTCH—For instance, there could be a case where a prisoner is blackmailed by people in the home country into returning. Threats could be put on the family of the prisoner. If the Attorney-General had wind of that, perhaps the Attorney-General would have an obligation to overrule any request for a transfer.

Ms Evatt—Yes, that is right. Although how he would find out about it, I do not know.

Mr McCLELLAND—I understand it is common practice in Americans gaols to use leg irons. I think we here would regard that as being in violation of a prisoner's human rights. Nonetheless a prisoner might want to back to that United States gaol.

Ms Evatt—Yes. That is right. The prisoner may want to risk conditions which we would see as not being fully in compliance with the UN minimum standards for treatment of prisoners as that prisoner may want to be close to family. It is a bit of a dilemma for someone, is it not?

Mr McCLELLAND—Yes, this is the issue that I am interested in. How far should the Attorney-General exercise parental control, if you like, over that prisoner, if he genuinely, after being given appropriate information, makes that decision?

Ms Evatt—I have to tell you that, in dealing with international human rights, I have seldom come across a country where one could say that prison conditions were fully up to scratch. There might be the odd country in Scandinavia, but elsewhere there are always defects.

Mr MUTCH—In view of all these difficulties, would you advocate, say, a country by country approach rather than a prisoner by prisoner approach to this?

Ms Evatt—A country by country approach will certainly come into it when we are entering into agreements. Do we not have to enter into an agreement with each country under this act? By and large there may be some countries that fall so far below the line that you would be very reluctant to enter into an agreement until their conditions were put right. Then you are met with a counter statement from developing countries that 'We cannot afford to put our prisons in good order.' We in the human rights committee simply do not accept that statement. We say that there is no excuse for not providing adequate food and clean water and hygienic conditions. We say there is no excuse for that—absolutely none. If you cannot provide people with clean water and fresh air, they should not be in prison at all. That is the case in some countries.

Mr BARRESI—As to the country by country approach, the comment was made by a previous witness that, even in Australia, some prisons are better than others. If we take a country by country approach, what assurance do we have that a prisoner is going to the prison that we envisage they will be going to, which meets the United Nations minimum standards, and not perhaps some back-block prison?

Ms Evatt—That presumably could be part of the agreement or part of the conditions attached to a transfer in the case of an individual prisoner. I have not examined the bill from that point of view, but I think one can put terms and conditions into an agreement with a country. Certainly one could have an expectation about the treatment of a particular prisoner before the transfer. If a country failed to honour its obligation, that would be the end of it for them, wouldn't it; they would not get another one back.

Mr BARRESI—It is incredibly restrictive, though, for a country to say, 'Well, we want our prisoner to go down to the Barwon prison in Geelong; it's the only place they'll go for the next five years,' and yet, perhaps through administrative constraints that may take place or any restructuring of the prison system that the state may have, that prisoner may very well have to go somewhere else which is of a lesser standard.

Ms Evatt—Yes, I can see that if you become too particular it could be a problem. But you could always then provide for substitution by agreement, I imagine; you would not need to tie yourself to one answer forever.

Mr BARRESI—On a separate issue: there has to be an agreement entered into country by country. If in coming to that agreement it requires reciprocity from one country to another, and the country which Australia is entering into agreement with has a low standard of prisons—much lower than the minimum for the United Nations—are we not then disadvantaging Australians in those foreign prisons by not entering into that agreement and is that not a violation of their rights?

Ms Evatt—Your question simply reinforces the view that there are many complications in the application of this legislation which will need to be watched as it moves along. I could imagine that the

government, in deciding whether to enter into an agreement with a particular country, would take into account how many Australian prisoners were already in that country, as well as other factors, in deciding whether it could go ahead with the agreement. You have to balance things out with each other. The benefits of allowing an Australian person to apply to come back to Australia have to be put into the balance against the possibility that a person from that country would want to go back to conditions which we think are substandard. How you weigh that up, I do not know. The government would have to weigh that up and decide what is best for Australia.

Mr BARRESI—Isn't the Australian government's responsibility first and foremost to its citizens?

Ms Evatt—It is responsible to its citizens, but it is also responsible to persons who are held in custody in Australia; they are entitled to the protection of human rights standards just as much as our citizens here or overseas. So you could not just ignore the human rights interests of the person who has been arrested and detained in Australia. They are, under all standards of international law, entitled to have their human rights respected too. Whether that is a question that comes up at the time an agreement is entered into or later down the track is hard to determine.

CHAIR—Can I just pick up Mr McClelland's question: is there a role for—for wont of a better description—paternalism on the part of the federal Attorney-General? Take for example a foreign prisoner in Australia wishing to go back to his or her country on the basis that there will be contact with family, and that is seen to be most important, yet the Attorney-General being of the view that the prison system in that country is of such substandard value that it does not meet on any reasonable assessment basic human rights; or, to take another example, the other country says, 'There is a possibility that this prisoner will also be dealt with for other offences and'—let us take perhaps an extreme example—'in addition to being sentenced for the remaining five years of a sentence is going to receive 20 lashes.' I know I am taking perhaps an absurd example, but in those—

Ms Evatt—I think that cannot be done under this.

CHAIR—Then leave that part out. Let us simply say that the prison system, in the opinion of Australian authorities, according to human rights standards, is so substandard that it does not meet the convention. In balance, would you like to comment on whether or not, despite the fact that you have not just the consent but also the request of the prisoner, the Attorney-General should act? You say in your submission that consent does not necessarily overcome a violation of rights. I am just trying to work out where that balance is arrived at.

Ms Evatt—It is difficult to do it in general without a special case. But I think you need to keep separate in the mind the question of the actual sentence, the conditions of the sentence, and the conditions in the prison. You have to work out, first of all, whether or not we have an agreement with the country. Abysmal conditions might be a factor to take into account in not entering into an agreement—though, as I said before, the fact that there are many Australians in that country who might want to come back to Australia would also have to be put into the balance. So we can envisage a situation where our government as a matter of policy might decide to lower its standards somewhat in entering into the primary agreement.

Then you have the question that you raise: the prisoner wants to go back and the conditions are poor; how much scope is there in this for the Attorney-General to negotiate with the other country about, first of all, which prison this person is to go to and, generally, about the conditions under which they will serve their sentence? If there were some scope, that could be part of the solution.

Of course, the solution I would like to see is that an off-shoot of all these agreements should be agreed international action and aid and support programs, if necessary, to try to ensure that all prisons throughout the world are brought up to what we could see as just a minimum standard of care. That really would be my goal in the whole thing. Whatever we do here about this, I know that throughout the world there are thousands, if not millions, of people who are held in prison in appalling conditions.

Mr McCLELLAND—You have referred to International Prison Watch, for instance. Do you know whether they go so far as to have some sort of ranking of prisons around the world?

Ms Evatt—They do not rank them numerically. But they do—I am sorry, I should have brought the report with me; the one I have is in French—analyse conditions in prisons in some countries. I have a report at home which is of several pages for each of about 80 countries under different headings. How they get information, I am not sure. But I imagine that there are other international agencies—one, I think, based in Vienna, the UN crime body—that would have more information on that than I can give you.

Basically, I do not really want to undermine the principle of the legislation. I think it is a good principle, because rehabilitation of prisoners is one of the primary aims that we have in sentencing and punishment. I would say that rehabilitation will be far more effective when a prisoner is in their own community than in a foreign country and with language problems.

CHAIR—I thank you very much both for your submission and for attending today.

[1.32 p.m.]

SIDOTI, Mr Christopher Dominic, Human Rights Commissioner, Human Rights and Equal Opportunity Commission, 133 Castlereagh Street, Sydney, New South Wales 2000

CHAIR—Welcome. 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 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 are in receipt of your submission to the committee dated 24 December 1996. Would you like to make some statements in relation to it?

Mr Sidoti—Yes, I will make some introductory comments that, first, go to the broad policy issues that concern us in making this submission and, secondly, that actually propose a couple of places within the drafting legislation of the bill before the House and the committee where we think there is some need for refinement. In the latter case the written submission did not go into detail about these, and so this is the first time we will be putting them before the committee.

The commission's submission emphasises the human rights issues of the proposed scheme for prisoner transfer, particularly its important humanitarian and social implications. Offenders gaoled outside their home country often suffer additional burdens of isolation through lack of access to a network of support from family and friends; cultural and language barriers, which may affect such things as medical and legal assistance; and often high security ratings which may result in their being ineligible for work, study and day leave. Foreign nationals imprisoned in Australia can experience similar burdens and disadvantages, as noted in the Australian Law Reform Commission's 1991 discussion paper, *Multiculturalism: Criminal Law*.

Our submission has stressed that access to family and cultural support, study and day release can be seen as integral to rehabilitation, reintegration and the observance of humanity in the treatment of prisoners. It also recognises that the ability to maintain links with people who are in prison is equally as important to the families and friends of prisoners.

These considerations are reflected in the international human rights treaties to which Australia is committed—in particular, the International Covenant on Civil and Political Rights, ratified by Australia in 1976. These human rights treaty obligations include the obligation to ensure that the treatment of prisoners is consistent with the essential aim of the reformation and social rehabilitation of the prisoner, which is article 10(3) of the ICCPR; the obligation to treat all people deprived of their liberty with humanity and with respect for the inherent dignity of the human person, which is article 10 (1) of the covenant; the guarantee of rights under the covenant without distinction of any kind, including race, colour and national origin, which is article 2; and the undertaking to prohibit and eliminate racial discrimination with respect to 'equal treatment before the tribunals and all other organs administering justice', found in article 5(a) of the Convention on the Elimination of All Forms of Racial Discrimination.

In determining what is 'treatment consistent with humanity' and 'respect for inherent human dignity', under article 10 of the covenant, it is necessary to look to the United Nations *Standard Minimum Rules for the Treatment of Prisoners*. Those standards provide that before:

completion of the sentence, it is desirable that the necessary steps be taken to ensure the prisoner a gradual return to life in society . . .

They also provide that:

. . . from the beginning of a prisoner's sentence consideration shall be given to his future after release and he shall be encouraged and assisted to maintain or establish such relation with persons or agencies outside the institution as may promote the best interest of his family and his own social rehabilitation.

Our submission has stressed particularly the importance of the proposal for the observance of the rights of children and indigenous peoples. Each child has a right to 'maintain personal relations and direct contact with both parents on a regular basis', a commitment founded on the Convention on the Rights of the Child in article 9. A child is entitled to the care of both parents so far as it is possible, and states have an obligation to 'use their best efforts' and 'render appropriate assistance' to ensure that. The proposal before the committee would assist children to maintain regular contact with parents and obtain the support and care that even an imprisoned parent can provide where the parent is imprisoned outside the jurisdiction.

The proposal is also critical to the observance of the cultural and family rights of indigenous peoples. The national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families, which our commission is currently undertaking, has confirmed the implications of the Royal Commission into Aboriginal Deaths in Custody that there is a strong link between forced removal from family and imprisonment as an adult. A significant but unknown number of children were forcibly removed from their families and taken overseas by foster and adoptive parents. The case of James Savage or Russel Moore is an example of that. It indicates that there is no reason to imagine that the link is severed by removal overseas. A summary of that case was provided with the commission's written submission to the committee and I will not go into it again now, unless committee members have questions about it.

The proposed legislation therefore is an important measure to overcome the effects of past injustices and discrimination against indigenous peoples. It can be seen as a necessary measure to facilitate the ability of Aboriginal and Torres Strait Islander people to maintain and/or re-establish family, cultural and community links where an individual has been removed overseas and finds himself or herself imprisoned.

The commission has expressed a concern in its written submission about the possibility that indigenous children forcibly removed from their families and taken overseas by their foster or adoptive parents might not meet the citizenship or Migration Act requirements proposed in clause 13 of the bill before the committee. Our written submission therefore recommended a simple modification to prevent the obvious injustice that could result—and that is to add a third category of eligibility: an Aboriginal or Torres Strait Islander prisoner who was removed from his or her family as a child.

Another concern raised in our written submission was the need to ensure the participation of all states and territories in the scheme. To operate uniformly, the scheme depends on each state and territory government passing enabling legislation. We understand that there is some suggestion that the Northern Territory is unlikely to participate in the scheme, but we have not been able to ascertain the reasons for that likelihood. If that proves to be so, Australians from the Northern Territory who are imprisoned overseas, and foreign nationals imprisoned in the Northern Territory, will be denied the same rights as others who benefit

from the scheme.

The commission notes that the potential non-participation of the territory in the scheme presents a particular problem for indigenous peoples who were forcibly removed from the jurisdiction. Clearly, the practice of forced removal was widespread and intense. There may be a considerable number of people who were removed from the Northern Territory and are now imprisoned overseas. We simply do not know. Non-participation by the territory would deny those people forcibly removed as children and others in circumstances of territory citizenship or residence the opportunity to reunite with their family, to re-establish links with communities and country and, in the case of indigenous prisoners, to socialise with other indigenous people and enjoy their culture.

The commission has recommended therefore that, to forestall this possibility, the bill should provide explicitly for extension to all Australian internal territories, either directly or by way of regulation if the territories themselves do not legislate.

There are some technical aspects of the bill that were not addressed in our written submission which I would like to refer to briefly for the attention of the committee. These matters refer to particular proposals for slight amendment to some clauses of the legislation.

The commission notes and endorses the provision of the Attorney-General's discretion in relation to the eligibility requirements of dual criminality and more than six months of the sentence remaining to be served. We recognise that there may be circumstances where the Attorney would wish to enable a person to return home and deal appropriately with the terms of sentence, even if these requirements cannot be satisfied.

The commission recommends that the legislation should provide that, when exercising any discretion under the Act, the Attorney-General should have regard to human rights and humanitarian considerations, especially whether there are any grounds for belief that the prisoner may be subjected to violations of human rights or torture in another country. Under those circumstances particularly, it will be desirable, to say the least, to ensure the return of the prisoner, even though the requirements of dual criminality and more than six months of the sentence remaining have not been met.

As transfer prisoners would be classified as federal prisoners, the Commonwealth must also guarantee responsibility for human rights and treatment by state correctional authorities. This is a broader matter that relates to federal prisoners generally and is one that I am happy to go into further, if you wish, in questioning.

The bill is strong on the need for informed consent to transfers. The commission considers this emphasis essential to the aims of the scheme. At a practical level, I would comment that, once the scheme is in operation, every effort should be made to facilitate access by foreign nationals imprisoned in Australia to relevant government and non-government organisations to assist the provision of full and accurate information about prison conditions in transfer countries. Information about the transfer scheme should be translated into a range of languages suitable to prisoners imprisoned in Australia, and it should be widely disseminated to prisoners in Australia and to Australian nationals and permanent residents imprisoned overseas.

The legislation would benefit from some clarification about the nature of consent—in particular, that consent is required not only to the transfer but also to the terms and conditions in relation to the transfer and the rights of prisoners to withdraw consent that are already implied but not explicit in clauses 10 and 20.

For that reason, we recommend that clause 6(4) state clearly that consent is required not only to the transfer itself but also to the terms and conditions in relation to the transfer. Clause 6 deals with consent. What we would propose is the addition of words in relation to that consent in subclause 4 to make it clear that consent goes to the whole question of transfer and not just the fact of it.

We also suggest that the provision dealing with consent in clause 6(6) be somewhat clarified to enable it to be explicitly stated that withdrawal is possible prior to transfer. The current wording of this subclause indicates that consent cannot be withdrawn after the transfer, but we believe that should be augmented by an explicit provision that says that consent can be withdrawn up until the time of transfer.

I draw the committee's attention to article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That convention must be observed as an obligation and commitment of Australia, even though there may be consent to a transfer on the part of a prisoner resident here. Article 3 states:

No State Party shall expel, return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

It continues:

For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The need to protect against the return of people to states where they may be tortured should be specifically recognised in the legislation. We recommend therefore that clause 20(4), which goes to the requirement for the consent of the Attorney-General, state that the Attorney-General is not to consent to the transfer of a prisoner where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

It would also be useful if the bill were to clarify that a transfer country, and not just Australia as a transferee country, may also grant a pardon or amnesty or commute a sentence resulting from a conviction under Australian law. Clause 48(1) specifies explicitly that Australia can provide for a pardon or an amnesty or a commutation. We suggest that subclause (1) be amended to insert the words 'or under a law of the transfer country' after reference to Australian law towards the end of this clause. This would make it quite clear that a transfer country can also exercise local laws and local powers for pardon, amnesty and commutation.

CHAIR—Can I just interrupt. What clause was that?

Mr Sidoti—Clause 48(1). I conclude with two general comments. First, in view of the longstanding

concern about the imprisonment of Russell Moore in the United States, which I referred to earlier, there is some degree of urgency attached to the completion of the scheme that is currently before the committee.

We request that the legislation receive priority so that Australia can ratify the Council of Europe Convention on the Transfer of Sentenced Persons and join the Commonwealth's scheme for the transfer of convicted offenders as a matter of urgency. In relation to Mr Moore himself, we would see his case as being one where immediate transfer is justified.

Second, in view of the fact that Australia is opposed to the death penalty, the commission also recommends that Australia make every effort to enter agreements that provide for the transfer of death row prisoners from relevant countries. The commission acknowledges that the obvious need to subsequently commute death sentences to an alternative sentence is likely to pose some difficulties, but these difficulties do not seem to us to be insurmountable. Every endeavour must be made to protect the humanity and the lives of those sentenced to this kind of inhumane treatment.

Australia has a policy of opposition to the death penalty in all circumstances, and it is a policy which is held strongly by all parts of the Australian political spectrum. The transfer of prisoners provides another opportunity to advance that policy internationally. Thank you.

CHAIR—Thank you, Mr Sidoti. Just one matter of clarification, you referred to clause 20(4). I presume you were suggesting that there be a clause 20(4).

Mr Sidoti—Yes, that is correct. I am suggesting the addition of an additional subclause to clause 20.

CHAIR—Can I just take up one matter, my colleagues may have others. I am perplexed that the Northern Territory is indicating that it is not proposing to be a part of this scheme, given the fact, as I am advised, that the Northern Territory was the government that first raised this with the Standing Committee of Attorneys-General.

As you point out, that can pose problems in relation to Aboriginal and Torres Strait Islander people in particular. But it seems to me to pose a problem more generally. As a hypothetical example, we could end up in a situation where Australian prisoners in a gaol in one of the countries party to the European convention—such as France—who were from Queensland, New South Wales, et cetera, would be able to request a transfer and come back to Australia; whereas if the prisoners were from the Northern Territory, that would not be open. Vice versa, if there is a prisoner who happens to be imprisoned in the Northern Territory, rather than in Queensland, who is a foreign national, he would not be able to make use of the legislation. That seems to create a dilemma to say the least in relation to that.

Do I take it from what you were saying that, if that is the case, we ought to be looking in the legislation to in some way use Commonwealth legislation or regulations to provide that all Australians could make use of the legislation? For that matter, it would provide to all foreign nationals no matter where they are imprisoned in Australia.

Mr Sidoti—Yes, you can read that into my comments. The situation, if the territory did not become a

party, is a general situation. I highlighted the indigenous dimension of it because it is a matter that has come up with some degree of seriousness before our inquiry into the separation of indigenous children, but it would be a general problem.

We have tried to find out what the basis of the difficulty is, and we have not been able to. I do not know why the territory might have a concern, or indeed whether it is strongly held or just a disinterest or apathy at this stage. I cannot tell you that. But it would be absurd to have one Australian jurisdiction not part of such a scheme, particularly a tiny jurisdiction. I must say that we, as a commission, do not have any problem with the Commonwealth exercising its constitutional powers and responsibilities.

Mr McCLELLAND—Further to that, could that problem be overcome if the decision making as to the transfer of a prisoner was vested solely in the federal Attorney-General, who, in turn, when exercising his discretion, could have regard to the views of the particular state where the prisoner was going to be located?

Mr Sidoti—Yes. I think it would be overcome by doing that. I certainly do not see any constitutional problem with it. I do not see any practical problem, because if these prisoners are defined as they are in the legislation as federal prisoners, there is a constitutional obligation on the states to take federal prisoners within the state prison system. So if that were the arrangement, the Commonwealth would not find itself with prisoners on its hands that it could not deal with. The states are obliged to take them. Certainly, that would ensure that there is a national scheme and a scheme that did not require state legislation. They would simply be treated as federal prisoners.

CHAIR—Does that work in reverse, though?

Mr Sidoti—It would work in one way, but not the other. That is right.

CHAIR—Yes, so what is the solution the other way?

Mr Sidoti—I think the only solution the other way would be to have the enabling state legislation and to have the Commonwealth parliament legislate for federal prisoners and for the territories.

CHAIR—So would the Commonwealth deem the prisoners to be federal prisoners for the purposes of this legislation?

Mr Sidoti—So far as the territories are concerned, there would be no need even to do that. The Commonwealth has power to pass laws for the territories.

CHAIR—I am well aware of that.

Mr Sidoti—I am certainly conscious of the fact that you are aware that of that, Mr Chairman. As I say, we do not have any difficulty with the Commonwealth exercising its constitutional powers. It would not be necessary to do any deeming for territory prisoners. They could be covered by direct Commonwealth law.

Certainly, you are correct in saying that, so far as the states are concerned, the transfer of prisoners from the state would be dependent upon state legislation. The only way in which it could be done under

federal legislation would be the exercise of external affairs powers, and at this stage we are not suggesting that that should be embarked upon.

CHAIR—I must say that it is my personal inclination that we try to explore with the Northern Territory whether there is some particular problem as to why they are not proposing to enter into the arrangement—given, as I said, that the initiative came from the Northern Territory as I understand it in the first place.

In relation to the Attorney-General's discretion, I take it that you are happy with the Attorney-General having a discretion rather than there being specific criteria set out. Simply what you would like to add is some reference by the Attorney in exercising that discretion to human rights considerations.

Mr Sidoti—That is correct. I think it is appropriate that it be a discretion. The circumstances are such that, outside the eligibility criteria provided in the legislation, if the Attorney's hands were forced, we could get some quite ridiculous situations arising. Discretion enables each case to be considered on its merits on a one-off basis. The criteria that we would like to see included do go to human rights and mistreatment considerations more than anything else.

Mr BARRESI—Can I explore the issue of pardons and the reduction of sentences. Which jurisdiction do you believe should be responsible for that—the country that the prisoner is transferring from, in other words, the sentencing country, or the one in which the sentence is being completed?

Mr Sidoti—Our suggestion, which goes to one of the amendments which I proposed to you, would be that the power lie with both countries. There may be circumstances both with the transferor and the transferee where a pardon is considered to be appropriate. So someone who is transferred out of Australia, for example, should not be subjected to a detriment because of that transfer. If there were some form of amnesty offered or reduction in sentences, for example, where Australian prisoners have the advantage of that, transfer should not preclude that advantage. Equally, the day-to-day care and control over the prisoner would be in the transferee country. So, again, our view is that whatever benefits are available they should be passed on to that prisoner. It allows a wide discretion, in other words.

Mr McCLELLAND—For instance, previous evidence stated that an Australian was convicted overseas of the illegal possession of alcohol. If that was transferred to Australia and there was no offence obviously in Australia for that, you see that it would be appropriate in those circumstances for that prisoner to be pardoned?

Mr Sidoti—I would. I see that as a circumstance where we can take into account Australian law, policy and customs if the person were back here.

Mr BARRESI—But with the approval of the sentencing country?

Mr Sidoti—The scheme in the legislation at the moment does not require the approval. I think to require the approval could unnecessarily complicate the scheme. Perhaps a clearer example may be the practice in some countries—Thailand is one—where, on particularly significant days in the history of the

imperial family, two-week amnesties are provided to prisoners.

There is the practice in Australia that provides that, when there is a prison strike and prisoners are locked up in their cells, they are often given a remission of a couple of days for each day of the strike to take account of the additional hardship that they experienced. It would seem to me to be unjust if those sorts of benefits were not passed on to prisoners simply because they happened to be in one jurisdiction or another under this particular scheme.

Mr BARRESI—And the appeal of a sentence? There is some debate as to whether or not a prisoner should be transferred only after all appeals have been exhausted. What are your thoughts on that?

Mr Sidoti—I consider that appropriate. It needs to be a final sentence in the country in which the sentence is imposed, and the person needs to exhaust the various appeal provisions.

I do not go so far as to say that any possibility of review needs to be exhausted as well. There are circumstances under Australian law where petitions can be made to the Governor or inquiries established by supreme courts or courts of appeal to review the circumstances of conviction, imprisonment and sentencing. Clearly, they are designed to cover particular cases where some injustice is subsequently suggested and review is considered appropriate. I think the normal course of conviction and appeal should be exhausted before the system comes into play.

I do not think it would be appropriate for an Australian court or a court overseas to be hearing an appeal against sentence that has been passed by a court in another jurisdiction—certainly not at this stage under the development of international law. Nor is it appropriate to deny the prisoner of the appeal rights that he or she may have. Even if the person consents to transfer, it is placing undue pressure on the individual to forgo appeal rights within the system in which the conviction occurs.

Mr McCLELLAND—Would it not be appropriate to allow that choice to the prisoner as to whether he wanted to abandon his appeal rights and pursue a transfer instead?

Mr Sidoti—I have not thought it through intensely—I had better introduce a caution. I must say that it would certainly place a great deal of pressure on a prisoner to forgo those rights, and it may not be in the prisoner's long-term interest to do so. My own feeling is that it is better to exhaust the criminal prosecution processes of the legal system where the prosecution commences before a transfer scheme comes into place.

Mr McCLELLAND—I suppose a prisoner could exhaust those any way by instructing his lawyers to discontinue an appeal.

Mr Sidoti—That is right. He can fail to undertake an appeal. If the appeal is not lodged within the required period of time, that is the end of it. That is probably the answer, I think.

Mr McCLELLAND—Just on a further point: I understand your submission in respect of Aboriginals and Torres Strait Islanders, but would it be worthwhile to add an additional class if there was no corresponding amendment to the Migration Act? In other words, if they were transferred to an Australian prison but, when they finished their prison sentence were still not Australian citizens and therefore liable to

be deported, would there not need to be a corresponding amendment to the Migration Act?

Mr Sidoti—I had better take that on notice. I have not looked at that particular point. Let me beg off.

CHAIR—Can I just take that up. You say that clause 13 should have the additional category of Aboriginal and Torres Strait Islander. Why is that? Take the case of James Savage. As a person born in Australia, is James Savage precluded under the current terms?

Mr Sidoti—If James Savage has lost his Australian citizenship, yes. Under certain circumstances, a child takes the citizenship of the parents. Australia has dual citizenship provisions under some certain circumstances which, I must say, I find quite complex. If there was a child who was taken overseas, adopted, acquired an additional citizenship and lost Australian citizenship, there would be no entitlement to return.

CHAIR—So is the answer to specify the category of Aboriginal and Torres Strait Islander or to specify the circumstances without reference to race?

Mr Sidoti—Certainly, we would have no objection whatsoever to a broader category that talked about persons born in Australia wishing to return to Australia. I have no trouble with that at all. Equally, I am not in the least bit concerned about specifying race if the broader category were not acceptable to the parliament. This is one clear situation where the position of indigenous peoples is so serious that special provision can properly be made for it.

CHAIR—I am just asking the question. May there not be some non-Aboriginal people in that situation who it would be unfair to exclude because the additional subclause refers only to Aboriginal people?

Mr Sidoti—Yes, there certainly could be. For that reason, I would be happy to see the clause extended further.

Mr McCLELLAND—On that point, I do not know their desire or when they are adults, but take the case of the children who were taken out of Australia by their father, the Malaysian prince. What would happen if circumstances befell them and they were in an overseas prison and they wanted to serve their time in an Australian prison? That is a long assumption and probably defamatory.

Mr Sidoti—Perhaps it is a long assumption of a particular case, but there is international concern about the international kidnapping of children. I think part of that concern would go to those circumstances where a child who has been born in Australia and is forcibly removed or removed without the consent of the other parent and acquires another citizenship should have the entitlement to return to this country.

CHAIR—There are no further questions, Mr Sidoti. I thank you very much for the submission and also for coming along this afternoon and addressing it.

Mr Sidoti—Thank you.

[2.12 p.m.]

GARNETT, Ms Lyn, PO Box 216, Parramatta, New South Wales 2124

CHAIR—Welcome. In what capacity are you appearing before the committee?

Ms Garnett—As a private citizen.

CHAIR—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. I understand, as you indicated, that you have a son who is currently in a Thai prison. Would you like to make a statement to the committee?

Ms Garnett—Yes, I would like to make a statement. Firstly, there are a million other places that I would rather be than sitting here in front of this committee, but far be it from me to miss an opportunity as great as this to explain how very difficult it is. Martin was detained on 25 September 1993 and put into custody. He has had no legal representation at all in English. My son does not speak Thai and has had no English spoken to him in any legal capacity whatsoever, other than to be interpreted by the Australian embassy in Thailand. He has had to appear in court five times and had no idea what was being said. He is quite astute inasmuch as he learns body language very quickly. He got through from body language only.

There was a panel of five judges each time, and he had to run by the seat of his pants literally because he was not asked a question at all and he did not speak at all in the court. That was the first thing that was terribly difficult to overcome. Australia is such a wonderful country, and to think that my son had to be put into this situation, regardless of why he is there. That is not my concern and I cannot do anything about that.

He was detained and put into a cell with about 35 people. He has not had a shower for about 3½ years. The first day that he was taken to prison they said, 'Take off all your clothes.' He was standing there in a rainy yard, and he noticed that there were piles of tin plates in the corner. There were cats everywhere, he said. After he was body searched in this open yard, he was told to get dressed. Then he passed out these plates to all the other prisoners, because that is what new prisoners do. Then he had to serve up this brown rice that had fish heads in it that had maggots in it, and that was what they ate. That was in what I suppose we could call the police cell before he got to prison.

Then he went to the first prison where he was detained while the court hearings went on. That went through until February the following year. He was then sentenced in February or March of 1994 to 40 years. He was sent to Bang Kwang Central Prison in Nonthaburi, which, depending on what time of the day you are travelling out there, is about six hours by taxi from Bangkok. At this prison the conditions were slightly better than where he was in Klong Prem, but not much.

He was then put into a cell with 22 people. It is about the size of our single car garages that we have here in Australia. There were wooden benches down either side, and each prisoner puts his head towards the

wall and his feet outwards. They are all in chains, and Martin happens to be six foot six. All the Thai people are very lucky if they are five foot. So his feet were hanging out over the edge of all these other people. Everyone has to walk up this narrow little path to go to the open-pit toilet that is at the end. That is the condition that he was in. For about seven months he was in chains after being transferred to Nonthaburi. With good behaviour and all sorts of things, he was out of chains before the end of 1994.

I find it very interesting that you should suggest that prisoners exhaust every other appeal in their country. It is just an amazing situation. It is not what you know; it is who you know and how much money you have. I do not have any money. Just the other day Martin sent me a letter which I have photocopied and which you are quite welcome to have saying that there are already prisoners free that had 2½ times the amount of heroin that he was carrying. This person who was set free this week was from Saudi Arabia. Saudi Arabia are supposed to be really hard on drugs, and yet their government is supporting their prisoners and helping them get pardons and whatever it is that they are entitled to. But there is nothing here for Australian prisoners at all—nothing.

Here is another letter from Martin dated September which says, 'Great news, Mum. I don't have TB.' We do get letters; we get letters quite regularly. I have files of letters. For two months he thought that he had TB. He eventually got himself to a hospital and found out that he does not have TB. As I indicated before, Martin is a very determined person. Rather than sit there in irons and do nothing, we exhausted every avenue we possibly could. Eventually we got him into extended learning from the Queensland university. Last year he did his entrance exam, and he says in this letter written in September that on the way back from the hospital the guard gave him an assignment in which he got 39 out of 40. For every other subject he got back a result of 99 per cent.

There is good and bad in everything and Martin, like me, will take every opportunity available. He does talk about his determination to come back to Australia to make sure that other kids do not get into the situation that he is in. It is all very well to say, 'This is a criminal person in another country.' There but the grace of God go anybody's children. It can happen to anybody. He is determined about his study. He is now applying for first-year psychology because he feels that he will be able to help the youth of Australia not get into the same position.

It is all very well to say, 'These are the rules and he should have known better,' but he says that you get into a spiral of destruction and circumstances put you further and further down this spiral of destruction. He feels that he now could assist a lot more people. This is why he is studying to have some sort of a degree: so when he does come back to Australia, regardless of when that is, he might be able to do something. Just maybe one other family will not have to go through what we have gone through.

Martin has a younger brother who is 21. When he was sentenced in early 1994, there was a photo of Martin in the *Sydney Morning Herald* in chains. His younger brother, who was then about 18, tried to kill himself. Every part of his body that was not covered with clothing he cut. He cut his legs, all up his arms, his neck—everything. He did not die. He had to have some time in Westmead Hospital. He fought and we worked together, and he pulled himself through. He is now fine. He is working with me as my secretary because he could not get another job. But that is working out beautifully.

That young kid felt so much trauma because Martin was his idol. Martin did not smoke; he did not even take aspirins. Martin is not a drug addict, and yet he found himself in that situation. Christopher found that very, very difficult to deal with, and he dealt with it the only way he knew how. It was because I was so aggressively determined that two boys lives would not be wrecked that I pulled him through. His sister, on the other hand, after being traumatised has now been diagnosed as being totally schizophrenic. She has not worked at all for three years.

The reason I am telling you this is to point out that I am an Australian citizen, that I pay taxes and that I am a good citizen. It is terribly difficult when you cannot do anything. I did not even know this committee was sitting today. I rang up by chance and spoke to Claressa. There has been no information given to me about the appeal process that we can use in Thailand; nothing at all. It has just been a mother helping a son out of sheer love and care that has kept that boy safe.

He has not got AIDS and he will not have AIDS. But I cannot even give him toothpaste when I go over there. I am not even allowed to give him a tube of toothpaste. It is very, very difficult. Had I known that this situation was one where I could talk to you, I would have had Martin write to you. I can do that now if that is what you want, because he would love to talk to you through letters. I am just flying blind here. I am just begging you to get this happening.

CHAIR—Thank you for that, Ms Garnett. I would like to pick up on a couple of things that you have mentioned.

Ms Garnett—Sure. I do not mind if you ask me questions.

CHAIR—It may be useful to us. What assistance was provided to your son by Australian officials?

Ms Garnett—When the sentence was passed, they told him that it was 40 years.

CHAIR—When he was arrested, was there contact with the Australian embassy?

Ms Garnett—Yes, the Australian embassy was there. The first letter from the Australian embassy was to say, 'We can assist Martin but we cannot do anything legally.' And they will not do anything legally. It was explained to me that I should envisage Thailand as the family next door who brings their children up one way and that I bring my children up another way. That person next door might bring their children up totally opposed to the way that I would. That is the situation that the embassy was in. They had no control over the laws of that country. Therefore they would not interfere.

CHAIR—I understand that. Did he have any legal representation in the court cases?

Ms Garnett—No. The embassy did not get him legal representation at all.

CHAIR—Did you or did he or did anyone?

Ms Garnett—As it turned out, the person I thought was his very best friend was one of the drug

lords that put him there. So that was a catch-22 situation, and I fell on my face badly by relying on this person who was sent over to Thailand. I thought she was doing things in favour of Martin, but in actual fact what she was doing was getting him locked up so that Martin could not come back to Australia to talk about all the people who put him in that situation. He was sold down the mine because it was convenient for the people in Australia not to have him here. That is how I see it; that is the way it is. He is still over there.

CHAIR—Just so I can be absolutely clear: was he represented by a lawyer in court?

Ms Garnett—A lawyer from Bangkok who could not speak English, and Martin could not speak Thai.

Mr McCLELLAND—Was the lawyer appointed by the Thai authorities?

Ms Garnett—No, I think he was appointed by this person who went from Australia over there. The embassy did not interfere at all. They did not assist him with any legal representation at all, as far as I understand.

Mr MUTCH—This is a private Australian citizen that you are talking about?

Ms Garnett—It was a solicitor here from Australia—

Mr McCLELLAND—Who went over there.

Ms Garnett—Yes. She got there before I did, and I was there 12 days after he was detained.

Mr MUTCH—Who paid for her fees?

Ms Garnett—I don't know, but I didn't.

Mr MUTCH—Who was the solicitor?

Ms Garnett—I would rather not say—oh, the solicitor's name is Leigh Johnson.

Mr McCLELLAND—So she went over to—

Ms Garnett—Thailand to speak to Martin.

Mr McCLELLAND—Did she represent him?

Ms Garnett—She did not represent him in court, no, but she got the lawyer for him in Thailand. How she did that I do not know.

Mr BARRESI—Were Martin's requests for translation heeded?

Ms Garnett—The embassy was sitting next to me in court one day that I was over there, and the man from the embassy just said, 'Look, I will tell you what all this means later.' There was no English translation in any court appearance at all.

Mr BARRESI—And he made requests for translation services?

Ms Garnett—I presume he did. It just was not possible.

Mr MUTCH—So, despite what was happening, they did not make any attempt to give him a literal translation.

Ms Garnett—No, nothing at all.

Mr BARRESI—Has Martin been through any of the appeals processes available to him, and is he aware of what those processes are?

Ms Garnett—No, he is not aware. As a matter of fact, the top part of his last letter says, 'Mum, I must start trying to find out if there is any way I can get an appeal.' There might be a little bit on that half letter, but there is lots more in this last letter that I got a couple of days ago saying, 'I've got to start doing something to get out of here because I've got no assistance whatsoever.'

Mr McCLELLAND—Have you been back in touch with the Australian embassy in Thailand to discuss that possibility with them?

Ms Garnett—I have not, no, because I am not allowed to speak to the Australian embassy here. There is only one appointed family member and that is his uncle and he has decided that he does not want to do anything anyhow. He has done as much as he wants to do. He has been over there a couple of times.

Mr McCLELLAND—Are you saying the Australian embassy would refuse to talk to you?

Ms Garnett—No, the Australian embassy can only speak to one family member, and I am not the appointed person. When it first happened, I was the naturally appointed person and then Martin appointed his uncle because there was a fiance involved who did not like me so his uncle was sent. So the embassy in the first place communicated with me.

Mr McCLELLAND—This is the Australian embassy in Bangkok?

Ms Garnett—No, from Canberra. But, whence his uncle was appointed as a contact person, I got no more information. Once I did call down to Canberra and I was told that the embassy staff were not allowed to speak with me because I was not the appointed person.

CHAIR—Do you know whether his uncle has been provided with information about the appeal process and the avenues available?

Ms Garnett—I am pretty sure he would have been because that is something that Tony would have contacted me with saying, 'This is happening and that's happening. This is what is available.' There has been nothing said to me about appeals at all.

CHAIR—Are you on good terms with the uncle?

Ms Garnett—Yes, that is why I am saying that there has been nothing said to him because I feel sure that I would know if there was an appeal available to Martin.

CHAIR—Can I ask you about another matter. He refers in his letter to the Saudi Arabian man who got life for 16 kilos of heroin and is:

. . . already free! He was put in prison after I was!

Do I understand your reference to that to mean that the effective length of a sentence in Thailand, regardless of what the court may impose, is something which is negotiable?

Ms Garnett—Yes.

CHAIR—And negotiable according to what?

Ms Garnett—Who you know or how much money you have got.

CHAIR—So a 40-year sentence—

Ms Garnett—Could be commuted to three years.

CHAIR—On the basis of who you know and how much money you have got?

Ms Garnett—The first time I went over I was told that, if I had a spare $A1 million, Martin would be on the plane back with me, but I do not have a spare $1 million.

Mr McCLELLAND—You mentioned in your evidence earlier that the Saudi government was supporting this other prisoner. Do you have any first-hand knowledge of that? Why do you assume it was necessarily the government?

Ms Garnett—Only that letter that Martin sent me this week.

Mr McCLELLAND—But that does not imply that it is necessarily Saudi government money.

Ms Garnett—Yes, he says in that letter, doesn't he? I am not saying it is government money. It is government support.

CHAIR—He seems to be suggesting the Saudi government had supported an application for a pardon.

Ms Garnett—There is also another case of a man called Marco, who is in the same cell as Martin. I think he is Portuguese, I am not sure. His government put in an application, the Thailand royal family granted him a pardon, but his embassy had not prepared his papers, so he missed his pardon. That is the sort of thing that happens.

You can go along to a Thailand prison thinking, 'These are the rules. This is where I've got to go and hand in my passport so I can go and see Martin,' and then the next time you go it is completely different. They seem to change the rules with the weather.

CHAIR—In relation to this bill, though, let us assume what you have described is the way the system works in Thailand for the purposes of discussion. That seems to me to create difficulties for this bill because, if a person is sentenced, as your son is, to 40 years imprisonment in Thailand and comes back to Australia with some translated sentence which is agreed between Thailand and Australia, and let us assume that it is only 20 years, could we not have a situation where he then spends 20 years in an Australian gaol whereas if you had hunted around and raised sufficient money he could have been out within a couple?

Ms Garnett—Yes, that is the case, but I do not have the facility to gather that much money and Martin has already said in numerous letters that he would do the full 40 years just to get back to Australia.

CHAIR—So you take that to mean that, even if it meant spending 40 years in gaol in Australia, he would much prefer to spend those 40 years here than whatever length of time, even a lesser length of time, in Thailand?

Ms Garnett—Yes, definitely.

CHAIR—The reason for that?

Ms Garnett—Sleeping conditions, health conditions, study conditions, family conditions. One of his grandmothers has already died. The list is endless. He would much, much prefer to be in Australia.

Mrs ELIZABETH GRACE—Just following on that, what difference would it make to you and your family if he were back here in Australia? Where would you see the benefits in that side of it?

Ms Garnett—It is very difficult, first of all, to be put in the situation where this is just so foreign to me as an individual to have a son who is in prison. There is not a day goes by that I am saying to myself that I do not believe that I am in this situation, but because of that I find it very difficult to see my son in my mind's eye walking in that filth.

For instance, there was a rainy season about October and the gaols have really high walls and they seem to be down from the roadside. Because of the rainy season, all the water was rushing into the gaol so that the whole gaol was three feet in water for about three weeks and there was sewage floating around in three feet of water. Each day that I get a letter I think, 'Is he going to say that he's sick or is he going to say that he's got sores on his legs, or what's he going to say?' At least here in Australia I would know that my son would be as healthy as he possibly could be.

He has now taken on this determination to study. The opportunities to be able to get a book to him—he has asked me to buy a book just recently that has cost me $28; that is not the point, but it is going to cost me $12 to send it—mean every piece of reading material that he has has to be paid for by the family. I feel that if he were here, his sister might be able to make some inroads to becoming a healthy person again, whereas she cannot in this situation.

CHAIR—Ms Garnett, have you read the bill?

Ms Garnett—I received it Wednesday morning.

CHAIR—I was just asking that as a precursor to asking whether you had any comment on it, if you wanted to.

Ms Garnett—No, I have not read it. I feel that, even if I did, I do not have the knowledge to decipher it.

CHAIR—That is fine.

Mr McCLELLAND—When you started off you were listening to previous evidence, I take it that you do not think a prisoner should be compelled to exhaust his appeal rights before he is eligible to apply for a transfer back to an Australian gaol?

Ms Garnett—If that is the case, Martin will be there for 150 years.

Mr McCLELLAND—You think it would be easier for you to get lawyers here to sort through what has happened and to get a plan of action and perhaps for the lawyers to go back and conduct the appeal while he is residing in an Australian gaol?

Ms Garnett—Yes, I do. There is another point too. Martin was given a very light sentence in the Thailand law and he was told in the last court appearance not to appeal because, if a foreign prisoner appeals and they lose, they then get executed. So that is why he did not push for an appeal.

Mr McCLELLAND—Without criticism to you, you seem to be basing this on third-hand accounts to you. You have not had the opportunity to sit down and discuss matters with the lawyers first hand. Do you think it would be easier for you to do that if your son were here in Australia and you could arrange legal representation?

Ms Garnett—That is the only way that I could speak to lawyers because I cannot speak Thai and there is no Australian representative there legally for me to access, otherwise I would have already.

Mr BARRESI—There will be some in Australia who will be extremely critical of our even introducing this bill on the basis that Australians know when they go to some of these nations what the penalties are and by introducing this bill we could in fact be removing a deterrence from those crimes. What would be your thoughts on that? It is probably a question better asked of Martin directly than of you, but I

would still like to hear your views on it.

Ms Garnett—I think that the whole point of the fact that Martin is in Thailand is the fact that not enough is known by the Australian public about the conditions and about how easy it is to find yourself in that situation of being detained in Thailand. Martin wrote to the embassy very early in his piece and said, 'Please, can I put a statement into each person's passport who leaves Australia?' and it was rejected.

I do not believe that Australian people understand at all. There might be learned people. We all know that it is something that you cannot do, that it is wrong, but circumstances prevail for some people that they just do not have the complete knowledge about how awful a situation they would put themselves in. They just do not know.

Mr BARRESI—You have indicated where the Australian government, or the embassy in Thailand, has perhaps failed your son. What is it now that you would expect at this point?

Ms Garnett—No, I am not specifically saying that they have failed. Once I was told that my son has 40 years and it is in another country and the Australian embassy does not have any jurisdiction over the law in that country, I did not think that I had any right to appeal. So, when I am saying that I am disappointed that there has not been any appeal made, I am disappointed that I was not informed.

Even this hearing today I just found out by chance. I was not told. If I am not going to be told, who does get told? I feel as an Australian citizen I should have been told that this was happening today and that I should have been given the opportunity to put a written submission in. Martin should have been given the opportunity to put a written submission in. He is an Australian citizen.

I think that it is very, very difficult for you because you do not get told the real truth. Martin has already said that, when the embassy are coming to the gaol for a visit, everything gets tarted up and dressed up really pretty. The embassy do not even get to see the real facts, but you are quite welcome to any one of those in excess of 400 letters I have got.

There was a prisoner who was doing the wrong thing and the guard belt him down. They call this guard Fred Astaire because he gets the prisoner on the ground and then stands on his face and swivels on one leg. They call this guard Fred Astaire because he dances on their face. You have got no idea, no idea at all.

CHAIR—How often have you visited?

Ms Garnett—Three times.

CHAIR—Would you think any Thai person in gaol in Australia would want to go back to those conditions?

Ms Garnett—We have such a different culture. The Thai people do not value life the way we value life. They do not have the same priorities we have. Their king is their God. They have a picture of the king in shops, on jewellery, on everything. Everything that that king says, they all bow down and agree to. We

have got a say here in Australia. We do not even think about that fact with other people in other countries. That is what they like, that is what they are used to, that is what they prefer. They just do not think the way we think. Yes, I imagine every Thai person in Australia would love to go back to his own country.

CHAIR—Even to those conditions?

Ms Garnett—Yes, because that is the way the Thai people are. Family is everything to them.

CHAIR—So you are saying that, even if they are facing what we might describe as atrocious conditions, which are substandard by any reasonable measure of human rights, if this legislation were in place, there could be prisoners who might choose to go back to that?

Ms Garnett—I am sure that every Thai person that you speak to would want to go back to his own country, regardless of what he faced. That is the sort of people they are. They just love their king and their country.

CHAIR—Ms Garnett, thank you for coming along today and sharing your experience with us.

Ms Garnett—I would like you to have this letter as well. It is not nearly as much evidence as I would like to have given you. So if you do want more, please ask and I will give it to you. If Martin can write to you, I think that would be great. If you could just tell me who he should write to.

CHAIR—I will have the secretary speak to you. Thank you very much.

Resolved (on motion by Mrs Grace):

That the copies of extracts of letters be accepted as exhibits and received as evidence to the inquiry.

[2.51 p.m.]

SHEARER, Professor Ivan Anthony, 76 Goodhope Street, Paddington, New South Wales 2021

CHAIR—In what capacity are you appearing before the committee?

Prof. Shearer—I am appearing in a personal capacity.

CHAIR—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 dated 9 January 1997. Would you like to make some comments to it?

Prof. Shearer—Yes, if I may just summarise the two main points I have made in my submission, then perhaps mention a couple of matters that have come to mind since I wrote that paper. I see two special advantages of the bill over and above the other advantages that have been set out by the Attorney-General. The first of these is that there is a problem about Australians who are wanted for crimes committed abroad and whose extradition is sought by foreign countries from Australia. There is a facility under most of our treaties and under the act to refuse the extradition of an Australian citizen merely by reason of the fact that he or she is an Australian citizen. If there were an agreement with that foreign country for the repatriation or transfer back of sentenced prisoners, it would make it easier for us to extradite Australian citizens on condition that, if they were convicted of the offence abroad and were sentenced to a period of imprisonment, then they would be sent back to Australia to serve their sentence.

The second point is also an extradition point. In recent Australian treaties, Australia has waived the prima facie case requirement. That is the requirement which used to exist that, before we would send anybody back to another country for trial, whether that person be an Australian citizen or not, we would require the requesting country to furnish evidence of guilt—not proof of guilt—sufficient to raise what we call a prima facie case. That is the same test that, under our present system in Australia of committing for trial persons accused of indictable offences, a magistrate would require before committing that person for trial before a higher court.

This prima facie case requirement has been abolished in the case of many—perhaps most—countries. It seems excessive to me to think that an Australian citizen could be extradited to a foreign country on the mere basis of a warrant without any supporting evidence of guilt. I have been long opposed to that. That change in the law occurred with the passage of the 1988 Extradition Act and in the subsequently concluded treaties. Even though I remain opposed to that, if this bill became law, and if agreements with the relevant countries were concluded, it would at least ameliorate what I see to be a grave defect in our present extradition proceedings; namely, that we could extradite an Australian citizen in the absence of evidence of guilt but on condition that, if the person were convicted and sentenced, he or she could be sent back to Australia to serve the sentence. So those are the two central points that I have made in my written submission.

I turn to a couple of additional matters that have come to mind since I wrote that submission. At the time that I wrote it I was looking for a file containing some materials which I had collected on this subject some years ago. I had misplaced it. I have now found it. I started this file in 1991. I was approached in that year by a group calling itself ASETT, which stands for Australians Supporting European Transfer Treaty. I do not know whether that group still exists or whether it has made a representation to this committee. That was a group of prisoners from foreign countries already in Australian gaols who were at the time urging the state Attorney-General—I think this was an entirely New South Wales based organisation—to do something about Australia becoming a party to the European convention.

There were some interesting figures that were attached to that submission, which they got from official sources. I hope that the committee would have available to it the updated figures. The figures I was supplied with then for 1988 were that, of the prison population of Australia, 20.44 per cent were non-Australian prisoners who, in principle, might be eligible to take advantage of any such scheme if it were to be introduced. The largest number of foreign prisoners in Australian gaols came from the United Kingdom and Ireland—there is a composite figure for the two countries—and the second largest number came from New Zealand.

It was estimated that the total cost to the taxpayer to maintain non-Australians in Australian gaols at the time was $171 million a year. I do not know how that is balanced out by the number of Australians in foreign gaols, but I suspect that the figures would show that the number of Australian prisoners in foreign gaols is less than the number of foreign prisoners in Australian gaols. I suppose one could make the purely economic argument that we might be better off with such a scheme, that we would actually be a net recipient in financial terms from such an arrangement.

A second point that I thought of after I wrote my submission was to ask—although I then rejected the idea—whether there should be some form of enhanced credit granted for time spent in inferior foreign gaols. I was thinking about it again when the previous witness was giving her evidence. We all know that conditions in gaols around the world differ greatly. As a result of a case that I was involved in as counsel, I know that Germany pursues a three level policy so far as giving credit off a German sentence to time spent in foreign gaols awaiting extradition. If a German is extradited from a foreign country to Germany, the time awaiting extradition and so on in foreign custody is counted off the ultimate sentence. This would be true here too, I think. For gaol conditions that are comparable to German gaol conditions, the equation is the same. But where gaol conditions are significantly inferior to German gaol conditions, then one month in such a country is counted as the equivalent of two months in Germany. Imprisonment in atrocious gaol conditions is counted three to one.

In fact, in the case in which I was involved, the German prisoner, having been awaiting extradition proceedings and appeals and so on for the 2½ years he spent in Long Bay Gaol, when he got back to Germany, was convicted of the offence and sentenced to 10 years. The 2½ years in Long Bay were treated as the equivalent of five in German gaols. They did an exact study of conditions not in Australian gaols generally but specifically in relation to Long Bay with evidence from people here. They concluded that the conditions in that gaol merited a two for one ratio.

Supposing the son of the previous witness were to return to Australia with, let us say, 30 years left of

his sentence to serve. Should the 10 years he has spent in Thai gaols count as 10 years or might they be regarded as the equivalent of 20 years or even 30 years in an Australian gaol? It sounds an attractive argument to make but, in the end, I think it would be unworkable because this scheme will only work on the basis of adherence to a multilateral treaty as in the case of the European convention or, presumably, the bilateral treaties in the case of countries like Thailand. I do not see Thailand or any other country agreeing in a formal document that their gaols are twice or three times as bad as ours. Diplomatically, it would be extremely difficult to carry off. On the other hand, there are the questions of amnesty and so on, but that is a separate point. I will come to that in a moment.

In the end I do not urge that on the committee as a viable solution. It may well be the case that, even if the sentence already served before transfer occurs is much more rigorous than would be the case in Australian gaols, nevertheless, it should still be counted as only the same period.

The third additional point—I have four altogether—is clause 49 of the bill. This was brought to mind by the summary of issues raised in relation to this bill which I got a couple of days ago. It is the one page document which appears to be a digest of the submissions already received by the committee and which seem to be causing some degree of concern.

I refer to the third hanging dot down in relation to concerns about difficulty in ensuring the release of a prisoner who has been transferred from Australia and is subsequently pardoned, granted amnesty or commutation by an Australian court. I do not think that can be right. Courts do not give pardons or grant amnesties. It would be the Australian government I should think, and that relates to clauses 48 and 49 of the bill.

I do not actually have problems with that point because that would be answered by diplomatic pressure from the Australian government to the other governments saying, 'Live up to your obligations under the agreement that we have.' What I am a little concerned about is the obverse of that coin. It is clause 49 which is in relation to prisoners who are transferred to Australia, because the only pardons, amnesties or commutations of sentences that are given effect to in Australia are those according to paragraph (1)—if they could have been granted them under Australian law had the sentence been imposed in Australia. I wonder whether that is too restrictive.

Let us take Thailand as an example again. Amnesties or commutations of sentences are often granted on, say, the King's birthday or because it is the such and such anniversary of the King's ascension to the throne. Everybody gets a couple of years or so off their sentences. There is no equivalent to that in Australia. Should not the prisoner who is here be entitled to the benefit of that amnesty? I just raise that as an issue. Why should it necessarily be one that could have been granted under Australian law if it is to the benefit of the prisoner?

My final point is again a point that was taken up by someone else. It is the fourth hanging dot point from the bottom of that page—concern about the dual criminality condition. To be eligible for transfer, a prisoner must be receiving a sentence for acts or omissions which would constitute an offence had they taken place in Australia, subject only to the discretion of the Attorney-General that the requirement need not be satisfied. Having thought about that, I agree there is a problem there. Why should the Attorney-General have

an unreviewable discretion to waive the double criminality requirement?

I wonder whether that was an unfortunate piece of drafting. I wonder whether it should be better reworded to say that the Attorney-General may decide whether that condition has been satisfied.

I understand the thinking behind that clause. It was to the effect that, when we talk about double criminality, we can think about it very broadly—that is, if a certain course of conduct is engaged in in one country and the same course of conduct is also an offence in another country. It might not be called the same name. It might have different characteristics and there might be different exceptions, defences and so on. Maybe what that clause was aiming at saying was that we do not want prisoners in Australian gaols who have been transferred back to Australia from a foreign country taking out a writ of habeas corpus and claiming that the dual criminality condition has not been satisfied for technical reasons.

I think it would be most unwise to waive it altogether. It is rather a determination that, in a broad sense, the same course of conduct would have led to punishment in Australia, and it is not some peculiar offence by the foreign law of which we know nothing and which would not be an offence were that to occur in Australia. So it may be a drafting error or something that this committee could suggest by way of a drafting improvement of clause 15(1)(b) read together with clause 15(1)(3). Thank you, Mr Chairman, that is all I want to say.

CHAIR—Thank you. Just on the last point, it would seem that clause 15(1)(b), which you are making reference to, picks up Article 3 1.e of the Council of Europe Convention on the Transfer of Sentenced Persons, which says:

> A sentenced person may be transferred under this Convention only on the following conditions:
>
> . . . . . .
>
> (e) if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory . . .

If that is the case and the draftsman's purpose was to translate that article into the legislation, does that pose a problem in seeking to redraft it in the terms that you are proposing?

Prof. Shearer—No, I do not have any problems with that. It is rather with 15(1)(3), which goes on to say:

> (3) The Attorney-General may determine that the requirements of subsection (1)(b) or (2)(b) need not be satisfied . . .

In other words, he 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. I think that would cure it.

Mr McCLELLAND—Just on that point. We heard earlier about an Australian in Saudi Arabia convicted of the illegal possession of alcohol. Do you think the Attorney-General should be able to deem that

person to have committed the offence of the illegal possession of alcohol in Australia for the purpose of serving the Saudi sentence in Australia?

Prof. Shearer—That perhaps explains why the original wording was put in. Perhaps it was thought that, although there is no equivalent of that offence in Australia—it is not illegal in Australia to have alcohol—it might be better for the Australian to come back to Australia to serve a sentence for the offence in an Australian gaol rather than to stay in Saudi Arabia. Maybe that was the thought.

But 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. Even though it sounds harsh, I think it is probably better that that person stay in Saudi Arabia and serve that sentence.

One could argue that everybody should know that, when they go to foreign countries, if those foreign countries have particular local customs or morals, they should respect those. They should not flagrantly violate the liquor laws of a country that does not allow liquor. But to then say, 'We ameliorate their plight by bringing them back to Australia and putting them into gaol,' seems a bit difficult. One could imagine what the public reaction would be to that. That is probably a very rare case.

Mr McCLELLAND—But is that necessarily the case? The Attorney-General here might get an inquiry from the Saudi authorities saying, 'We have a request from Mr Bloggs who would like a transfer back to Australia. He has been convicted of the illegal possession of alcohol. What would be your intentions for carrying out the remainder of the sentence if he was so transferred?' Our Attorney-General might write back and say, 'There is no offence in Australia. We would not intend to inflict any penal sentence upon him.' The Saudi authorities may say, 'He is an embarrassment here. It is a diplomatic embarrassment. Nonetheless, we want to appear to the rest of our community to be enforcing this law. We don't really care if the Australian authorities let him out. It is a matter for him.'

Wouldn't subsection (3) give our Attorney-General the discretion to do that? If you remove that discretion, it may result in a situation where that Australian is compelled to serve out the equivalent time.

Prof. Shearer—Yes, that is right. That is what I am worried about. The earlier part of the scenario which you sketched out is more likely. It is better that in the end the Saudi authorities decide to deport the person, but as soon as that person comes back to Australia, he is free because he would not be under this scheme.

CHAIR—Isn't the alternative there that the person remains in gaol in Saudi Arabia?

Prof. Shearer—Yes, unfortunately so.

Mrs ELIZABETH GRACE—That would work out more as a deportation rather than a prisoner transfer, would it not?

Prof. Shearer—Yes, if the Saudis could be persuaded to deport, assuming we had an agreement with them. I think it will probably in the end come down to only those countries with which we have an

agreement, because I think this whole bill assumes that there will be bilateral or multilateral agreements that will come under it.

If we had an agreement with Saudi Arabia, I have no doubt that it would probably apply only to those prisoners who have committed offences that are recognised by both sets of laws—in which case, this question would not arise. The person would not be eligible for transfer if it were not an offence in Australia.

In all probability, we will not have agreements with those countries, so I do not really see the need for section 15(1)(3). I think it would be much better if it were reworded in the way that I have suggested. Otherwise, it does suggest that the Attorney-General can throw the whole principle out and that it is an unreviewable act of discretion.

CHAIR—Professor, can I take you back to your first point about extraditions and the possibility of transfer of the prisoner back to the country from which he or she was extradited. Are there not problems with that proposal because it is prospective? Say a person in Australia is sought by another country by way of extradition. As I understood it, what you were suggesting was that extradition might be more agreeable in circumstances where, if that person was convicted in the overseas country, he or she would be transferred back to Australia to serve their sentence. That is what I understood your scenario to be.

Are there not problems though that, under that scenario you are talking about, it is a prospective situation whereas the act seems to work on the basis that a person has been sentenced and that that person is then seeking transfer? Can you set up a scheme whereby if a person is extradited and convicted and sentenced they will be transferred back?

Prof. Shearer—I see the problem but I do not see it as a major difficulty. In fact, we already have this kind of problem in another way under our present extradition arrangements. In our treaties and under our act Australia may make extradition to a country which imposes the death penalty conditional upon the death penalty, if it is imposed, not being carried out. So that does refer to a future and hypothetical situation because a person is presently only accused of a capital offence in another country. We say, 'Okay, we'll send you that person back. But if the death penalty is imposed you will not actually carry it out.' The precedent has been set there.

I have heard it argued, 'But what do we do if this is ignored and if the death sentence is carried out?' It is the same as asking about any breach of any agreement. We have diplomatic means of protest and we can take retaliatory action against that country. It is no different from the breach of any other international undertaking whether it is contained in a treaty or not. What I am saying could apply to a country that is not a party to a transfer of offenders scheme but is a purely ad hoc arrangement in the particular case with the particular country. We can make our extradition conditional that if this person is sentenced they will then be sent back to Australia to serve their sentences.

If they say, 'Yes,' well then that is a binding commitment in international law. It would be evidenced in writing. Any formal promise evidenced in writing counts as a treaty in international law and is enforceable accordingly.

CHAIR—Are you suggesting that, if such a condition was proposed, it would be more likely that there would be more extraditions?

Prof. Shearer—I do not have the figures to suggest that. At present, if the extradition of an Australian citizen is requested, we have the option under section 45 of the act of 1988 and also under the provisions of extradition treaties to refuse the extradition of Australian citizens. But then the only option is to try them in Australia for the foreign offence.

That section was put into the act in 1988. I have not heard that it has ever been used. I suspect that because of the horrendous problems of trial—having to fly Boeing 747 loads of witnesses from the other side of the world, the language problem, the evidentiary problems because the case has been investigated by foreign officers who are not aware of the standards of proof required in Australia and so on—that that would almost inevitably lead to acquittals.

I have no means of knowing how many extraditions of Australians have been refused under these provisions, but there has in fact not been a prosecution under section 45 of the Extradition Act 1988. No doubt the Attorney-General's Department could tell you if there have been any cases of Australians whose extradition is refused on account of nationality.

If there have been such cases, it would be a failure of justice because those people would go free unmeritoriously. But, under this proposal, they could be extradited and then brought back to Australia to serve their sentence. In other words, trial would take place in the place where it is most appropriate—namely, in the place where the offence was committed and, again, in the community which was offended by the offence. Then they come back to Australia for the rehabilitative stage of the whole process. That seems to me to put every stage of that process in the appropriate place.

Mr BARRESI—I want to just pursue that line for a while—and I do not have a legal background, so excuse me if I have got it wrong. I have put the appeal process and the review of a case to a couple of witnesses here in terms of in which country it should take place. Should it be exhausted at the country of sentencing to begin with and, if the review does take place—for example, in the Australian system—are we not then presented with problems in terms of rules of evidence? As you say, we will look at a case based on our rules for a case that has been tried in Thailand or Saudi Arabia under a different system.

Prof. Shearer—I do not understand the bill to say that there can be any appeal or review of sentence carried out in Australia in respect of a sentence imposed overseas against a person who is now being transferred back to Australia, nor do I believe that that would be a good idea. I think that would represent an infringement of the sovereignty of the country which tried and sentenced the prisoner.

Quite apart from the practical difficulties to which you refer, I think it would be unacceptable. I do not think any country would negotiate a treaty for transfer on the basis that the transfer country could then act as an appellate tribunal in relation to a trial and sentence of imprisonment that has been imposed abroad. They would not accept that. So I do not see the possibility of any such appeals being entertained once the person has been transferred. I think all appellate rights and so on should be exhausted in that country before the transfer takes place.

Maybe I would want to make an exception that, if the appellate process is extremely drawn out and if it is rather theoretical, the prisoner might well wish to waive any further appeal rights in the country and come back to Australia to serve the full length of sentence. I think that would probably be a matter for the personal choice of the prisoner concerned.

Mr McCLELLAND—Do you think that should be a mandatory obligation? For instance, if it were a technical appeal done on points of law and the evidence was already in, could that appeal not be conducted in the country of the offence while the prisoner was occupying an Australian gaol?

Prof. Shearer—I suppose it could, but I suspect that, again, if you put yourself in the negotiating positions of Australia and the other country sitting down and negotiating a bilateral treaty which would operate under this scheme, the feeling would be that all matters relating to the trial and sentence were within the province of the country where the offence occurred. To mix the two up or to have the prisoner in another country whilst matters affecting conviction and length of sentence are being decided, I just do not see it.

Mr McCLELLAND—There would be practicalities regarding instructions and things of that nature, I suppose.

Prof. Shearer—Again, it is the sovereignty issue that comes up there.

Mrs ELIZABETH GRACE—Have you ever had anything to do with, or are you familiar with, the structure and operation of any of the international transfer of prisoner schemes that are operating anywhere in the world? Are you aware of any of them?

Prof. Shearer—I am aware of them, but I have not made it an object of special study. Extradition has been for me a subject of special study. This, of course, is allied to it and I have taken an interest in it. But I would not claim to be an expert, for example, on how the European scheme is operating, how the Commonwealth scheme is operating or the bilateral treaties which I think the United States and Canada have with some countries. I think I am right in saying that there is a bilateral treaty between Canada and Thailand for the reciprocal transfer of offenders, but I just do not know how well it is operating or how frequently it is invoked.

Mrs ELIZABETH GRACE—The other thing I was interested in that you were referring to before was the enhanced credit scheme because of the conditions of prisons, and I can understand why you discard the idea. I see it fraught with all sorts of difficulties. Do you think that the standard of prison conditions should be taken into account when the transfer of prisoners is being considered? Do you think that should be one of the criteria?

Prof. Shearer—Maybe this is one respect in which the very wide discretionary powers of the Attorney-General under this bill, which have been pointed out by other commentators, might work to the advantage of the offender. I have been wondering about the implications of the two different modes of execution referred to in the bill. These are termed the continued enforcement method and the converted enforcement method both of which are mentioned in clause 42, but we do not hear anything more about them. The difference between the two, as clause 42 says, is the converted enforcement method is the one

where the Attorney-General substitutes:

. . . a different sentence of imprisonment for that imposed by the transfer country or Tribunal . . .

It may be that, as a matter of negotiation in a particular case between Australia and the foreign country concerned, the Attorney-General might say, 'Twenty years in your gaol would be a significantly harder sentence than 20 years in an Australian gaol. This Australian has already done five years in your gaol, would you agree that we count that as 10 and give him only a further 10 to serve in Australia?' Maybe that is the sort of thing that could be done under that provision. I do not know but, as it stands, it probably could.

So I suppose the Attorney-General could take that matter up, but I think it would be a matter for diplomatic negotiation in each particular case, and I doubt whether the Australian side could push that very far. They might encounter considerable resistance by the other country to make, in a sense, an admission that their gaol conditions do not meet international standards.

Mr McCLELLAND—In other words, it is probably appropriate to have that broad discretion on the part of our Attorney-General.

Prof. Shearer—I think so, yes. I would not oppose it there, no.

Mr BARRESI—In my previous question you spoke about sovereignty and infringement of sovereignty if an appeal took place in Australia when the sentence took place overseas. At the same time, though, you also mentioned earlier whether a prisoner should not benefit from perhaps sentences that are commuted because of a king's anniversary or accession to the throne.

Using that argument, therefore, should not the prisoner in Australia be also privileged to some of the remissions that may be due to that prisoner from Australian conditions? One of the witnesses today spoke about days being taken off the sentence if there were strikes and they were locked in their cells. Is that not then an infringement on the sovereignty of the sentencing country as well if we do that?

Prof. Shearer—The bill follows the provisions of the European convention, and I think it is written into that, and also the provisions of any likely bilateral treaties that we might enter into, that any amnesty or commutation and so on imposed by one side would automatically apply to the prisoner transferred to the other and also that the enforcement of a sentence would be carried out in accordance with local laws so that any local commutations and so on would also be to the benefit of the prisoner.

I think that is understood, and I do not think that would be regarded as an infringement of sovereignty when the countries concerned have already, to an extent, surrendered their sovereignty by even allowing a person who has offended their laws, who has been tried and convicted and sentenced, go to their home country to serve it. That is already a very considerable surrender of sovereignty, but it is done on the basis of reciprocity and the mutually convenient administration of justice and so on. So it works both ways because they get back their prisoners under this scheme too.

I think a commutation of sentence on the grounds of something which has happened that is peculiar to

that gaol—let us say a prison strike in which for a period of time they were not looked after in the same way so they got a few days remission off their sentences—is quite appropriate. It would be understood in the sentencing country as being a purely local arrangement. It does not significantly make inroads on the foreign sentence. I do not think in practice that would prove to be a difficulty.

CHAIR—Professor, may I thank you very much for the submission to the committee and also for the period of discussion this afternoon, which has been quite informative and will help us in our deliberations. Thank you.

Prof. Shearer—Thank you.

[3.33 p.m.]

DOWD, Mr Justice John, President, Australian section of the International Commission of Jurists, c/- Chambers of Mr Justice Dowd AO, Supreme Court of New South Wales, GPO Box 3, Sydney, New South Wales 2001

CHAIR—Welcome, Mr Justice Dowd, to the inquiry. Judge, I am obliged to indicate the committee does not require you to give evidence under oath, but 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 aware that you have an interest in this matter. Although there is not a written submission, there may well be aspects of it that you would like to address in the capacity in which you appear before the committee and I invite you to do so.

Mr Justice Dowd—Thank you, Mr Chairman, and members of the committee. Firstly, I want to commend the attorney for the introduction of the legislation. It is supported by the International Commission of Jurists. It is an area in which I have long had an interest in my various previous lives.

I also want to place on record our commendation to the parliament for the use of this committee system. I think it is a superb means of gaining input to legislation and I think a lot of other parliaments could do it as well, so I commend the process very much. The only problem, of course, is that I arrived back from Indonesia earlier this week to find that I was giving a view on this not having been able to look at it before that, for which I apologise. Therefore, some of the views which I will express will be only tentative views not having been seriously thought through. The problem that your committee system has, of course, is that yesterday I was giving evidence before another of your committees about the situation in Hong Kong. But, as I say, I very much commend the procedure.

My interest in the area comes from the fact that I have for many years been conscious of the problems of foreign prisoners here—not so much, as is publicised, of Australian prisoners overseas. When I visited Mulawa about 20 years ago, I saw two young American girls who were quite clearly intelligent, educated kids who had been picked up as drug couriers. They were not carrying, but the procedure at that stage was normally to have several people go onto the plane and have someone pick up the luggage. Several of them had got out on bail and were back in the United States continuing their course. These kids did not get bail and were remaining there. They were so out of line in the prison that it was very sad, not that I was in any way condoning the offences that they had committed.

I also visited prisons in Bangkok—Klong Prem and the women's prison—mainly because I was looking at the circumstances of a particular parent whose son was in a prison there. He had psoriasis—a skin disease which is extremely painful—firstly, in Bangkok and, secondly, in a Bangkok prison. There was one Australian woman in the women's prison with 1,500 Asian women. She was convicted of the offence and she was a tough lady. I think Ayres was her name.

Her circumstances were emotionally appalling. She had no-one to communicate with. She had

committed the offence. She was eating food that was alien to her and sleeping on the floor and so on. Again, I have no sympathy because of the seriousness of the offence. However, the circumstances for her were seriously worse than the other prisoners who could have family, friends and so on. Therefore, she was not serving the same sentence as the others; she was serving a sentence that was heavier.

The Australian male prisoners that I visited there were exactly the same in Klong Prem. Not only were they cut off from their family and friends; their family and friends were cut off from them. I see prisoner transfer as a concern not only for rehabilitation, which it approves, but also for the people that just happen to be related to that person. Therefore, children, husbands, wives and parents go through an appalling life worrying daily about someone in a Bangkok prison. The Bangkok prison actually was not all that bad. I made a point of not telling people that, because I like people to be afraid of going to Bangkok prisons, but it was not all that bad in terms of conditions. They were not badly treated, except for the food. The parents had to supplement with food and medical supplies which are just not available.

Various countries have different policies in relation to overseas prisoners. In my experience, both overseas and here the United States of America are superb in the way that they look after prisoners. They go and see them; it does not matter what the offence is. They look after them, they convey messages and so on. Australia is not bad. It is patchy, but it is not bad depending on how busy the particular mission station is.

I visited Sinclair, Heywood and Fellows on a separate visit when they were in gaol. They had the usual complaints that people were not taking up their case. Nevertheless, they were being looked after by Australians. But other countries are not so good, and these are matters of real concern. If you look at our gaols here, we have people that ought to be back with their families even if it is only for a weekly visit or a monthly visit for rehabilitation. So I very much support this, and the Australian Section of the ICJ supports it.

I would like to address one of the matters that is raised in your notes. A concern has been expressed about prison conditions in other countries. No-one is going to be forcibly sent to another prison. It is going to be on application. I think there are Thai prisoners who would quite happily be in a lower standard Thai prison than a higher standard Australian prison. It is optional. These people were not going to go unless they were transferred. They may not be up to scratch but, as I have said, the ones that I have seen are not too bad. And not everything that I have seen in our prisons is such that we can criticise. I remember my first visit to Long Bay. I looked at the open windows and the bars, and I said to McGeechen, who was head of corrective services, 'What is the heating system here—personal warmth?' That is 20 years ago, so we have only just seen the light in these terms.

What I would like to do would be to quickly go through some provisions of the bill. I am sorry to do it in that form, but I think it will highlight particular problems. On my quick reading of it—and I really have not been able to study it properly—am I right in saying that there are no enforcement provisions in respect of those prisoners that we transfer to other countries? As I understand it, part 6 deals with it. The big gap in the bill is that I do not want prisoners being transferred to other countries which let them out the next day, and I do not think the Australian public do either.

We do not control those other systems. We have to assume that there will be multilateral treaties and all sorts of countries with all sorts of systems. I do not want a bill to allow someone who is serving 10 years

here to go over there and be released and made a hero of. I remember, for instance, a Yugoslav boy who was shot a few years ago at a consulate here. I, as Attorney-General, advised that he was guilty of an offence here. I have, of course, no power. He was let out and returned to his country a hero, when he had shot a 15-year-old boy who I think still has the bullet in his neck. He was a criminal in New South Wales terms, and he is a hero in that country.

So, in my view, unless we have some very strong provisions by way of treaty—and I understand all the difficulties—I do not see safeguards in this bill to ensure that a political decision will not be made in another country. Governments come and go, and regimes come and go that put out an Australian criminal who might have 10 years to serve. In my view, an industry will grow of country selection. If, for instance, you are an ethnic Chinese who has spent some time in Hong Kong, Vietnam and was originally born in the People's Republic of China, you can pick your best shot and get transferred back to a place where you may be able politically to persuade a government to let you out. Most decisions about prisoners will be on legal bases, but many governments will make political decisions on high profile cases.

CHAIR—Can I just interrupt you there, Judge? Is not the enforcement provision in this legislation twofold? Is there not an enforcement in the sense in that, first, there will be an agreement between the governments? One presumes that, if that agreement is breached by one government, the other government would be reluctant to continue the process. Secondly, is there not some assurance that would be sought by the Attorney-General or Attorney-Generals, federal and state, in Australia as to the likely sentence that would be carried out in the recipient country?

Mr Justice Dowd—We are about to see in five months at midnight Hong Kong, without consent, handed over from one colonial power, the United Kingdom, to the People's Republic of China, another colonial power. There was an agreement in place since 1984. China has already breached it. Britain has done nothing. Assuming that there may be 30 to 40 prisoners a year, there is a real sanction that, if you do not put Bloggs back in, we are going to take our marbles and go home. With respect, I do not think that is real. I think there will be protests, letters and newspaper headlines.

Take Christopher Skase, for instance. He became a Spanish citizen and went back there. We have had too much experience of people in other countries interfering with or assisting that legal system to make decisions to think that this is a real sanction. Assurances from Attorneys-General—and I very much respect their assurances—are only as good as that one's term in office. You cannot bind a future government or a future Attorney. If someone in government says that they will serve their Australian sentences here, a change in government could see someone saying 'No, we do not recognise this offence now' or 'We think he was wrongly convicted' or whatever. So I do not think you have sanctions. I am not saying that I have any answer as to what they should be.

Mr McCLELLAND—Do you think it may be a matter of the formality of the agreement between the two countries? For instance, Professor Shearer, who gave evidence earlier, thought that a formal exchange of correspondence would amount to an international treaty or an international agreement enforceable as such. It may be simply a matter of the form of the assurance if it were done in a formal exchange of letters by way of an agreement.

Mr Justice Dowd—The point I made about Hong Kong was that it is a formal agreement between Hong Kong and China. China has already breached it. No-one is going to enforce it. It is not real to say that there is a legally enforceable document from a practical point of view.

Mr McCLELLAND—But is that not a necessary reality? Assume someone was transferred to a Hong Kong prison. Despite the assurance or even agreement that they were going to serve the balance of a 20-year sentence and the Hong Kong government let that prisoner out, our Australian police force is not going to be sent into Hong Kong to arrest that fellow and bring him back without an international incident. As a matter of reality, there may be nothing else. It is the only game in town, in summary, to have an international agreement.

Mr Justice Dowd—I appreciate that point, and I say in answer to it that my original views were that there should be a parole committee between Australia and Hong Kong that would review the prisoners there. We are not going to build up to thousands of them, but we may get to hundreds. This committee could act as an advisory committee to the respective governments.

So Australia would need to meet only once a year or twice a year to build in a mechanism whereby a joint parole board—established at probably no more expense than our parole boards here which deal with thousands of cases a year—could examine those cases and have the same function under law. We could have reciprocal legislation which would be enforceable perhaps by giving an Australian government standing in Hong Kong or a Hong Kong government standing here to take proceedings to see that the government carried out its way.

It is the only mechanism that I could conceive would work. It is not that much more complicated than all the paperwork on a parole board here, meeting every year, then making decisions and recommendations. You give legal standing to an Australian representative to go to Hong Kong to commence court proceedings in the Hong Kong court against the minister for not doing this or for doing it. It is not that difficult a procedure.

I have just come back from taking evidence in Hong Kong. The Hong Kong authorities give me tremendous assistance to hear a case there, and it was concluded and settled. I think a lot of countries can set up those mechanisms. Some judges come here to take evidence and so on. That is the sort of safeguard I think the Australian people would want, rather than have someone released.

I give you this example. The most difficult cases are those where a prisoner, to help a government, turns states evidence; that is, they become a prison informer, as a result of which a lot of people are convicted of offences. The government's only power is to offer them release by way of release on licence. It is the policy of all governments to give concessions to people who, on approved evidence, help to get someone else convicted. That procedure will operate for those people as well, probably particularly so. We are not going to know—unless we have an international parole board—when they say, 'He has been very helpful to us and we are going to let them out' that that is genuine. If it is, great, because it would happen here. If it is not, then it may be an abuse of somebody saying that they have given information and it is really not very good.

I remember a time when the Federal Police came to me and to John Hatton here in this parliament—in this building—with a criminal for us to say whether his information was any good. Hatton and I both said that it was scuttlebutt and moderately good information, but nothing critical. The Federal Police then could not test the weight of it. They are now better equipped at dealing with organised crime. We were able to evaluate this fellow's evidence, and he was not really giving enough. So it is very difficult in that special case. Even if information is not given, it is very difficult for us to know whether the information was good unless, firstly, you have an international committee that meets between the countries or, secondly, we are given standing in their courts and they in ours, on a reciprocal basis, to have the right to bring an action against the minister that lets them out. It is not a big deal to give standing to someone to enforce a right. I hope that is of some assistance.

In section 4, on page 5 there is a definition of the words 'release on parole'. It might be a little clearer to exclude bail. It clearly intends to exclude bail, but it could be made clear that it excludes bail. Someone may be on bail, for instance, on a murder charge for a couple of years. So that is a clarification matter.

The definition of 'sentence of imprisonment' does not, in my view, clearly exclude what we in Australia call a Griffiths remand. That is where a judge will send somebody home and that person is locked into home detention for 12 months then brought back for review to see whether he or she has been a good boy or girl and so on. The definition seems to include that, and I do not think that ought to be included in prisoner transfer. The definition of 'state law' is sufficient. I was worried about where someone has been sentenced on the basis of totality, where they are serving a state and federal sentence.

In section 4(4)(a) on page 8, I am concerned about two matters in relation to community ties. Firstly, there is the use of the word 'immediately'. 'Immediately' is an impossible concept to deal with in the law. I recently gave a decision in a matter of Dresser v. the Conveyancing Committee, where you had to be a conveyancer 'immediately before'. There is very little law on this aspect; if the committee would like me to, I will burden them with my published but unreported decision.

Say a Thai citizen lived for 12 months in Hong Kong immediately before a sentence here. He does not want to go back to Hong Kong particularly—they will not have him anyway. But his normal place of residence is Thailand. Therefore it seems to me harsh if he has got a Hong Kong residence but in fact had it for two years while he organised the crime. He ought to be able to apply to go back to Thailand. That section is unnecessarily restrictive. The word 'immediately' really is not necessary for the section and, for the reasons outlined in my judgment, you will see it. Does it mean 'at midnight'; does it mean 'the day before'? It becomes unnecessarily restrictive.

Section 4(4)(d) is couched in terms of the prisoner having an interest in that 'other person'. It is not couched in terms of that 'other person' having an interest in him. Sometimes a person can be more than interested in the welfare of a prisoner. I know of several examples of that. The prisoner really is not concerned about the welfare of that other person. They may be concerned about them. I think 'welfare' is an odd word and creates an artificiality about it if in fact the other person might have frequent contact and may be concerned about the prisoner's welfare. A lot of people spend years looking after prisoners—church groups and clergymen and so on—where the prisoner does not really care about that person; there is plenty of contact. So that struck me as restrictive.

My next concern is with section 8. This is really one of the philosophical problems with the act. We here, in extradition, are bound by reciprocity. That is, everyone says, 'It must be an offence in both countries.' I am of the view that Australia should take Australians back where an act is not an offence in this country but is an offence in that other country. For instance, if someone were convicted of committing a male homosexual act in another country—many countries still have that as an offence—it is appalling if you could get back here as a rapist because it is an offence in both countries. Whereas it is not an offence in Australia to commit a male homosexual act, if you are convicted over there, you cannot come back.

There is a provision for the Attorney to say 'other offences'. I am concerned about any discretion—I am sure you have had other submissions; I just glanced at some here—being invested in an Attorney. I mean no offence to the present Attorney. But to any Attorney discretions are very dangerous because they can become very political. If an Attorney has to exercise a decision about whether someone should come back, and it is an offence known over there but not here, then there would be a reluctance for an Attorney to be courageous and exercise a discretion where it is a political matter.

I used to act for Ray Denning, who was on witness protection. The government interfered with Ray Denning's witness protection and took him out of it. He was then in the general public. He was dead in six weeks. A government interfered with a witness protection scheme, which had been before the royal commission, if I recollect, because it was a high profile public matter. So governments do interfere.

CHAIR—Just on that point whilst we are on it, Professor Shearer actually put the contrary argument, as I understood it. That is, for Australia to accept a prisoner back here for a sentence for an offence which is not recognised by a law in Australia is to give credence to the existence of that offence in another country. He was arguing the contrary case.

Mr Justice Dowd—As a matter of technicality, if you accept the principle of reciprocity, you give it credence. My answer to that is so what. The trials I have been observing last week in Indonesia carry the death penalty. It amounts to exercising political freedom and demonstrating is an offence under a Sukarno law 11 PPNS 63, Presidential Proclamation. These are students and union leaders, who are just students and union leaders, who are on trial for the death penalty. They may get anything up to death. If they are convicted, and it is just a demonstration, it becomes a farce if we cannot get them back. This legislation is human legislation dealing with human beings.

I am sure I committed offences in Indonesia merely by criticising the law there, as I did. That is an offence under the law. If I had been arrested and sentenced, the rapist in the cell next door could get back because rape is fashionable here and there, but I could not.

I am saying so what? Professor Shearer is correct, but who cares? If we are concerned about getting Australians back here, we ought to be more concerned about the people who do not commit an Australian offence. That is an underlying principle of the whole of this bill that I think is flawed. It is, if you will forgive the expression, lawyers' constipation, as they feel it has to be reciprocal. I do not care if it is reciprocal, as long as I get Australians back.

Mr McCLELLAND—If someone was convicted of homosexuality overseas, you would not see any

embarrassment to our system if we kept them in gaol for the remainder of their 12-month sentence or something of that nature?

Mr Justice Dowd—If the alternative is to be in the other prison as to being in this, it is their option. What we are doing is saying, 'You are serving your Bangkok sentence, but you are serving it in Australia.' Of course it is a technical insult and anomalous, but it is the prisoner's choice. What does it matter that it is an anomaly. These are a special category of federal prisoners.

We have people out there in the prisons—some serving a federal offence, some serving a state offence, some not serving as much as they ought, some serving more than they ought. There are anomalies all through the system, but I think we can brush aside that problem. For the whole philosophical purpose of the act, we can forget about reciprocity. There is not a lawyer in the country who will not say, 'No. We must have reciprocity because it has to be the same both ways.' So what.

CHAIR—One difficulty it seems to me with that is that article 3 of the Council of Europe Convention on the Transfer of Sentenced Persons provides that a sentenced person may be transferred only on the following conditions:

(e) if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory . . .

Does that mean we would have to enter into a whole series of bilateral agreements?

Mr Justice Dowd—The short answer is yes. But if you are doing this, it is only another piece of paper. I do not see it as a major problem if the principle is right. Otherwise, we are bound by the whole reciprocity regime that most Australians find offensive. People get off in the other country because it is an offence here and not an offence there. A lot of people do not like that principle. I do not understand why Australia has to be bound by it, and I would like to see us do some ground breaking—even on extradition.

I can understand on extradition why someone ought not be brought back, because you are imposing our laws on that country. It is a sovereignty issue. But, in terms of a sentence, a sentence is a matter of the prisoner himself. I do not have any problem with this scenario—if I have an alternative of letting him serve his sentence there or here, the overriding principle is that he should serve the sentence here for the benefit of both countries, his families and himself.

Therefore, if it is necessary to do bilateral treaties, big deal. I do not mean to be disrespectful, but so what. It may well be that, once you point it out to the other countries, they might have the same idea any way.

In any event I do think, if we are going to include additional offences, it should not be done at the discretion of the Attorney-General. There are some discretions here. It should be done by way of regulation because it is reciprocal.

Promulgated regulations are reviewable by the parliament under the interpretation act. In major matters such as dealing with highly political transfers of prisoners, the average Australian would say, 'Let them rot in

the gaol over there.' So the public are not that concerned, but I would rather have that subordinate legislation that is reviewable.

Mr McCLELLAND—So you think we should delete entirely the provisions requiring reciprocity?

Mr Justice Dowd—Yes. You have to have them in to deal with your treaties but, as a matter of our law, make the others the subject of a separate negotiation. We have taken since the beginning of time to get around to doing this—why not start the next stage?

To paragraph 10, you have probably already heard the problems in paragraph 10(f) about 'in the opinion of the Attorney-General'. I think that ought not be present. If you take those words out, it becomes a justiciable issue and enforceable before a court. If you leave those in, it becomes an absolute discretion. You would build up a common law as to the way the power should be exercised. Part of paragraph 13(b) states:

. . . and has community ties with a State or a Territory.

That operates unnecessarily harshly. Community ties is a very difficult concept and it is dealt with very badly in the NSW Bail Act 1978. There may be people here who have no community ties. For example, I do not have anything to do with that fellow over there, but he is just as entitled to come back, if he is a permanent resident of Australia, if he has no ties than if he does.

It is a cumulative requirement. A permanent resident is permitted to travel. If he is a permanent resident of Australia, his wife has gone overseas and his kids have left him, or he just happens to be without family and he is an Australian permanent resident and has been for 20 years, why should he be left in a South American prison when this is the place where he resides? The fact that he has no community ties is a harsh requirement. If I have loads of a family, I get in; if they have gone overseas and I have none, I have to stay in South America. So that the cumulative effect of that is, in my view, harsh.

Mrs ELIZABETH GRACE—Sections 4 and 5 define community ties.

Mr Justice Dowd—Yes.

Mrs ELIZABETH GRACE—Basically that is referring back to that section of the bill. If we eliminate it from section 13 of the bill—

Mr Justice Dowd—Community ties is set out in sections 4 and 5. I do not know where else it appears but, frankly, I do not see why it is unnecessary for this provision. It may be for other purposes but I am saying 'and has community ties' excludes unfairly people who may be Australian long-term residents. People may have been here for 70 years as British citizens but not taken out Australian citizenship and end up in a Vietnamese prison.

CHAIR—Isn't your objection that 'community ties' is defined too narrowly to mean, in effect, a family relationship?

Mr Justice Dowd—It is a matter of definition—it is too tight. Assuming you have no ties, assuming the rest of your family went off and left you and has had nothing to do with you, abandoned you because you have been caught drug smuggling in a South-East Asian country, you are not tied. The operative word is 'tie'. The fact that you have family does not mean you have community ties. It is a very nebulous concept. You can have thousands of cousins but not be tied to them in the slightest. 'Tie' is a word not easily dealt with in the Bail Act. My view is that it has its ordinary common law meaning in which you are dealing with close to the family and all that sort of thing. So assuming you have nothing—

CHAIR—I take your scenario where the family has gone off, but if you are a member of the local leagues club or the local football club, do you community ties then?

Mr Justice Dowd—Is that really the agenda that we want? Assuming that you are just a bloke who works—does not belong to the Liberal Party, P&C and all that sort of thing—has committed an offence and wants to come back and work in the country. You may have lost his job and may not have a house, but a person with permanent residency does not have to have any of those things at all. So why not let people come back? They are just as good a person as the person with 15 kids in the cell next door from the point of view of eligibility. In clause 15 I am concerned about 'had occurred in Australia', whether that means all Australian states because there are some offences in some states and not in others. I think that lacks clarity. Does it mean in all states, in most states or a state? For instance, laws in the Northern Territory about euthanasia about which people here have views may make it an Australian law. It does under the definition. That needs to be clarified.

Again that appears in subclause 2(b)(ii) where it says that acts or omission have constituted an offence in Australia. That is not clear. For instance, the offence of buggery of a male on a female. As to whether that is still an offence now—it is a common law offence, it was 30 or 40 years ago but may not be today—that may be an offence in another country; it may not be an offence here. It probably is not an offence here. It certainly would not be one that would be enforced as a matter of common law. So we have that difficulty, that is, a sort of anomaly that a rapist can come back but a person who commits an offence of buggery cannot. I use that as a dramatic example of the point.

Clause 17(4), the word 'provisional' strikes me as unnecessary but I just make that point for the record. In clause 17(5)(a) all you deal with is the interest in extradition made by another country. If, for instance, the person is convicted in Ontario and is subject to extradition from Newfoundland, it should be country or state within the same country. It seems to be a gap for federations where, as in Australia, we might have an Western Australian extradition against us and it is not another country. That just strikes me as an omission.

If I can quickly go over to section 24, transfers from other countries, it seems to me that section 24 should be 'shall consent' because there is a qualifying discretion in the fifth line, 'if the Attorney-General is satisfied that the transfer can be made in compliance with section 10'. It seems to be, if he is satisfied, there will be law about the way in which he satisfies himself, perhaps reviewable by administrative review, and therefore the word 'shall' should come in because it is a double discretion and it seems to me to be unnecessary.

If I may turn then to the troublesome section 42, what I would recommend is, instead of the discretion that is invested in the Attorney-General here, that you set up what I would roughly call a re-potting mechanism such as where someone in New South Wales was serving a 'life sentence' where you can apply to the court under section 13(a) of the Sentencing Act to have fixed term and an additional term imposed. It strikes me that it is a matter which only takes a couple of hours of a court's time. We do them in the normal routine here in New South Wales and most of them are fairly straightforward. Rather than having a discretion—it is too wide a discretion—then it could be taken before a simple court procedure in the same way as the Sentencing Act.

Section 43, again the section 13(a) type procedure ought to be available. I am sorry I was not able to do a written submission, but I just did not have time to prepare it adequately. Section 45(2), no appeal lies against the decision. You need to look at inquiries into convictions, as section 474G and others of our Crimes Act. It is not an appeal but it is—

Mr McCLELLAND—It is an administration challenge, sort of thing.

Mr Justice Dowd—Yes. It is an examination and that ought to be dealt with. Section 46(5), I think the word 'relevant' should be inserted in front of 'Australian law' as you have in subsection (4). It does not make it clear that relevant law, because Australian law covers all Australian laws. Therefore, it should be in the particular state.

Section 47, I am concerned about the fact that on transfer from Australia the sentence ceases to have effect. It seems to me if a citizen is transferred to the UK to serve a five-year sentence, his sentence should still continue here. If he applies from a migration point of view, it should not cease to have an effect. It should continue to be on the record. Otherwise, a person who has committed a serious drug offence may still have citizenship rights here and be entitled to come here. If he is dealt with the next time, this would imply that the UK sentence which he has served, by virtue of transferring over there, serves his five years and comes back as an Australian citizen, is no longer on his record. It ought to be on his record here for his next offence.

I have already mentioned the serious gap in this part about not dealing with people who have been transferred overseas and our enforcement. Can I just briefly deal with section 53. This is an appallingly wide discretion. Secretary of the department is bad enough, but a person holding the duties of a senior executive service officer in the department can be dealing with someone at a very great level of juniority and I think this delegation should be limited and only be able to be delegated to another minister, but at best a head of department. A member of the Senior Executive Service could be someone who is quite junior and only joined the department a year or a week ago. I think the discretions here are wide enough without shifting that.

Section 57 is an appalling provision to require the consent of the Minister for Immigration and Ethnic Affairs. It is a matter of history that this department, whoever is in power and whoever the minister is, has a degree of intransigence. That is about as polite as I can be about it. I a person is a permanent resident here, it has nothing to do with the minister for immigration. If he wants to intervene and put material, let me, but to require the consent is just an appalling power to a department with not a good track record.

I thank you for you patience in dealing with those matters. As I have said, it is only a cursory glance that I have had and I am sorry that I have not been able to give you a written submission.

CHAIR—Thank you for having gone through that in such detail. Unfortunately, we are running out of time. There may be matters which we would have wished to have raised with you. Could I leave it that on further reflection of the matters that you have raised, and on re-reading the *Hansard* if there are some matters that we would like to tease out, we can come back to you?

Mr Justice Dowd—Of course. I appreciate that. One or two of the matters are quite novel and you will get responses to them from departmental advisers. If I can assist in any way to answer those, I would be delighted to give assistance.

CHAIR—Thank you for having looked in such detail. We appreciate that.

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 4.24 p.m.