PROOF

COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON MIGRATION

Reference: Criminal deportation

CANBERRA

Monday, 1 December 1997

PROOF HANSARD REPORT

CONDITION OF DISTRIBUTION

This is an uncorrected proof of evidence taken before the Committee and it is made available under the condition that it is recognised as such.

CANBERRA

JOINT STANDING COMMITTEE ON MIGRATION

Members:

Mrs Gallus (Chair)

Senator Bartlett	Mr Eoin Cameron
Senator Eggleston	Mr Ferguson
Senator McKiernan	Mr Holding
Senator Tierney	Mr Sinclair
	Dr Theophanous

Matter referred for inquiry into and report on:

The policies and practices relating to criminal deportation, with particular reference to:

1. the adequacy of existing arrangements for dealing with permanent residents who are convicted of serious criminal offences and whose continued presence in Australia poses an unacceptable level of threat to the Australian community.

2. the appropriateness of existing arrangements for the review of deportation decisions;

3. the appropriateness of the current 10 year limit on liability for criminal deportation;;

4. the extent to which effective procedures and liaison arrangements are in place between the Department of Immigration and Multicultural Affairs and State/Territory Governments for the timely identification and handling of all cases subject to the criminal deportation provisions;

5. the extent to which sufficient weight is being given to the views of all relevant parties, including the criminals and the victim/s of the crime, and their relatives; and

6. the adequacy of existing arrangements for the removal of non-residents convicted of crimes.

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WITNESSES

CHAPPELL, Dr Duncan, Deputy President, Administrative Appeals Tribunal, PO Box 9955, Sydney, New South Wales, 2001 286

McDONALD, Mr Graham Lloyd, Presidential Member, Administrative Appeals Tribunal, Sun-Herald Tower, Southgate, Victoria 286

RANSOME, Ms Kay, Registrar, Administrative Appeals Tribunal, GPO Box 9955, Sydney, New South Wales 2001 286

JOINT STANDING COMMITTEE ON MIGRATION

Criminal deportation

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Monday, 1 December 1997

Present

Mrs Gallus (Chair)

Senator Eggleston Senator McKiernan

The committee met at 1.03 p.m.

Mrs Gallus took the chair.

CHAPPELL, Dr Duncan, Deputy President, Administrative Appeals Tribunal, PO Box 9955, Sydney, New South Wales, 2001

McDONALD, Mr Graham Lloyd, Presidential Member, Administrative Appeals Tribunal, Sun-Herald Tower, Southgate, Victoria

RANSOME, Ms Kay, Registrar, Administrative Appeals Tribunal, GPO Box 9955, Sydney, New South Wales 2001

CHAIR—I welcome witnesses to the committee and thank you for attending. The committee has received your supplementary submission and has authorised its publication. Mr McDonald, do you want to make an opening statement?

Mr McDonald—I would like to make a brief one. Thank you for the opportunity to put in the supplementary submission and to appear today. There are just one or two things that I would like to raise in particular without going through all of the issues in the supplementary report. I would like to emphasise the difficulties associated with mandatory deportation—that is, somebody who gets a prison sentence of a year or more would automatically be the subject of deportation.

CHAIR—You did refer to that in your submission and pointed out quite a few problems, including that the different states have different penalties.

Mr McDonald—I just wanted to emphasise that those matters are fairly important in this area, I think. And the other one, of course, is the way bail is treated from state to state. In some states bail is treated as part of the sentence. If the person, for instance, has been remanded in custody awaiting sentence, sometimes that counts towards sentence. Sometimes they give a reduced sentence, taking that into account, and that can lead to quite big variations that I think would lead to unfairness.

Secondly, there is the issue of delays of hearings. There are, again, a number of factors, and I think we looked at some of these before. One is, of course, an applicant who may have an appeal. We have got one, for instance, that has been pending in the High Court for two years. Until that appeal against conviction is determined, it is really inappropriate for us to determine the deportation appeal. Another is that people might be waiting for legal aid. And, of course, you have got unrepresented people that may have language difficulties. It takes them some time to get their cases together even if we can assist them.

But there are further issues. We took some figures out to see the increase in deportations, compared with the time it is taking us to dispose of them. That clearly indicates a backlog developing, particularly in the Sydney registry. That is compounded by the fact that the government has recently reached agreement with the Vietnamese government to allow the return of Vietnamese deportees for whom previously there was

no agreement. We are told that there are 44 pending appeals from Vietnamese—

Dr Chappell—No, not from Vietnamese.

Mr McDonald—That is the total in Sydney.

Dr Chappell—Twenty-one Vietnamese.

Mr McDonald—Twenty-one Vietnamese, 44 total in Sydney that are pending.

CHAIR—So DIMA has actually agreed to a deportation and they are under appeal to you. Is that right?

Mr McDonald—That is right. The rate of increase of number of appeals compared with disposal rate—and we have prepared that figure for you and can give you that—as you can see there shows that the number of deports since 1994 to 1997 has increased from 22 per cent of the workload to 1.6 per cent of the AAT's workload, but the disposal rate is not increasing at the same rate, if you look at the last column. The disposal rate is actually dropping. So that tells us there is going to be a backlog, and we know it also from discussions we have had DIMA, and that is a resource problem.

In particular, we had previously members of the Family Court who were sitting as presidential members and they could assist. But they have now been withdrawn because there is too much work to be done in the Family Court. So there are seven deputy presidents trying to hear these cases, as well as doing the other workload. That is a problem.

Added to that, the minister has apparently decided that bail will not be granted for those people that are waiting on immigration custody. Again, that puts added pressure to hear the matters quickly because the person is in custody and needs to have the issue determined. We understand that there is going to be a lessening in giving warnings to people, so there will be more direct intervention for deportation at an earlier stage. So those are factors that are clearly going to affect the timeliness with which the tribunal can deal with the matters. The next thing I wanted to mention was victim impact—

CHAIR—I know you are making a statement, but can I just pick you up there? What you telling us is that you are going to take longer in future. Are you saying that there are pressures on you that may indicate a longer time?

Mr McDonald—Yes. We are going to have to address that issue. We are told that there is the possibility of a further part-time presidential member being appointed in Sydney, following a retirement from one of the courts, and that would certainly assist in this process. But with fewer and fewer people represented, if we have got Vietnamese there are inevitably language and culture problems. It takes time and effort to help them

prepare these cases, so those are going to be inevitable difficulties, yes.

CHAIR—And what would it take?

Mr McDonald—These figures have indicated to us for the first time that the problem is there but I have to say we have not yet worked out a strategy to deal with it, but it may well be—and we undertake to inform you how we go—that there is some strategy that we could work out. It might mean more DPs have got to be flown into Sydney to do the cases, if that is where they are arising, and some reorganisation of our lists.

CHAIR—Would you like to continue with this one now or do you want to finish your statement? I interrupted you, but seeing we are on this, will we stick with it?

Mr McDonald—Sure.

CHAIR—You were saying that perhaps one of the answers is to fly the DPs into Sydney. Is perhaps the answer to have a greater concentration of DPs in Sydney? What would be the problem with that?

Mr McDonald—There are two in Sydney, two in Melbourne and two in Brisbane and that reflects the general case load.

CHAIR—But you are now saying the case load is the heaviest in Sydney.

Mr McDonald—For deports, yes. It means that DPs will be less available to do other matters, for instance in customs and other cases, if the resources are to be redirected into this area.

Dr Chappell—If I might make one brief intrusion there, at the moment I do virtually all of the deportations and immigration visa matters in Sydney. It is becoming a full-time vocation because of the workload and in the discussions we had recently with the DIMA people they indicated that roughly 50 per cent of all deportations occur in the Sydney registry. They anticipate probably up to 200 deportation orders being made nationally this current financial year. About 70 per cent of those they estimate are appealed, so we are anticipating a massive increase in our workload for those reasons. It is impossible for me to do all those cases, and probably undesirable anyway. Regardless, it would be required to have someone else or other people—

CHAIR—We do seem to have problems. You have argued that you do not feel you have been taking too long at the moment. You feel it is a reasonable length of time. I think I would disagree with that but perhaps we can go into that later. That is your first problem: you already have a fairly long time period. Your second one is the Vietnamese that are going to add to your case load. Overall you have told us you are going to have

this huge increase and you are already hitting the line. The bottom line is, I expect, the government is not going to give much more resources in this atmosphere.

Mr McDonald—That is right.

CHAIR—So where are we going from there? What is the answer?

Mr McDonald—We will have to look at that and see whether there can be reorganisation in other jurisdictions to reduce the involvement of DPs there and increase their involvement in this area. It is the only viable way in which we can look at it apart from, as I say, a part-time appointment. But it is undesirable for one person to be doing only deports and immigration matters. For instance, a couple of weeks ago we had a challenge to an ASC decision involving a takeover for $400 million for an Australian company. That had to be addressed quickly and disposed of. There are other matters that are of importance and pressing and we have to have that sort of flexibility.

Senator McKIERNAN—Do the figures you have provided on page 7 of your submission for the extreme cases include the instance that you mentioned in opening up at the High Court or waiting an appeal to the High Court?

Mr McDonald—Yes.

Senator McKIERNAN—If you take those—I think you are talking about five cases, which would include that one to the High Court—aside, the delays in that period from 1 July to the end of September this year are still 199. I have problems with that short period of time and measurement and comparing it to previous years.

Mr McDonald—I do not know what the answer to that is. The things that cause delay are: firstly, the appeal is lodged and the department has to file its documents—usually there is a 28-day period there; then there will be usually a telephone directions hearing with the parties to work out a program to set it for hearing. That will then depend whether the person is still serving sentence as the result of the criminal conviction. There may or may not, therefore, be an urgent need because deportation does not occur until after the person has served the minimum time the judge has imposed. There may be no rush there.

For instance, somebody gets a 10-year sentence and they are served with a deportation order after the end of the first year. If the judge has given them 10 years with a minimum, say, of five, there are still four years to run before that person is considered eligible for parole and before they would be deported in any event. There is not a great deal of pressure in that sort of case and we can set a reasonably long timetable for it. Plus there is the other consideration, for those individuals to look at rehabilitation, which makes it a bit difficult under the policy if they are not given the opportunity to see how they perform in prison and the like.

That is one end of the scale. The other end of the scale is where the person has actually finished their minimum term and the deportation order is served, and the person is then put into immigration custody. We are under pressure there to process that matter fairly quickly so that the person knows where they are.

Senator McKIERNAN—Could you give an analysis or a prediction about the impact of an additional deputy president, or even two deputy presidents? How would they impact on those figures that we see in front of us? Like the chair, I agree that the figures are too low. What impact would you expect with, say, the appointment of two deputy presidents to handle deportation matters? What would be an achievable target?

Mr McDonald—What would be the optimum?

Senator McKIERNAN—The optimum would be different from what would be achievable—or would it?

Mr McDonald—It would be, because different considerations, as I say, apply in different cases. I am reluctant to give a sort of simplistic answer that says, 'We could do all of these in three months if that was the case,' because, again, it would depend on the individual circumstances. But our aim is to get the cases where the person is coming to the end of their minimum term heard before they go into immigration custody. That is the optimum. If they are in immigration custody, then the pressure is on to dispose of those as quickly as possible. I would have thought two months would be an appropriate period from the time of filing the application to at least the hearing. If the decision is reserved, usually they are only reserved for a week or two in these matters and we would get those out very quickly.

Dr Chappell—With respect, I would say that is too optimistic, in my experience.

Mr McDonald—Three months?

Dr Chappell—It is simply the cumbersome quality of the interaction we have particularly with people in custody, because it is so hard to communicate with them. They are moved around very often in the New South Wales correctional system; they are unrepresented, as we have stressed before; they often need an interpreter even to have the hearing to determine how to help them. I think one could clear matters much more rapidly with a concentrated effort, but I would still say that a minimum of three months is realistic—that is to the hearing date—and then perhaps a further month to be added to that in order to ensure that you have the time for the hearing itself and the writing of the decision.

Some decisions can be done very quickly, I would agree; others are very complex and require very careful thought. Also, the Federal Court is always sitting there above you to decide whether or not you have done the proper thing. It is something you cannot

ignore.

CHAIR—At the very beginning you said there was 28 days. What was that 28 days for?

Mr McDonald—The department has 28 days to file all the documents that the decision maker relied on to reach the decision to deport the person.

CHAIR—Does the department need 28 days to file those documents if they have already come to the decision?

Mr McDonald—The documents can be quite voluminous. They do not prepare them until they know that there is going to be an appeal, because of the cost issue.

CHAIR—I see. So they do not actually start—

Mr McDonald—No.

CHAIR—It is not just a matter of handing over their previous papers? They basically do not start collating—

Ms Ransome—It would be a photocopying of documents which are on the departmental file, basically.

Dr Chappell—But often there are supplementary documents that they also need to get which relate to the records of the people concerned, to any comments that were made at the time of sentencing by different judges, much of which may not be directly available to the original decision maker. It is not merely a matter of the same information being gathered, very often. There can be quite a lot of additional material, too.

Senator McKIERNAN—With the statistics, you point out the differences between what the department are saying and what you have got in your statistics, and different ways and means of collecting those. I accept that that can occur, but have you had any dialogue with the department or, indeed, has the department had any dialogue with you about getting a similar system in place so that you are both talking the same language?

Ms Ransome—We had discussions with the department arising directly out of the fact that in their submission to this committee the figures that were provided were quite different to the ones that we had. We came to the recognition that we were counting perhaps different things, although there were issues where we could not resolve at all where the differences did lie. We will have further discussions with the department about those sorts of issues.

Senator McKIERNAN—From that, do you stand by the statistics that you have

given to the committee?

Ms Ransome—We stand by them with the rider that, in all statistics, there may be a degree of data entry problems but we are not aware that, to any great extent, they affect our statistics—in the same way that the department cannot assure us that some of the discrepancies do not arise because of data entry problems at their end.

Senator McKIERNAN—I understand why you are laughing, Chair; but, on page 7, some of the factors you talk about are mentioned, including 'late and/or inconsistent identification by the department of prisoners eligible for deportation'. It is a very serious comment to make, is it not?

Mr McDonald—That is a delay, yes. That happens where somebody is released from custody. I think I mentioned last time we came to the committee that we had a case where the department actually gave a person a visa to return to Romania. He returned to Romania for three months and came back to Australia, and they then served him with a deportation order upon re-entry. There was clearly a delay between the sentence and the expiration of the minimum sentence—and the expiration, I suspect, of the whole sentence—before it was decided that he would be subject to being deported.

CHAIR—It is very extraordinary. I am sorry we did not have that when we were talking to DIMA. I would like to have heard what they said about it.

Ms Ransome—That issue does not relate to the statistics, though.

Senator McKIERNAN—That is the clarification I needed, but thank you for that, though. That was the intent in asking my question.

CHAIR—Senator Eggleston, we are really pursuing the delay times and the statistics, at the moment. Have you got any questions particularly on that?

Senator EGGLESTON—No, actually I have not. I was not given the background papers until I arrived here.

CHAIR—Do not confess that; just nod sagely!

Senator EGGLESTON—I am skim-reading, and I will just sit and listen at the moment.

CHAIR—As I said before, the point of contention here is that the AAT thinks the time taken to process is reasonable. Both the deputy chair and I have questioned whether that is so. The AAT has also put on notice that they feel that, under the present circumstances with increased numbers of Vietnamese now able to be deported back to their own countries, their workload is going to increase quite considerably; and that, unless

something is done, we will get greater delays than we are already getting.

Senator EGGLESTON—Yes, I have read through the tribunal's conclusions to the submission. As a matter of simple logic, if your workload increases and you do not have the staff to process it, then there will be delays. There must be justification for increasing the number of people dealing with the criminal deportations that come before you.

Ms Ransome—The criminal deportation area is a very small proportion of the tribunal's overall jurisdiction. As the figures demonstrate, at the moment it is 1.6 per cent; but the cases do take up probably a disproportionate amount of resources the tribunal has.

CHAIR—Dr Chappell, when you have a criminal deportation case before you, you are working solely on that, are you, and you are not working in any other area at the same time to do with the AAT? Or do you have overlaps?

Dr Chappell—I have a running list, as it were, of cases; and there might be a day, perhaps, between individual hearings when I am not actually sitting but I am writing decisions and going back all the time. It is a fairly vicious system in which you never catch up, really. With the deportation matters and visa matters, quite often—because of misestimating how much time they will take for hearing—we may get, say, a case list for two days and we go two days but we have not finished, because of the need for interpreters or perhaps phone evidence from elsewhere, and then we have to adjourn and set another date; and so that causes delay. I have now established a policy of trying to list every case for a minimum of three days, simply because my experience has been that the cases take longer than it seems they will need. This means that we usually will finish on time, and that does speed matters up.

CHAIR—That would seem to be an intelligent way to do it. Is there any problem with that?

Dr Chappell—I was a new person on the block, as it were, and I was told various things about how long these cases would take. It took me a while to realise that they were being underestimated and that they took longer. I have tried to adjust to that, and we are probably processing more cases. It is awful to have a case partly heard and to have to wait, say, another two months before you can fit something into your list.

Senator McKIERNAN—What happens in that sense when a case starts? If you do list something for three days and it is settled within a day, are you able to then pick up another one, or can you then use that two days for writing up decisions?

Dr Chappell—Yes, for writing decisions. But I have to say that there is not much settlement in the deportation area.

Mr McDonald—No, very little.

Dr Chappell—Very little fall-out. So, if you list something, it will almost certainly go on. The only type of circumstance where it does not is exemplified in a case last week where the gentleman was supposed to have appeared. He was wanted on a police warrant for arrest on another matter and he did not turn up. The police were waiting, I suspect, in the corridors for him to appear. That case did not go on. That is very unusual.

CHAIR—Does that then go straight back to the original DIMA decision of the deportation?

Dr Chappell—I dismissed the matter. I assume that, as soon as they apprehend him, he will go.

Senator McKIERNAN—Does that mean that you are effectively only dealing with one case a week, then?

Dr Chappell—No, I usually average two cases. I might list a deportation matter and a visa matter—bad character matters, which I also deal with principally—so it would take me a full five days of the week; or I might list something for Wednesday through to Friday, make Monday a break, and then go to visa cases. Unless you have some break, there is no way you can do your decisions. If you are doing written decisions, you simply have to have some time to do them.

Senator McKIERNAN—What about the weekend? I suppose your weekends would be used, as well.

Dr Chappell—We work at weekends, yes. I find it very—

Senator McKIERNAN—My questions were not necessarily directed to you on a personal basis.

Dr Chappell—No, but it might give you an idea of what it is like in reality.

Senator McKIERNAN—That is what I was seeking to ensure. I was not putting you on the spot.

Dr Chappell—I would have to add that, very often, we are given interlocutory notice to deal with, as well; and so we are dealing with directions hearings in the mornings and doing other things of that nature.

CHAIR—I suspect we have moved as much as we can on that. Given our time constraint of 2 o'clock, unless you have got another question, I would not mind moving to the area of the suggestions that DIMA made, which are fairly key and fundamental to the

work of the AAT.

Senator McKIERNAN—There is one thing that intrigued me: on page 6 you talk about 'perceived' delays. That is rather dismissive. Either there are delays or there are not delays. I understood from you that you were accepting that there were delays. Why the use of the word 'perceived'? It is in the last paragraph at the bottom of page 6, on the first line.

Mr McDonald—As I say, that does depend on the individual case. In the one that I mentioned, where the notice was served early and the person still has a number of years to serve on their sentence, that case might take six months to get heard. And then, if somebody says, 'Look how long it takes in the AAT. It takes six months for that case,' that is really only a perceived delay, because in fact the person is not disadvantaged; nobody is really disadvantaged by that system. If the person were in immigration custody, having finished their sentence, and it took six months to get on for hearing, then that would be a real delay. And there is a real delay coming up, as we now know from the number of Vietnamese matters that will be coming forward. That looks like causing a real delay. So there are both 'real' and 'perceived' delays.

Senator McKIERNAN—Thank you.

CHAIR—Are you happy if we move on to that other matter? Senator Eggleston, you were not here, but DIMA gave us a submission for a number of options to the present system. One of them was for the minister to appoint his own commissioner, and another was to have internal reviews and keep it within the department itself. The one that I felt rather attracted to—and I speak certainly for myself here and for no-one else on the committee—was that the AAT continue in its present role doing exactly what it does, but that its submissions be recommendatory to the minister. So it is a recommendation that DIMA's decision be overturned. Your argument against that is that it brings in a political bias.

Mr McDonald—I would not go as far as saying bias. A politician has political considerations. They are not necessarily biases; they are political considerations.

CHAIR—I take your correction. This does not actually worry me because that is the role of the minister. The role of the minister is to take the ultimate responsibility for the decision and parliament is there on top of the minister if it does not like his decisions. That the AAT makes its own recommendations is important, and it makes them free of any political considerations. It is then up to the minister to say, 'Okay, it is a very clear recommendation'. He can then put his political considerations on that. I find no problem with that but I have no idea how you feel, Jim, about that.

Senator McKIERNAN—I have some concerns about appearing to give unilateral decision making to the minister. The recent case with Lorenzo Irving is a case in point

where the individual concerned had to go to the High Court. If you have some resources about you, you can get to the High Court, but if you are just a normal person there is just no way in the world you can do it. That is where I see a real problem in giving that decision making authority to the minister and not having some form of review on top of it.

CHAIR—Mr McDonald, would you like to comment? I think you are in sympathy with Jim's point.

Mr McDonald—You need to distinguish the functions. We are looking at merits review. The government of the day determines a policy with respect to immigration and we review the facts of individual cases against that policy. It is a basic merits review function that takes place in the vacuum of independence, if I can call it that. If there is ministerial input into that at a later stage then there may be different legitimate considerations that a minister may want to take into account on behalf of the community, as you said, Madam Chairman.

If that happens then you are going to have two conflicting decisions. You are going to have the merits review decision which regards the policy as the government determines it, and then you are going to have the minister's decision. Inevitably, there is going to be some conflict between the two decisions. I wonder about a system that allows merits review on the one hand and yet imposes a political decision on the other hand.

CHAIR—Suppose you have given an honest, intellectual response based on the policy to the minister and you have said, 'Under the policy we believe we should overturn the decision. DIMA has said "deportation" but we have looked at it and we think we should overturn it for these reasons.' I have this theory that the parliament is supreme, as the elected body. The minister then looks at your reasons and may say, 'I understand your reasons but I have another reason,' or, 'I reject the reasons because I feel that they are somehow fuzzy at the edge and that is not what the policy had actually intended.' I think the minister should have a right to say 'No, I have taken on board your recommendations but I will make the decision,' because the minister is ultimately answerable to parliament.

Mr McDonald—With respect, that is not then a merits review decision. If the minister is saying, 'This is what we intended when we set this policy up and you have strayed from it,' that is saying the intention, whatever that might be as distinct from the words that are actually used, is going to be the overriding factor. Those two decisions—

CHAIR—But surely that is exactly what the minister would be saying now?

Mr McDonald—then start to be in conflict. That is the difficulty that arises.

CHAIR—They are in conflict already, except the minister does not have power to overturn your merits review. There are seven or eight DIMA decisions that you have

overturned. Let's face it, part of the reason why we set up this inquiry was because the minister was unhappy that you have overturned his department's decisions. So there is already a conflict there concerning how he is interpreting what should be done and how you are interpreting it.

Mr McDonald—Again, with respect, the answer is to change the policy on that if he is unhappy with that aspect. It is a bit unfair when he, in the debate, describes the AAT as reaching degraded decisions because they are not decisions that he might have reached had he been the one responsible for reviewing the individual cases. This is the sort of conflict that I think arises.

CHAIR—The conflict is already there. You are supposing that we are going to have conflict if the minister has the power not to take up your recommendation. As you are pointing out, if the minister is already making statements like this, it is clear that the conflict exists in the present situation. There is going to be nothing new in the next situation, except possibly less conflict, because the minister has to really seriously take your recommendation and decide whether he will go along with it. On his head be it. I am not saying whether the minister is right or wrong or whether we should agree or disagree with him. I am sure there will be times when I will happily disagree with his decision.

Mr McDonald—Of course. There will be deputy presidents who will reach different decisions if presented with the same facts in some cases. I have no doubt about that. By their very nature, some of the decisions that get to us are very fine line. You may go, as I have said, one way or the other.

CHAIR—In those decisions where there is a fine line decision, I feel it should be the minister who makes that final decision. Be it the right decision or the wrong decision, it is on his head.

Mr McDonald—As you know, that was the system prior to 1992. There were these difficulties because the AAT was reaching one decision and the minister was reaching another. There were criticisms developing between each of the two bodies, which is not the best way these matters should be handled. The answer to that is to change the policy.

CHAIR—But we have criticisms now. Did you comment that the minister said you were making degraded decisions?

Mr McDonald—Or degrade the quality of decision making.

CHAIR—So we have the conflict now. We had the conflict prior to 1992. We have changed it. The conflict has not gone, but we have an unhappy minister because he has not got any residual power.

Dr Chappell—He has, in fact, and has utilised that power under section 502 of the Migration Act to overturn decisions with which presumably he was not happy. It is a power in a case to revoke a permanent visa, where in most cases these people here under those sorts of circumstances—

CHAIR—Yes. I accept that is an ultimate one, but again it is an extreme—

Dr Chappell—In a pragmatic sense, is it better to utilise that power or is it better to have a recommendation only? I would have to say personally that I find it extremely difficult to be placed in a situation where I decide not to affirm a decision, thinking that the minister may well exercise that power under section 502 to overturn whatever decision I have reached. It would probably be more honest to say it would be preferable to have a recommendation only. It would be easier for the decision maker at the merit review level to wrestle with that and the overturning of a decision as it is at the present time. It is the lesser of two evils.

CHAIR—Yes, I would certainly agree with you on that.

Ms Ransome—Regarding the change from recommendatory to determinative powers for both the AAT and the Immigration Review Tribunal at the time, my understanding of what was happening in 1992 was that there was a whole move on the part of the then government towards determinative powers for review bodies. That is also what happened with the Social Security Appeals Tribunal, which at one stage also had only recommendatory powers.

CHAIR—What you are talking about here might be very much a difference of philosophy rather than of anything else. My inclination is always to not have it so tightly sewn up that it cannot be changed at the ultimate level.

Senator McKIERNAN—If it was tied up in such a way I probably would be supportive of your position, but I do not think that it is tied up to that extent. The minister with some of his utterances might be seeking to use a sledge hammer to crack a nut. There will be times when there are decisions of your tribunal or other tribunals or other courts that each of us in turn may not be happy with, but because we are not part of the total examination, we can come to different conclusions as to the merits of the case.

This whole thing rides upon the merits review. The very important thing is that it is a merits review. Whilst people in my position might criticise decisions—and I have, I am not so sure that I have done it publicly—we do not necessarily have access to all of the information that the tribunal or a court might have access to. I think it is a bit of a dangerous proposition to give all that power to the minister. For example, if the new system were in place and if something happened today, Monday, 1 December, an individual or the parliament would not be able to exercise a control over the minister until sometime in March of next year.

CHAIR—That is always a problem but that is a problem with the whole system.

Senator McKIERNAN—In times of election, you are faced with a three- to four-month adjournment of the parliament. What is the power of the parliament? I am not fingering this particular government but, if the government of the day make a decision, the House of Representatives will support that government of the day.

CHAIR—So speaks a senator!

Senator McKIERNAN—Well, I have been here now for 13 years and I cannot recall an instance where the House of Representatives did overturn a decision of the government of the day.

CHAIR—That is the way it is supposed to be. That is why they are called the government of the day and not the temporary government or the other government in exile or anything.

Senator McKIERNAN—That is where the parliamentary scrutiny comes in. Where is the parliamentary scrutiny? What service would it be delivering to it, when you take that scenario into account? That is the difficulty that I have with your proposition.

Mr McDonald—I suppose the other thing, Chair, is simply the issue of ministerial time. If there is an increase in these cases and each one has a recommendation—and it takes us a couple of days to hear it and a couple of days to write it up—I would be surprised that the minister would have time to devote to the consideration of each individual case in those circumstances.

CHAIR—Senator Eggleston, we are going to have to let you say something before you go. We cannot have this as just a private discussion between Jim and me.

Senator EGGLESTON—I think the point that is being made by Mr McDonald is a valid one. I think ministers do have premiums on their time and it is hard to believe that a system of referral of cases to the minister would be a very efficient one and that some other lower level of determination should be the usual practice.

CHAIR—That would be there. The AAT would still make its recommendation and it would only be in exceptional cases, surely, that the minister is going to say, 'Well, I do not agree with it'.

Mr McDonald—How do you identify the exceptional case?

CHAIR—You have said that you have had seven cases or maybe eight in the last seven years. In seven years, he has got eight cases to look at where you have in fact overturned DIMA's recommendation.

Mr McDonald—Yes, except everyone under your suggestion would surely be a recommendation. So he would have to consider each one, would he not?

Ms Ransome—Yes or no.

CHAIR—You mean, where you have actually agreed with DIMA's recommendation?

Mr McDonald—Yes.

CHAIR—I do not think he is going to spend much time with it, frankly. Look at this realistically: you have confirmed what DIMA have found, therefore, the minister is going to sign off on it, unless, for some absolutely exceptional reason, there is something else happening there.

Mr McDonald—I suppose you could devise a system where he does not even have to look at those where they become binding—

Dr Chappell—Could I suggest that there will be more cases that presumably he will need to look at in the future, because we have heard that, in many of the cases previously where a warning was issued, no warning is now given and the person is ordered to be deported. One would assume that those were the cases where the line was difficult to draw in the past and I imagine that it is more likely that the tribunal would take a view, too, that these are cases which might well result in an overturning of the decision, if that is the power that it has, or recommend that no deportation take place. In other words, there would be an increase in the number of cases that are likely to be challenged at the tribunal level and result in a recommendation or an order going against the deportation.

Senator EGGLESTON—What are the guidelines for ministerial reference of a case or a decision to the minister at the moment?

Mr McDonald—They are the December 1992 guidelines issued by Mr Hand when he was the minister. That is just given by way of a statement to parliament. It can be changed at any time.

Senator EGGLESTON—Are they fairly strict guidelines? Are they contained in your submission?

Mr McDonald—They are in our original submission, are they not?

Dr Chappell—Yes.

CHAIR—Which is included in this?

Dr Chappell—Yes, and we have recommended that they might well be tightened to a degree, that there are some areas of non-clarity—let us put it that way.

CHAIR—I think that is probably an important area.

Senator EGGLESTON—The whole question of referral to a minister introduces a subjectivity factor, I suppose, whereas one would trust and hope that the AAT would have a fairly objective assessment of all the facts involved and would come to a fairly dispassionate decision. It often seems to me that referrals to ministers are people clutching at straws and trying to bring in extraneous factors to have fairly carefully made decisions overturned.

Mr McDonald—That was what I was trying to convey to Mrs Gallus about the different functions with these bodies. Mrs Gallus, the other thing is that, inevitably, if it goes back to the minister I imagine he will go to the department for further advice.

CHAIR—You are arguing circularity, in that the department has already given the advice.

Mr McDonald—Where is the independence coming from?

CHAIR—I do not actually see that he will go back to the department. I see him overturning in those situations where he feels that there is a political consideration.

Senator McKIERNAN—What if the policy were changed to give an automatic rubber stamp to those decisions that affirmed departmental decisions and only those that you did not agree with—that the tribunal did not give in favour of the department—were considered? Could it then be said that the tribunal is an independent body if that were the case? Surely not?

Mr McDonald—No; it would be administered by legislation, I would have thought, anyway.

Senator McKIERNAN—So you would have absolutely no independence at all? So you could not even pretend to be independent in those scenarios?

Mr McDonald—No.

CHAIR—Sorry, Jim, I missed your point. Why cannot the AAT pretend to be independent?

Senator McKIERNAN—That is if the minister were going to say ‘yes’ to all of the affirmative decisions—that is, to affirm all the decisions in favour of the department—and they were going to be accepted in law as being decisions. But, as for those that were

in opposition to what the department had originally intended and were going to be again reviewed by the minister, I am saying that would take away the complete and utter independence, and perception of independence, that a tribunal might seek to have.

CHAIR—So you think that because they know they are likely to be overturned that will influence their decision?

Senator McKIERNAN—I am saying that were a policy like that to happen—and I do not believe it ever will; I think I know Ruddock better than that and I do not think it will happen—I would suggest that there is no vestige of independence in that. It means that every negative decision is subject to further review and, if it is subject to further review by the minister, how many decisions can one expect to get? Even if a litigant or a client did get a negative decision, surely there would be an opportunity open in the courts to challenge a negative decision if one were made in those circumstances?

Ms Ransome—Only after it had been made by the minister.

Mr McDonald—It might open up that area. Then the applicant will say, 'We have got the conflicting decision of the AAT and the minister's decision. The minister has taken into account improper considerations.' The minister would have to write and give some explanation for it and off you go again into the Federal Court.

CHAIR—Unfortunately, we are going to have to wind up now because Jim has to get something from his office for question time.

Senator McKIERNAN—It is a busy time in the Senate.

CHAIR—We did appreciate watching you on television this morning, Senator, wondering if you were going to make the committee or not. It was the highlight of our morning.

We are still not even close to resolving this. I do not know what we are going to do about it. I suspect the committee has got to meet and we have got to discuss it further ourselves. Perhaps we can continue this by correspondence. That may be one possible way that we can keep a dialogue going.

Mr McDonald—Sure; by correspondence or video conferencing. We are happy to do that.

CHAIR—If we have not clarified this by January, perhaps we could have a third meeting in January because I am not certain about this in my own mind.

Dr Chappell—Personally, I think this is the crux of the issue. Again, from a tribunal perspective, there is nothing more frustrating than being in a situation where you

do believe that, when you try to make an honest, fair, impartial and correct merit decision, it is simply going to be seen as something that should be turned over.

CHAIR—Okay. I declare this inquiry adjourned until a time and date to be fixed. Thank you very much for your patience today.

Resolved (on motion by Senator Eggleston):

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

Committee adjourned at 1.50 p.m.