COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON PETITIONS

Reference: Petition regarding the convictions of Morant, Handcock and Witton

MONDAY, 15 MARCH 2010

CANBERRA

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON PETITIONS

Monday, 15 March 2010

Members: Mrs Irwin *(Chair)*, Mr Broadbent *(Deputy Chair)*, Mr Adams, Mr Chester, Ms George, Mr Hawke, Mr Craig Thomson and Ms Vamvakinou

Members in attendance: Mr Adams, Mr Broadbent, Mr Chester, Ms George, Mr Hawke, Mrs Irwin, Mr Craig Thomson and Ms Vamvakinou

Terms of reference for the inquiry:

To inquire into and report on:

Petition regarding the convictions of Morant, Handcock and Witton

WITNESSES

BRENNAN, Ms Michele, Principal Legal Officer, Attorney-General's Department 7, 20

BURNESS, Mr Peter John, Private capacity 16, 20

EKINS, Mr Ashley Kevin, Private capacity 16, 20

HERIOT, Dr Dianne, Assistant Secretary, Border Management and Crime Prevention Branch, Attorney-General's Department 7, 20

UNKLES, Mr James William, Private capacity 2, 20

WILCOX, Dr Craig Anthony, Private capacity 11, 20

Committee met at 9.30 am

Petition regarding the convictions of Morant, Handcock and Witton

CHAIR (Mrs Irwin)—I hereby open the public hearing of the House of Representatives Petitions Committee. I welcome all witnesses and members of the public to the Petitions Committee hearing today into the petition that has been presented to the House of Representatives regarding the convictions of Messrs Morant, Handcock and Witton.

Under the rules of the House of Representatives the Petitions Committee is required to consider if petitions comply with the appropriate rules. If so, the petition may then be presented to the House, and the committee may refer it to the relevant government minister for a response. We may also hold public hearings into petitions, allowing both government agencies and principal petitioners to consider further the concerns raised in petitions and the response made—which is what we are doing here today.

In this case, the petition was referred by the committee to the Attorney-General. The Attorney-General's reply to the committee has been presented in the House and is published on the committee's webpage. The Attorney has referred the petition to the British Secretary of State for Defence—as the appropriate authority to review the decisions that were made at that time—for review and any further action he considers appropriate.

So that we can all be clear about the procedures that the committee will follow today, I will outline them briefly now. First, I will invite witnesses to come to the table in turn to answer our questions individually or as representatives of a single department or organisation. When all witnesses or groups have been heard individually and we have had a short break, I will invite all witnesses to return to the table together for further questions and discussions. During that roundtable discussion, I ask that questions and answers be directed through me as the chair. This will ensure that everyone has an opportunity to be heard. As you can see, the committee's proceedings are being filmed and broadcast. If any witnesses have any concerns about this, please inform a member of the secretariat staff.

[9.32 am]

UNKLES, Mr James William, Private capacity

CHAIR—We welcome Mr Unkles, who is the principal petitioner. Although the committee does not require you to give evidence under oath, I should advise you that the hearing today is a formal proceeding of the parliament. I remind you, as I remind all witnesses, that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We invite you to make a brief opening statement before we go to questions.

Mr Unkles—Thank you. Madam Chair and members of the petitions committee, on behalf of myself and Nick Bleszynski, author and historian, who is also here today, I wish to thank you for the opportunity of appearing before the committee on a matter of significant importance to all Australians. I commend the committee for its recognition of the petition that I submitted in October of last year. Before proceeding further, I would like to commend the work of Dr Brian Lloyd, the secretary of the committee. Dr Lloyd has been most professional in providing assistance to me. I also wish to state at the outset that the views expressed by me, both written and verbal, are entirely my own and do not necessarily represent those of the Royal Australian Navy, the Royal Australian Naval Reserve, the Department of Defence or indeed the Australian government.

On this ides of March, let me say that what happened to Morant and Handcock was a good deal rougher, in terms of the lack of justice, than what happened to Julius Caesar on the floor of the Senate. Over 108 years, this case has apparently been the property of organisations like the War Memorial and individual historians, who have determined whether these men were lawfully convicted and sentenced, and who may or may not enter the arena of debate. Thankfully, this conservative and blinkered approach has come to an end with today's proceedings.

The high-handed approach is best illustrated by Peter Stanley in an article he had published in the *Canberra Times* on 8 March in which he asks:

> Are Unkles and Bleszynski pursuing them in the interests of "justice"? No.

The imputation is that both I and Nick Bleszynski have had an ulterior motive. For the record, I responded in an article printed in the newspaper on Friday, 12 March:

> Stanley's imputation that this case was not pursued in the interests of justice is insulting and is refuted.

To dispel any conspiracy theory, the pursuit of this matter commenced years ago when Mr Bleszynski, who researched the circumstances behind the Morant matter, wrote the book *Shoot Straight, You Bastards!* in 2002. As for me, I began researching the history of Morant's lawyer, Major JF Thomas, a country solicitor from Tenterfield who went to the Boer War as an infantry officer. My research was prompted by discussions also with Captain Tim Beale, an Army Reserve legal officer.

My research soon grew into studying the circumstances of the arrest and trial of Morant, Handcock and Witton. Aside from my interest in history, my research into the law that governed the trials in 1902 was motivated by nothing other than my concerns about justice and the lack of credible and legal due process in 1902. My aim is to focus on accountability, to get the convictions quashed and the sentences pardoned. Mr Stanley's statements that:

> Unkles is arguing that Morant and Handcock received rough justice because the court-martial proceedings were flawed—if they are compared to modern practice.

and that:

> Their case lacks common decency: this sort of amorality is why lawyers have such a poor reputation.

demonstrate, in my view, his complete lack of understanding of what the petitions and the supporting legal arguments are about, and his bias against the rule of law and due process of 1902. For his benefit, and for the public record, for the committee, I again state: this case is about an unsafe trial, according to the legal standards of proof and procedure, in accordance with the law of 1902. Stanley's comments about legal technicalities and lawyers are unfair and insulting, and again demonstrate his lack of understanding. If 'common decency' means standing up for fairness and due process, then I make no apologies.

Taking Stanley's arguments to their logical conclusion, what he is saying is that, in a democracy, standards of jurisprudence are defined without adherence to legislative standards and common law. The laws that governed the trials of these officers were defined by the British Army Act 1879, the *Manual of Military Law 1898* and the courts martial rules of procedure 1899. No amount of criticism from anyone, including Mr Stanley, will change that. What this case is about is holding the military authorities of 1902 to account against the legal standards of that time.

I understand that the committee's role is to inquire into and report to the House on this petition. The committee's role is significant as it provides Australians like me with an opportunity to raise a matter of public importance through a process that is immediate, devoid of unnecessary protocol and burdensome red tape, and that attracts the attention of our elected representatives. Importantly, it ensures the attention of relevant ministers and MPs in Australia and in Britain. This particular petition to the House has also been complemented by the petition that I have forwarded to Her Majesty Queen Elizabeth. I am pleased to say that this petition is now being considered by the British government, and I have a copy of that for the committee if you wish to have a look at it.

We are witnessing important legal history today. For the first time since Morant, Handcock and Witton were tried and sentenced in February 1902, their convictions and sentences are being reviewed by an Australian institution—the parliament. I am pleased to say that—unlike the proceedings in the cases of Morant, Handcock and Witton, who were tried and sentenced in secrecy, without the knowledge of the Australian government and their relatives—these proceedings are being conducted in an open and transparent manner. The arrest and trial of these men—volunteers, not professional, permanent soldiers—who served the British in their war against the Boers, were kept a secret from the Australian government and, more importantly, their relatives.

As I have detailed in legal submissions before the committee, perhaps the most aggravating aspect of their sordid trial was the manner in which the men were denied the basic rights of a civilised nation—that is, England—of contacting their relatives and seeking support of their government. Tragically, this secrecy also precluded their defence counsel, Major Thomas, and his clients from seeking clemency from the King to whom they had pledged their military service. Morant and Handcock went to their deaths knowing that their appeal rights of 1902 were denied—a cruel and calculated conspiracy of the British military command. As to George Witton, his sentence of life imprisonment came to an end on 11 August 1904 when he was released after an extraordinary display of nationalistic fervour by over 80,000 Australians who petitioned King Edward VII, the Australian government led by Prime Minister Barton, representatives of the South African government, and even former Boer commanders and British MPs including Winston Churchill. There was also a persuasive petition presented by Isaac Isaacs KC, MP.

Of great legal significance was the British government's recognition of the injustice of Witton's trial and the sentence. The House of Commons, interestingly, voted on 11 August 1905 to overturn Witton's sentence. This is a precedent for what is being sought now. I am pleased to welcome the descendants of the men here today and share their hope that the dedicated and professional legal work done by their lawyer, Major Thomas, and Witton's lawyer, Isaac Isaacs, will now continue so this matter can finally be resolved.

On behalf of the nation, this case is an unjust stain on Australia's identity and military history. For the descendants, this matter has been a source of intense grief and personal interest. Their letters to the government and the Queen will be presented to the committee and they wish me to express their thanks to you and the parliament for the interest shown in this matter. They wish a fair and transparent process of review by the British government and hope that the British authorities will finally recognise the injustice that occurred and will continue the remedy that was partly shown to George Witton—namely, his release from prison and the overturning of his sentence.

What is expected now is the final step—a quashing of the convictions and the granting of pardons for Morant, Handcock and Witton. The Attorney-General has responded for the committee and the petition has been referred to the British Crown. The remaining question for the committee to consider, in my view, is: what should be done? The detractors have focused solely on history and argued the status quo—namely, do nothing. I say that this is not a case of arguments over history. It is far more important than that. It is about due process that was supposed to have been followed in accordance with the British military law of 1902. It is a furphy for people like Peter Stanley, Craig Wilcox and others to suggest that we are trying to apply the laws of 2010. This is simply not the case. Nor is it a case of arguing legal technicalities. This argument is absurd and does not represent any of the research contained in the materials that I wish to put before you. One of my primary sources used in the research is this *Manual of Military Law 1899*.

What this committee can do is make findings and recommendations to the British government through our parliament. Your deliberations will have a significant effect on the final outcome. I am happy to answer any questions you may have, and wish to provide you with copies of legal submissions, a covering executive summary and conclusions, and letters from some of the

descendants. I also have copies of the two letters that appeared in the *Canberra Times* in the last week or so, and a short summary and an outline for the committee.

CHAIR—Given that this is a roundtable discussion rather than an inquiry, I would ask you to give the letters and documents to our secretariat staff at the conclusion of today's roundtable. The committee will consider them in private at a later date and the secretariat will then inform you of the committee's decision.

Mr Unkles—Thank you.

CHAIR—I have just a couple of questions before we move to the Attorney-General's Department. The petition appears to suggest that a pardon for the men named in it would be a significant development. What do you say to arguments that the exercise is a pointless one? Secondly, can you tell the committee what the significance of a pardon, or pardons, would be if granted?

Mr Unkles—In some of the documents that I will leave with the committee today I say this as to one of your points: the passing of time and the fact that Morant, Handcock and Witton are deceased does not diminish the errors in the administration of justice. Injustices in time of war are inexcusable and it takes vigilance to right wrongs and address injustices. I say that the passing of time is irrelevant. There is an argument that says that time is of significance or the fact of whether someone is alive or dead makes a difference. I say that there is no difference. If on the face of it and proven they were treated unfairly and not in accordance with the law, the fact that they are dead means that they should be recognised and pardons should follow. A similar process was followed by the New Zealand government with New Zealand soldiers executed during World War I by the British—and Canadian, British soldiers and Irish soldiers. So I say that the passing of time, if anything, means that this case is very significant. It is very important that the wrongs be corrected.

What difference will it make? There are a lot of relatives here today and it makes a lot of difference to them personally. As you will see from the letters I will file today, they have carried this burden throughout their family histories for many decades. It has been handed from one generation to the next. So for them personally it will make a difference. What is it to the nation? Leaving the movie aside, I think it will make an enormous difference. This case has got nothing to do with the movie; it has everything to do with demonstrating to the public that due process and fairness are hallmarks of our democratic system—a democratic system that I acknowledge we inherited from the British. I want to celebrate that by bringing this case to the committee's attention and to the attention of the British government. I believe that on the merits of the legal arguments there is a strong case for pardons. Those posthumous pardons would enable these men to claim their rightful place in the archives of Australia's military history.

CHAIR—Are you happy with the response to date from the Attorney-General that he has referred your petition to the British Secretary of State for Defence? You have stated you have also written to Her Majesty the Queen. Is that correct?

Mr Unkles—That is right.

CHAIR—Have you received a response from Her Majesty the Queen regarding your letter or the copy of your petition?

Mr Unkles—Yes, I have got a response. That petition, which is considerably longer than 250 words, was sent to the Governor-General and the Governor-General of Australia sought advice from the Attorney-General on the contents of that petition. I understand, without having access to correspondence within the department, that that petition has now gone back to the UK. I have a copy of that petition with me and I am happy to provide a copy.

CHAIR—We are out of time. I know you will be coming back to the roundtable once we have heard other people who are coming before us today.

Mr Unkles—Thank you.

[9.49 am]

BRENNAN, Ms Michele, Principal Legal Officer, Attorney-General's Department

HERIOT, Dr Dianne, Assistant Secretary, Border Management and Crime Prevention Branch, Attorney-General's Department

CHAIR—I welcome representatives from the Attorney-General's Department. Although the committee does not require you to give evidence under oath, I should advise you that the hearing today is a formal proceeding of the parliament. I remind you, as I remind all witnesses, that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Thank you. I invite you to make a brief opening statement.

Dr Heriot—I would like to make a brief statement about the concept of pardons and jurisdiction. The Governor-General is able to grant a pardon to a federal offender under the royal prerogative of mercy. By convention, the royal prerogative of mercy is exercised on advice from government. Owing to its origins as a personal power of the monarch, the prerogative is a highly discretionary power. Under the prerogative, the Governor-General may grant a person convicted of a federal offence a free and absolute pardon, grant a person convicted of a federal offence a conditional pardon, remit a fine imposed on a person convicted of a federal offence or order an inquiry into a conviction for a federal offence, but that inquiry must be undertaken by an entity other than a court.

Section 85ZR of the Commonwealth Crimes Act provides that, where a person has been granted a free and absolute pardon because he or she was wrongly convicted of the offence, they are taken to never have been convicted of that offence. Given the significant consequences that flow from the grant of a pardon, a high threshold has been applied by attorneys-general when deciding whether it would be appropriate to recommend that the Governor-General pardon an offender. A pardon would generally only be recommended if the Attorney-General were satisfied that the convicted person were both morally and technically innocent of the offence for which the pardon was sought and there was no remaining avenue of appeal. Morally and technically innocent would describe a person who is innocent both in law and in conscience, in contrast with a person who is culpable in conscience but technically not guilty as a matter of law.

Statistics on federal pardons were not maintained prior to 1990; however, I am aware of three pardons having been granted since 1990. All of these people had received fines rather than sentences of imprisonment and in each case the agencies involved agreed that the offender should not have been prosecuted for the offence. I should note by way of completeness that people convicted of a federal crime can also ask the Attorney-General to refer their case to a court of appeal under legislative schemes that exist alongside the royal prerogative. These are set out in state and territory legislation and apply to federal offenders by virtue of section 68 of the Commonwealth Judiciary Act.

The Governor-General is not able to exercise the prerogative power to pardon people in other jurisdictions and the Attorney can only refer a federal offender's case to a court of appeal. When applications for pardons or referrals are received from people convicted of offences that are not

federal offences, which is not uncommon, we advise the applicant of the appropriate channel through which they may seek a pardon and, in appropriate cases, forward the pardon application to the relevant agency or to the relevant governor. For example, it is not uncommon for the Commonwealth to receive applications for pardons from people convicted of state and territory offences.

A similar approach was taken in relation to Mr Unkles's petition. As Morant, Handcock and Witton were convicted under British courts martial, the Attorney referred this petition to the UK Secretary of State for Defence. The Secretary of State for Defence had previously been involved in legislation which pardoned soldiers convicted in British courts martial in the First World War.

CHAIR—I want to go to the letter received from the Attorney-General in which he stated he has referred it to the Secretary of State for Defence. Have we received a response from the United Kingdom?

Ms Brennan—We have received email responses confirming that they have received the petition and have started looking into it, but nothing official has come back through the Attorney yet.

CHAIR—So they are looking into it at this stage, but we have not received any update. Does the Attorney-General's Department have a watching brief on this review or it is just waiting to hear the response from the United Kingdom?

Dr Heriot—We will be just waiting to hear from them. No doubt, we will send follow-up inquiries, but they will not be of a formal nature.

Mr BROADBENT—We know what our processes for dealing with petitions here are. Do you know what the UK process is for them to deal with petitions that have gone to them or the letters that have gone to them?

Dr Heriot—No, I do not. I am sorry.

Mr BROADBENT—That cut that one short, didn't it?

Dr Heriot—I can seek advice. I do not know. They said they were looking at the matters raised in the petition. I have no detail about their procedures.

Mr BROADBENT—As you know, our new petitions process is that petitions come to the parliament, they are received by the committee if they are in order, they are passed on to the relevant ministers for consideration and then there is a letter back. So Mr Unkles, in this case, actually gets a response to his petition from the government of the day, which is really important. The old system was that the petition came in, it was read out by the Clerk, it was put on a shelf and you never heard another thing about it unless it got some other credence, which most did not. So I was just wondering, with the petitions that have now gone to the UK, if you know whether they have the same processes that we have of getting a response from government to that petition?

Dr Heriot—No, but I can make inquiries.

CHAIR—Do you feel there is any alternative approach to investigate or provide a further resolution to this matter?

Dr Heriot—The British government has jurisdiction in this matter and they have all the primary files, so they are in fact best placed to do an examination. There is precedent in work they have done previously around World War I sentences.

Mr HAWKE—You talked about British legislation; you are talking about statutory pardons? Is that what you are referring to there?

Dr Heriot—Yes.

Mr HAWKE—And the pardoning of World War I soldiers—the different governments who petitioned for those pardons—they are statutory pardons, aren't they?

Dr Heriot—They also have royal prerogative of mercy applying, but I am not aware of applications of royal prerogative of mercy in the UK. That is outside my knowledge.

Mr HAWKE—That is fine. I just want to explore the statutory pardon for a moment. My understanding is that a statutory pardon does not overturn the conviction. The dishonour of the original verdict is removed, but the conviction is not overturned. Is that your understanding of a statutory pardon?

Dr Heriot—The UK Armed Forces Act 2006 included a special provision in section 359 to pardon people who were executed in World War I for offences which are specified in the act—they focus around mutiny and desertion type offences. That section stipulates that the provision does not affect any conviction or sentence; does not give rise to any right, entitlement or liability; and does not effect the royal prerogative of mercy.

Mr HAWKE—So, if the royal prerogative of mercy is not used, one option that still could be accessed is the British parliament issuing a statutory pardon or passing a statutory pardon. Then the conviction would not be overturned but the dishonour of the original convictions and the meaning would be removed.

Dr Heriot—That would be a matter of course for the British parliament.

Ms GEORGE—In relation to that, in the case of George Witton and the overturning of his sentence, could you explain the process that led to that. As I understand it, there was a petition with lots of signatures. Who made the final decision in that case—was it the parliament or was it the prerogative of the King to grant the pardon? Do we know enough about the background there to draw any parallels with this current situation?

Ms Brennan—I am not sure exactly if it was the parliament or the King, but Witton was not pardoned; his sentence was commuted and then he was let out of prison early. His conviction still stands.

Ms GEORGE—So was it in the nature of a statutory pardon, as Mr Hawke referred to—do we know?

Dr Heriot—Just to be precise, it was not a pardon; it was a commutation of sentence, which is a different thing. I would imagine that would be through the normal course of justice, but I would have to look at that, sorry.

CHAIR—If you could take that on notice and get back to the committee that would be greatly appreciated. Mr Adams has a question for you now.

Mr ADAMS—I understand a file was lost after it left South Africa. How much record is there of the trial in the British archives?

Dr Heriot—I am sorry; I do not know what the British archives hold. I am not sure that is something within my competence.

Mr HAWKE—Just following up on that: does the Australian government seek those files if they relate to Australian citizens? Can we request those? Can the Attorney-General request those files?

Dr Heriot—I am not sure that they were Australian citizens. I do not think Mr Morant was an Australian citizen, he was a British citizen, and the others would have been British subjects by nature of the situation at the time. I am not sure why we would. The matter has been remitted back to the UK government, whose responsibility it is to inquire. They have indicated that they are looking at the matters that were presented to them at an official level. I do not know what the files are, I do not know what the archive policy about releasing these things is, I am sorry.

Mr CHESTER—In relation to the Attorney-General's letter to the Petitions Committee of 8 February this year, he refers to the fact that he sent it to the Secretary of State for Defence to review the material and petition and to take any further action he considers appropriate. From the Attorney-General's Department perspective, is that the end of the matter for your department and you just take a wait-and-see approach to see what actually happens over there, or what do you actually expect to happen next in terms of this petition?

Dr Heriot—From our point of view, it is outside our jurisdiction. It has been referred to the appropriate authority, who have indicated that they will look at the material. As I said, we will make inquiries from time to time as to progress, but there is nothing within our jurisdiction for us to do with this petition for pardon.

CHAIR—Is it correct that the Department of Defence do not have a historian on staff at the department? I am sorry, that is why we do not have the Department of Defence here today, because they do not have a historian. We have got some wonderful people from the Australian War Memorial. I do apologise for that.

Dr Heriot—I am confident we do not have an official historian.

CHAIR—We were hoping for the Department of Defence but they could not come because they do not have a historian. Thank you very much. I look forward to you coming back to the roundtable later on.

[10.01 am]

WILCOX, Dr Craig Anthony, Private capacity

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearing today is a formal proceeding of the parliament. I remind you, as I remind all witnesses, that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. You may wish to make a brief opening statement.

Dr Wilcox—I am a historian, an independent one, and an author. I live and I write in Sydney. I am happy to say a few words. I am also happy to answer, only as a historian, some of the questions that our friends from the Attorney-General's Department were not able to answer. Would that be appropriate, or would you prefer me not to?

CHAIR—I think we will leave that to the roundtable.

Dr Wilcox—In that case I will just talk for a couple of minutes and then take your questions. I have written on the Morant case probably more than anyone else. I have written repeatedly on it. It seems to me that my first concern about the petition is that I have a historian's general concern about revisiting the past, not just to reflect on the past but in an attempt to change it. Petitioning to reconsider a verdict I think ignores the difficulty of fairly reviewing a legal case decided in an age with very different priorities from our own and conducted under what is now obsolete law in which no-one today is a practising expert, and in this particular case where the transcripts, not to mention the transcripts of the trial but also the transcripts of the preceding court of inquiry, have not yet turned up.

To be more particular, the petition's call to procedural fairness I think hijacks the concern with justice to obscure historical evidence of guilt and legal findings of guilt in this case. Most historians and researchers, from Manning Clark down to little old me, have concluded that Morant and his colleagues killed unarmed men and teenage boys repeatedly and with far too little reason to excuse what they did. The trial of Morant and the others was a series of courts martial that—note this—stretched over five weeks in an age when murder trials were typically wound up after just two or three days. After lengthy hearings and what seems to me to have been lengthy legal argument, the courts repeatedly found Morant and the others guilty of multiple murders, except in one case in which the defendants were able to deny, and the historical record turns up that in fact they were responsible for that particular killing after all.

The petitioners say that they can look beyond historical argument to the workings of the law and its failure to work, but they keep talking history, don't they? They keep talking history to journalists, to me and now to you. But I think that when they do that they misunderstand historical evidence. I will quickly cite two examples. One is the claim that Morant and the others were acting on some kind of orders in killing prisoners. No such orders have been found. We really have no evidence of any kind of order, and I can say later on why I think that it would have been completely improbable that there would have been orders. Another example of talking historically—and, I think, talking with the wrong sense of history—is the standard argument that

the defendants, Morant and the others, had too little time in their trial. It is usually said that they had one day to prepare. If you go through what we know about the trial, in fact they had 17 days to prepare. I am not a lawyer; I do not know whether that is a good deal or a bad deal. I am certainly not an expert in military law in 1902, but it seems to me that it is one of those classic cases where you get to elide the truth about the Morant case and come up with a spectacular line.

It is wonderful that the descendants of some of the men, at least, are here today. It sounds like I am talking very harshly about those men. I do not want to do that. Every one of us is the sum of far more than our worst deeds—of course we are—and I hope that we are going to be remembered for the good things about us and not just the bad things. But you also have to acknowledge the bad things.

There are here today descendants of men who, to my mind, were rightly convicted of having murdered or having incited murder. What about the descendants of the people who they killed—the descendants who I have met when I have been to South Africa? I have looked into their eyes. I have talked to them. I know about their family memories. I have been with them when they have looked down on the memorials—the little graves of the people who, in some cases, they can almost personally remember. What about them? What kind of justice are we going to be doing for them today if we say in this case, as unfortunately we have in many other cases of Australian history, 'It was all the Brits' fault; it wasn't us'?

CHAIR—So you feel as a historian that Kitchener did not make those orders, virtually, to shoot to kill?

Dr Wilcox—I cannot see any evidence. It is important to remember that we are not talking about battlefield prisoners. I will backtrack. Kitchener issued harsh exhortations to the army, saying, 'I want you to behave harshly.' It was not very good, but those orders were far short of saying, 'You should round up everybody and start killing them.' But this is, in fact, what Morant and his comrades were doing. We are talking about people who, apart from one case, were not battlefield prisoners. They were generally civilians, in effect—men and boys who were required under martial law to come into the custody of the army which had recently rolled across their conquered republics. They were required to come into the custody of the army, hand over any rifles that they had—these were farming people, so of course their farms were full of rifles. Some of them had been combatants, but not all of them had been. They were required to hand in those rifles and sign a piece of paper saying, 'We now accept the King and the new order.'

For some reason which we still have not unearthed—and it was not Morant who started it—Morant and his colleagues started randomly killing these people. We really do not know why, but it is incontrovertible that that is what they did. Then they started killing others to stop the story getting out. They killed a missionary who had been trained in Germany, and they also killed one of their own men. If there were orders, why did they have to kill people to silence them?

CHAIR—I will ask one more before I hand over to Mr Adams. I was very interested, when I was looking at some of our news clippings, by a Nick O'Malley Investigations item. I have an article here, and I want to read it to you. I hope I pronounce this gentleman's name correctly:

Bleszynski and Unkles are among those who believe Kitchener wanted Morant and Handcock shot to discredit their claims that he had ordered the execution of prisoners, to facilitate peace talks with the Boers, and to appease Germany, which was considering entering the war.

You would disagree with that?

Dr Wilcox—Yes, I would. I do not see any credibility in that argument. It is a classic case of a historical conspiracy theory. You can argue anything that fits in between the facts and say that because there is nothing directly contradicting this it must be true. But then it might also be true that aliens are sitting with us and listening to everything that we are doing and we just do not know.

At a certain point you have to apply a common-sense judgment as well as, with regard to the past, a historical judgment and say, 'What is the evidence for that? Why would that have happened? Why would Kitchener have ordered some men to start randomly killing in a small unimportant part of a huge military campaign? Then, why would he try clumsy methods like this to send men to their deaths with the idea of winning against other people?' Certainly he wanted—and now I think we are getting to the heart of military justice at the time—to show the rest of the army that it had to draw a line somewhere. Kitchener in effect is making a gesture, I think—but this is after the recommendation for an execution has gone through London and come back with a yes to it.

But I think Kitchener in effect is saying to the rest of the army, 'We're going to be harsh, we're going to be tough, but we're just not going to engage in mass murder.' At this stage he is trying to draw in the Boers and say, 'Look, the new order won't be so bad. I am a soldier like you are. We all understand each other, don't we? Let's end this silliness now. You're just going to have to be part of the British Empire, but it won't be so bad after all.' Sure, he is making gestures like that, but is that the reason he has these people executed? I really cannot see that.

And even if it were, even if Kitchener had issued bizarre orders in this case to start randomly killing Boers, how would that have made these men any less guilty? There has been a huge moral discovery since then that you can follow orders in a war crime and you can still be guilty, and that moral discovery is important.

CHAIR—I have just one other question, because I know that you will be coming back to the roundtable. The article that I have before me states also that the executions probably saved the lives of 119 Australian soldiers charged with desertion in the Great War. It goes on to state:

So great was the outcry that no Australian government ever again allowed a foreign power to shoot its men.

What do you feel about that statement?

Dr Wilcox—Again, Chair, that is another interesting case of the legend driving a false history. Australia's military system was based on a strand of soldiering in Britain which you might call 'citizen soldiering', raising part-time militias rather than having a professional army. If you have a look at colonial Australia's volunteer acts and militia acts as they were called, what did they say? They said that there would be no capital or corporal punishment in the case of our soldiers, and it said the same thing in Britain's Volunteers Act and Militia Act as well. We simply

inherited that along with a whole system of amateur soldiering, if you like, from Britain. It had nothing to do with the Morant case. If you look through the 1904 debates over the Defence Act do you see any reference to Morant and Handcock? There is none that I have seen. Maybe it will turn up; maybe people talked about it behind the scenes. But I have seen no evidence of that.

Ms VAMVAKINOU—I am intrigued by the assertion that you made that there was no evidence of the issuing of orders. I can understand that there may not be any evidence of any written orders, but are you absolutely confident that there was not at any time possibly an issuing of verbal evidence? How can you substantiate that confidence if indeed you have it?

Dr Wilcox—That is a splendid question. I am not able to say that there were absolutely no verbal orders ever, but I can cite the example, say, of one Morant's men, Trooper Frank Hall, who said that only the very green believed the bogus proclamations supposedly coming from Lord Kitchener. It seems to me that you have to work how historians generally work: when there is no evidence of something then you do not have to look straightaway to saying, 'Maybe I just haven't found it yet.' It is possible that you might not have found it yet, but when the other things stack up a certain way you can say, 'Hmm, I don't think we are going to find that', and I think that that is the case here. No written orders have been found, and this is in an army that was addicted to doing everything in triplicate all over South Africa. Why would their own men have been sceptical about the existence of verbal orders? I think because probably there were none.

Mr ADAMS—I understand Hall was paid to make that statement against the accused; he was coerced into making that statement. This was the first of the non-conventional wars. This was the first guerilla warfare, where, as we have seen in Afghanistan today, civilians are put in front or are a part of guerrillas fighting a war against a conventional force.

Would you accept that as being the situation of the day; and would you also accept the politics of the day—and we are politicians; you may not understand politics as we do? There was a lot of pressure on Kitchener. There was a lot of pressure on the British Army because of the politics of the day, because this war was very unpopular. They were losing it. They could not make the Boers submit to the empire, so the word went out, some of us would perceive, to make sure that they stopped the civilians from supporting the Boers who were possibly armed in the field. These were irregular troops. These were not people who had been through a military academy; they were country people, skilled at what they did—riding horses, living tough, doing the tasks they were asked to.

CHAIR—Mr Adams, what is your question?

Mr ADAMS—Dr Wilcox has been dealing in a conventional process of what is written, and that is the only evidence we have. The politics of the day, the political pressures that were being applied, the war itself and how it was fought, I think, also have some relevance in this case.

Dr Wilcox—Those are excellent questions. You have obviously done a fair bit of reading. As to a guerrilla war: no, it was not the first. The British Army had been fighting them before. European armies had been fighting them—in particular, in the Napoleonic Wars. The German army was accustomed to them when fighting France in 1871. There were recognised ways of going about things—ways which we would not approve of, brutal ways—but they stopped short

of massacring every man in a locality. There was no permission for that, and when it was done it was considered complete barbarism. The Germans became particularly keen on doing that kind of thing.

As to the British losing the war: no, they were winning the war. They fought very successfully. I am sorry to say we are not doing very well in Afghanistan; we have not done very well in Iraq. The British did extremely well in South Africa. They were able in the space of three years to conquer a very large part of South African upland very successfully with minimal casualties and minimal problems back home. I do not think the Boer War was the right kind of war—don't get me wrong—but if it comes to simply prosecuting a campaign like that, they were doing brilliantly and they were winning very successfully by the end of that war. It was just a question of: would the Boers hold out for another couple of months or would they come in now?

As to irregulars: yes, you are absolutely right. The soldiers were not professionals in some cases, but do not buy too much into the myth. Think about Witton: what was Witton's job before he left Australia? He was a professional soldier. He should have known better. Morant and Handcock were officers and they should have known better too.

CHAIR—But Witton was pardoned, wasn't he—finally?

Dr Wilcox—No, his sentence was remitted. I do not believe he was pardoned. Jim Unkles may know better, but I believe his sentence was simply remitted.

Mr HAWKE—It is very good you ended on that note. You say there is no evidence in history; there are different interpretations of history. How do you explain the disparity in the treatment of Witton, and Handcock and Morant?

Dr Wilcox—The disparity comes largely because Witton was not executed, and his family were able to do something about it. They mounted a very large campaign saying that, 'Our young George was under the thumb of others. He seems only to have killed one person. He assures us that he killed that one person in self-defence. He's now in an English military prison. You shouldn't really put Australian soldiers in an English military prison, so why don't you just let him out now?' The politics of that—to get back to the excellent question asked before—were that in South Africa the white opponents of the war wanted now to get on, and they wanted to say, 'Let's be forgiving now. There are a number of Boers in prison—or Cape rebels as they were called but that is a complicated category I will not go into—let's let them go. Let's also let Witton out of prison.' In fact it was a South African politician named Logan who went to London and eventually got Witton out of jail.

Mr HAWKE—Witton wrote a book, didn't he—*Scapegoats of the Empire*—when he got out.

Dr Wilcox—Witton compiled a book; yes, he did.

CHAIR—Thank you very much and we look forward to you coming back to our roundtable shortly.

[10.20 pm]

BURNESS, Mr Peter John, Private capacity

EKINS, Mr Ashley Kevin, Private capacity

CHAIR—Welcome. Although the committee does not require you to give evidence under oath I should advise you that the hearing today is a formal proceeding of the parliament. I remind you, as I remind all witnesses, that the giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Would you like to make an opening statement before we go to questions?

Mr Ekins—Thank you. I am the head of the Military History Section Australian War Memorial. I appear here at the invitation of the committee, and I thank you very much.

CHAIR—And thank you for accepting our invitation.

Mr Ekins—Thank you to Dr Brian Lloyd for arranging that. My colleague, Peter Burness, and I are both military historians, practising for many years. I would like to say at the outset though that we are not spokesmen for the Australian War Memorial; we are both here as independent military historians, and as far as I am aware, the memorial has no substantial position on this matter.

With what we have heard so far, I think I would like to start by just stating a few of the irrefutable facts about the case, because they seem to be at risk of being lost in much of the debate so far. Dr Wilcox, who is an authority on this case and has written, indeed, the volume which is now considered an official history of Australia's involvement in the South African War, has pointed out how important evidence is for historians in drawing their conclusions.

I would just like to say several things. Firstly, these men were all guilty of cold-blooded murder of prisoners of war. They admitted this; they confessed it, and there were witnesses to what they did. Secondly, they served in British units, in this case, an irregular force, the Bushveldt Carbineers, as members of a South African contingent raised by the British government. Thirdly, there is, as Dr Wilcox has said, no evidence of Kitchener's secret order to take no prisoners or to wreak this sort of havoc on the population.

Fourthly, the trials were conducted under British military law, under the British Army Act according to the *Manual of Military Law*, and followed, as far as we are aware, the normal rules of procedure. The proceedings have not been found. That could be because they were taken by one of the senior officers involved—that sometimes did happen. In my own researches into military discipline and punishment in the First World War I have come to gain a fair knowledge of how the proceedings were drawn up and what the proceedings were. This seems to have been, as Dr Wilcox indicated, a protracted trial, a general court martial that would have involved a great deal of evidence being presented, and I think it is rather risky to now talk of the proceedings being found unsafe when we do not even have the records. Those proceedings were

normally reviewed in London by the Judge Advocate General. It may be possible that some example of the records might still turn up.

I would like to add just a final point about what I see as the futility of a pardon in this case. There is an understandable anguish among family members, the descendants of these men who were executed, and I appreciate that. The World War I pardons enacted by Canada, and New Zealand in particular, and considered by France, offered solace for such family members but they did not change the facts. These men were executed in the First World War often in extenuating circumstances—men who were suffering shell shock or were severely stressed by their war experience.

However, to rewrite the historical record by retrospective pardons changes nothing for those men. In a way, as Dr Wilcox indicated, it falsifies the historical record. The idea of the conviction not being overturned but the dishonour removed, to me, is a very strange one. As Dr Wilcox indicated, historians from Manning Clark to the present have seen what Morant, Handcock and others did with a cold eye, and I think this committee in the end has to do the same.

CHAIR—Mr Burness, did you want to make a statement?

Mr Burness—No, I have nothing to add.

CHAIR—We are not a trial by judge and jury here today. No recommendations will be going to the government. We are just here really to have a roundtable discussion and to hear the for and against arguments. The Attorney-General will be advised of the discussion that we have had and then it is entirely up to him if he wants to refer to that the United Kingdom. It is very interesting—let us be honest here—that Morant and Handcock did not have the right of an appeal, which I feel was very wrong. Would you agree with that?

Mr Ekins—No. It was the standard procedure of the day. There was no right of appeal for cases like that. Soldiers in the First World War very rarely were given any right of appeal. It was the nature of the military justice of the day.

CHAIR—Can you give us a little more history on the reasons for that?

Mr Ekins—No, I cannot. That was simply the nature of military law.

Ms VAMVAKINOU—You are not providing evidence as to why. I think it would be significant for people to understand why there was no option for appeal. You are simply saying it is because that is how it was. I was just wondering whether it has ever intrigued you to explore further why it was like that.

Mr Ekins—I think one has to understand, as someone once said, military justice is to civil justice as military music is to normal music. It is sui generis—it is a thing of its own. Soldiers serving in uniform come under a different standard. They are men who in effect put their lives on the line and who were expected to serve. There is no limited liability clause in a soldier's contract.

CHAIR—I think we are going to have a very interesting roundtable discussion. I think Mr Thomson wants to put a brief question.

Mr CRAIG THOMSON—I understand the position you are putting in terms of the historic facts as you see them, but I do not understand the argument that you and Dr Wilcox have put that, because it has happened in the past, we should not revisit it. That just flies in the face of common decency. If a situation is wrong in the past, surely we have the ability to go back and have a look at it. The argument that, because it has happened in the past, we cannot look at it just does not stack up.

Mr Ekins—I think you have misunderstood my point. I am not saying that we should not revisit—historians spend their lives revisiting issues like this; that is what we do—but I think it is really the verdict of history in the end that will give some sense of justice.

Mr CRAIG THOMSON—But it is not the verdict of history; it is the verdict of men at the time that people who come after that can have a look at. It is not the verdict of history; it is the verdict of men.

Mr Ekins—I think they are the same thing. I think historians can revisit the past—they do it all the time—and reassess the evidence and re-weigh the situation. But to somehow wipe the slate clean as if these things never happened does these men no service at all—it does them no long-term justice at all, in my view.

CHAIR—I think we will go to Mr Broadbent and then I know Ms George wants to ask a question.

Mr BROADBENT—I thought, Chair, that we were having a presentation from the War Memorial's perspective, not from your own personal perspective. So I am disappointed in that. I ask you: is public sentiment not important here? You have many exhibitions at the War Memorial about events that have happened in the past in this nation. The War Memorial is a very important part of Canberra's countenance. Many people come here and are amazed at your presentation and at the War Memorial and the importance of it. You have done exhibitions on this very issue. What is the public sentiment on this issue?

Mr Burness—The War Memorial does not have a position on a pardon. I do not think we have even discussed it. As you say, we have mounted exhibitions in the past and Breaker Morant comes up in those. His name is not on the Roll of Honour, but he was never eligible anyway to be on the Roll of Honour because he was serving in an irregular South African unit. He was not in the Australian forces when he died by execution; that is the reason his name is not on the Roll of Honour. His presence is in some exhibitions, notably in the Boer War Gallery, and there we simply outline the facts. We know there is public sentiment in relation to it. There was even an interactive device where people could vote yes or no as to whether the execution was—

Mr BROADBENT—You went that far?

Mr Burness—Yes, but that was—

Mr BROADBENT—What was the result of the survey?

Mr Burness—Marginally, no. But it was an unsupervised survey, and we witnessed people pressing buttons several times. We simply lay out the facts. Peter Handcock's last letter is on display and it is a very emotive thing obviously, and that is going to affect people's view. I will just read two sentences in a recent exhibition in which we feature Breaker Morant. We say: 'Morant has sometimes been depicted as an Australian hero. While he may have been brave, he was guilty of a war crime and so offers a poor model for a hero. Shooting prisoners is not heroic.' So we did address that at least, if not the pardon.

Ms GEORGE—Mr Unkles presented background information to the committee and I will quote from it and then seek your response. Mr Unkles protested about the 'secret manner in which the arrest, investigation, trial and sentencing' of Morant, Handcock and Witton were conducted. He argues:

> This prevented the Australian government and the men's relatives from interfering in the process. The secrecy prevented any hope of appeal to the King for mercy and ensured the government could not intercede on behalf of the men—

with the government finding out about the sentencing in April, long after the sentences were brought down. What is your response to that—that, in a sense, due process of appeal and seeking mercy was prevented by the manner and conduct of the courts martial?

Mr Ekins—In the absence of the court martial transcript of proceedings it is very hard to say. It is my understanding that the trial or at least the conclusion of the trial was reported in the press at the time. Dr Wilcox might be able to illuminate us on that in the roundtable discussion. The court was a closed court, from all accounts. In the First World War the courts were open courts and the results were being published in Australia.

I might just reinforce the statement that Dr Wilcox made before, that the Handcock-Morant case had nothing to do with the fact that Australian soldiers in the First World War were not executed. In fact, the clause that ended up in our Defence Act 1903 which states that no sentence of death shall be passed on an Australian soldier unless first confirmed by the Governor-General—which meant, of course, the Prime Minister, the channels of communication being through the Secretary of the State for the Colonies to Australia or the dominions—only appeared as a result of colonial legislation. As Dr Wilcox indicated, four states had a similar statement in the colonial defence acts that they had before Federation.

Mr ADAMS—What about opinions about that?

Mr Ekins—I do not think there are any opinions at all.

Mr ADAMS—Well, I had one.

Mr Ekins—I go by evidence, not opinions.

CHAIR—As I stated earlier, I think we are going to have a very open discussion, for and against, after very short break.

Proceedings suspended from 10.34 am to 10.42 am

BRENNAN, Ms Michele, Principal Legal Officer, Attorney-General's Department

BURNESS, Mr Peter John, Private capacity

EKINS, Mr Ashley Kevin, Private capacity

HERIOT, Dr Dianne, Assistant Secretary, Border Management and Crime Prevention, Attorney-General's Department

UNKLES, Mr James William, Private capacity

WILCOX, Dr Craig Anthony, Private capacity

CHAIR—I now invite all witnesses who have appeared before the committee to come to the table for a roundtable discussion with the committee on the petition so that we can ensure everyone has an opportunity to be heard. I remind witnesses and colleagues that discussions should be directed through me as the chair. I am going to ask a question and it is going to be fairly broad ranging and then I am sure a number of you will be answering that. Then I am going to hand over to various other members of the committee to ask questions. My broad-ranging question is: do any of our witnesses wish to comment on questions raised earlier this morning or on the answers that were given?

Mr Unkles—Noting that we have to finish today—

CHAIR—We have about three-quarters of an hour, so you are fine.

Mr Unkles—I have a few things. These are not in any particular order but are on what some of the other gentlemen have had to say. First of all, the War Memorial do have a position on this. It is reflected on their website. If you google Breaker Morant you will see what they have to say. As to the voting that people do coming into the War Memorial, the figures I researched said that it was in favour of Morant. The voting finished in about 2001 or 2002. The display is still set up there. In fact, I went there recently wanting to push the button to vote yes, of course, and I was informed—

CHAIR—I will not ask you how many times you pushed yes.

Mr Unkles—Only once.

CHAIR—That is good to hear.

Mr Unkles—But I asked lots of other people to do the same thing! I was informed that the machine no longer works. You still see a green or red light, but that is by the by. Those figures at the War Memorial are certainly out of date. I wondered why that display was no longer active. Perhaps I got an explanation today.

Secondly, this volume—and I will not go through it—contains the legal submissions. I have provided a copy for each of you today, something to read when you go to bed at night. In it you will find information—and these gentlemen have not mentioned today—that the courts that were given the job of trying these officers took an extraordinary step that was not really taken very often at all: they made very strong recommendation for mercy. Fortunately, the court record of the recommendations still exists. I will just read you the recommendations in one case. In the shooting of a man by the name of Visser, the court details things like:

1. Extreme provocation by the mutilation of the body of Capt. Hunt—

Morant's senior officer—

2. His good service during the war, including his capture of Field-Cornet T. Kelly in the Spelonken.

3. The difficult position in which he was suddenly placed, with no previous military experience and no one of experience to consult.

Now, one of you on the committee picked up this issue. These were not full-time, professionally trained soldiers of the British military, familiar with this volume, the *Manual of Military Law*. There were given a quick spiel on the ship going across to South Africa. They did not have the learning of full-time British military officers. Again, someone on the committee also picked this up: they were men from the outback of Australia, hired for a particular purpose—to fight a guerrilla war; an ugly, dirty war—and that is what they were ordered to do.

In the shooting of the eight Boers, again the court highlighted the following:

Provocation received by the maltreatment—

the torture—

of … Capt. Hunt.

Again, this will be disputed by the historians, but the court says it. The court was in the best position to judge the evidence. It also highlighted:

Want of previous military experience and complete ignorance of military law and military procedure.

Complete ignorance—not just ignorance; complete ignorance. It goes on to highlight their 'good service throughout the war' and ignorance of military law and custom. Recommendations were made for each and every one of the three counts that these men were found guilty of.

CHAIR—Mr Unkles, I am just watching the time. Mr Ekins, are you representing the War Memorial or individuals?

Mr Ekins—Madam Chair, I am representing myself, but I can answer the question.

CHAIR—Is what Mr Unkles was saying correct—that the War Memorial has a position on it because I felt that you stated earlier that it does not.

Mr Ekins—No, it is a distortion. It has no position on the issue of a pardon.

CHAIR—Okay, fine.

Mr Unkles—That is not what it is on the website.

CHAIR—Mr Unkles, do you mean the War Memorial's website?

Mr Unkles—Yes.

CHAIR—Okay. I think we will be looking at the War Memorial's website when we convene later today.

Mr Ekins—Madam Chair, may I address one of the other issues that Mr Unkles raised?

CHAIR—Yes.

Mr Ekins—The recommendation of mercy—he sees that as significant for some reason. Having looked at 25,000 World War I courts martial cases, I can tell you that a strong recommendation of mercy was very common by a court at the conclusion of a trial. This is not at all uncommon. This was unusual in capital cases—and there were, as we said earlier, not 119 but 120 capital cases that I discovered in my research, none of whom were actually executed—because in most cases those sentences were commuted or remitted by senior British officers on account of recommendations of mercy, usually relating to the age of the accused, their war service, their recent service, wounds and other matters. So it is not an uncommon thing whatsoever.

CHAIR—Does the Attorney-General's Department want to comment at all on what Mr Unkles has stated, especially regarding the legal submissions and military law?

Dr Heriot—No. We certainly would not in any way claim to be experts on British military law as it operated during the time of the South African war, so no.

CHAIR—Mr Chester, do you have a question?

Mr CHESTER—My question is to you, Dr Heriot, in relation to the earlier comments about no jurisdiction existing within the A-G's department. Do we set any standards for the British response in this regard with our correspondence? When you say, 'We are watching what happens,' are we then going to follow up within a certain time frame? What do we do to make sure this does not just disappear as an issue, given it has been raised and it is of considerable public interest in Australia?

Dr Heriot—We would anticipate, given the Attorney has written to the UK minister, that the Attorney will receive a letter in response, and I imagine that would contain some information about likely timelines and processes and then we would follow up. It has been put to them for review and action as appropriate. I know that when we examine cases seeking Royal Prerogative of Mercy it is quite a detailed and time-consuming process. It is not quick, if you are going to do it properly, to review the files, to review the evidence, to address what is put forward as new

evidence and see if that has been covered off in any of the cases. It does take an amount of time to do it properly.

Mr Unkles—I am anxiously waiting for a response from the British government to find out what process they are going to use to review. Is it going to be a couple of beers at the pub; is it going to be an inquiry? What is it going to look like, so that perhaps I could have an opportunity of writing another submission? I will be very interested to see if the Attorney can get some response from the British government.

Mr CHESTER—Given that we are the Petitions Committee and that a petition seemed to have been successful in 1905, I am interested from a historian's perspective. I think one of the bits of information referred to 100,000 signatures out of four million Australians at the time. Was that a significant petition in terms of changing the course of history, if you like, and what would it take in current circumstances for similar influence from the Austrian public?

Dr Wilcox—There were 80,000 signatures, as far as we know, on the petition. There were more signatures from South Africa as well. My guess is that signatures on the petition came generally from the south of Australia, for some reason—Perth, Adelaide and Melbourne in particular. Witton's family were well known in Victoria, and Victoria was possibly the heart of the petition. What did that mean? I am not really sure. I do not know how common petitions were to overturn verdicts like that. It is odd that no one has mentioned here that another Australian was tried around the same time, in this case in London, for high treason for having fought on the Boer side. He also was sentenced to death. There were no petitions there—no-one in Australia was interested in him. He seemed to be, first, a bit too much of a smarty pants to be a real Australian and, second, he had obviously fought on the enemy aside and so he was beyond the pale.

CHAIR—And was he executed?

Dr Wilcox—No, the British government did not want to –

CHAIR—So he had an appeal?

Dr Wilcox—He ended up sitting in the House of Commons, interestingly enough. He was a brilliant man, in his own way. It does seem that there was a fair bit of public sympathy for George Witton, absolutely.

Mr CRAIG THOMSON—There seemed to be a degree of difference as to the rights of appeal there. I would like to explore that a little bit more in the roundtable. The people from the War Memorial said there were no rights of appeal, but I understood there were.

Mr Unkles—I can quickly run through the evidence as I understand it to be. It is in the folders that you will get a copy of. The courts martial were held between 16 January and 19 February 1902. On 21 February, and without being informed of the convictions and sentences and recommendations for mercy, the accused were removed to Pretoria and again kept in solitary confinement. During this time the court's verdicts were transmitted to Kitchener's military law advisers, who reviewed the trials. The men were finally informed on the 26th what the verdicts were. At that time Lord Kitchener had left his office and, to use an Aussie term, went bush,

saying that he could not be contacted. On the 26th they are informed that in 18 hours' time, 'You, Morant, and you, Handcock, are going to be executed at 6 am tomorrow; you, Witton, are going to be put on a train and transported and then taken by ship to England.'

In that 18-hour period—and this is in the materials that I will leave with you—Major Thomas, to his great credit, and obviously in a very stressed condition, went to Lord Kitchener's headquarters to plead for a stay of execution, not to overturn the convictions; just a stay. These men had been in solitary confinement since their arrest in October 1901. They were denied access to their relatives and the prison chaplain and then kept in solitary confinement during the trial period. The Australian government was not informed of their arrest—

CHAIR—Until when—April, was it?

Mr Unkles—Until April, when finally Prime Minister Barton found out what the facts were and demanded an explanation from Lord Kitchener. But to get back to the appeal process: in that 18-hour period, there was no cable to the relative to say, 'I'm going to be shot tomorrow morning; get the Prime Minister to do something.' In that 18-hour period, Thomas endeavoured to get a stay of execution. He had no hope. Lord Kitchener was gone and Thomas was told, 'There's no hope of appeal.'

In the materials that I will leave with you, you will see that, in addition to their common law right to petition the King for mercy, under the *Manual of Military Law*, they had a right—which still exists to this day—and it is called a 'redress of wrongs'. Under the military code to which they had signed up to, they had a right to petition their commanding officer on a complaint. The door to that right was closed. The door to the King was closed. Morant tried to send a cable, and he was denied the use of a cable. So these men sat in the prison for 18 hours waiting to be shot the next morning. That is the denial of appeal argument.

CHAIR—As we all know, it is a roundtable discussion for and against.

Dr Wilcox—I will just jump in and say that Jim's advocacy is admirable, but I disagree with everything that he has just said.

CHAIR—Why? On what grounds?

Dr Wilcox—For instance, solitary confinement. We have a photograph with the prisoners all photographed together posing for the camera. That does not seem like solitary confinement to me.

Mr ADAMS—Was that because the fort was under attack?

Dr Wilcox—Yes. Fantastic; this man has read about the—

Mr ADAMS—Take a photograph of it.

Dr Wilcox—Absolutely. That is right. For instance, Kitchener did not decide to nick off because it was all getting uncomfortable; he actually had a war to fight.

CHAIR—He had a what?

Dr Wilcox—He actually had a war to fight.

Mr BROADBENT—That was not the suggestion that I took. He had gone bush.

Dr Wilcox—I am sorry. I am possibly reading-in other conventional accounts in that case.

Mr Unkles—He made himself unavailable.

Dr Wilcox—No, I do not think so. There was a big drive in Harrismith—about 300 kilometres to the south.

Mr CRAIG THOMSON—Going back to my question: Mr Ekins said that there was no right of appeal. That was what I was getting to, because that is not what Mr Unkles has said. I am interested in your view in terms of commenting on that. He has outlined that there were two grounds of appeal—two avenues that you could go through. Are you saying that that is not the case at all?

Dr Wilcox—I would not say that that is the case at all.

Mr CRAIG THOMSON—It was?

Dr Wilcox—I look at it not as a lawyer but as a historian, so I ask how common it was to do that. As far as I understand, it was not common. And I think that there was a general principle—to go back to a question that the committee was thinking about earlier—that, when there was a capital sentence, an appeal was actually cruel to the prisoner. This seems to be the idea at the end of the 19th century. That seems completely wrong to us—just absolutely ridiculous—but, as far as I know, that was a common view and that there should be no rights of appeal.

Mr CRAIG THOMSON—But one of the things that we an establish is either that there was a right or there was not a right.

Dr Wilcox—Certainly, and Jim Unkles is the man who can establish that.

Mr CRAIG THOMSON—So there was a right?

Dr Wilcox—Absolutely.

Mr CRAIG THOMSON—So we agree that there was a right.

Mr Ekins—I would like to add something, Madam Chair, if I might. Mr Unkles has raised the idea that a redress of wrongs amounts to an appeal. A redress of wrongs would never be used in these circumstances. It was a soldier's mechanism to redress some grievance he might have against his commanding officer. Of course, in this case, his CO was one of the accused, anyway—so it made it pretty difficult to bring that into play in a court martial.

Mr Unkles—It is a redress against his service.

Mr Ekins—I might just add one other thing. As in much of this discussion, we are applying retrospective values, or our values retrospectively, to the time. I think we really do need to remember that not only was this military law—and a harsher form of military justice than we can normally associate with our standards of justice—but also we are looking back at a time with flogging and corporal punishment was common and the death sentence was imposed in civilian law for murder. The things that now make us feel that many of these actions were unjust were standard practice in the day.

The idea that these men were kept and only informed of their sentence just hours before the execution was standard practice throughout the First World War. Regrettable and horrific as we might find that today, that was the practice. Three hundred and forty-six British soldiers were executed during the First World War; 25 of them were Canadians, five were New Zealanders and two were born in Australia. Those men were all told of their execution the night before or the day before.

Mr ADAMS—No Australians.

Mr Ekins—No Australian soldiers, two Australian-born. No soldiers of the Australian Imperial Force were executed.

Ms GEORGE—I want to take up a couple of things that Mr Ekins, Mr Burness and the official historian, Dr Wilcox, said. What worried me a little bit about the evidence you presented to the committee was the absolute certainty and conviction with which you spoke. You spoke about irrefutable facts and the futility of a pardon. You claim there was no evidence of secret orders by Kitchener as if that was a certainty. Yet just in more recent times I have personally on behalf of a constituent had an example where official historians and indeed the Australian War Memorial got it wrong as recently as the Vietnam War, where for decades the War Memorial and official historians had written out of existence the 2nd D&E platoon and now the government has recognise that in fact that platoon existed and that records relating to that platoon have proven that case. I am not going into that other than to just say that you can get it wrong at times as well, as can official historians. I wonder why the absolute certainty, the irrefutable facts, when, for example, in the case of the secret orders by Kitchener I am told by colleagues who read Witton's book that he asserts quite to the contrary. So not only are we refuting the use of retrospective values of the last century and the turn of the century but you can get it wrong even in contemporary military history. I will leave my point here.

Mr Ekins—Any good historian would be quick to agree with Ms George that of course history is a process of assessment of evidence. More evidence accumulates and interpretations change over time. There is no doubt about that. I am not going to go into the issue of the 2nd D&E platoon, for which there was absolutely no evidence, by the way, and the Memorial still holds to that position. But that is a matter for another time. A number of the people who lobbied Ms George at the time have now refuted the evidence that they put forward and said in fact there was no such unit. But that is a matter for another time and place.

Mr Unkles—Could I have just cover off on a couple of things, noting the time and that it has been 108 years since these guys got a fair go. I want to highlight a couple of things before we finish up.

CHAIR—We have still got quite a bit of time.

Mr Unkles—Okay. My friends at the other end of the table talked about Morant's and Handcock's killing spree. It is very important to take time to read the materials. Morant and Handcock and Witton did not suddenly appear in April or thereabouts in 1901 and go on a killing spree. That is simply not the case. They say they got specific orders from their superior, Captain Hunt, verbal orders, and in fact there is evidence that Morant was reprimanded for not obeying those orders about not taking prisoners, including prisoners waving a white flag and wearing British khaki. It gets worse. There were killings of other people. There was one case involving the murder of six Boers. That happened before Morant even got there. My friends talk about how history can be skewed to a particular argument, Morant, Handcock and Witton have been fitted out with all sorts of murders—children, youths, adults. They either were not in the area at the time or there is no proof.

The case I would like to draw on is the shooting of the German missionary, Hesse. Whether the historians like it nor not, the reality is that the court found them not guilty. The matter finishes there. When you pick up the history books, there are volumes—conspiracies about Handcock doubling back and shooting Hesse. All of that is interesting reading. It looks good in the film. It is even discussed in the Bleszynski book. But the reality is, on the day, the evidence did not prove the charge beyond a reasonable doubt in accordance with the manual of the military law. So the matter finishes.

CHAIR—Fine. I think we will go to Mr Hawke, who has a question.

Mr HAWKE—I want to take up a point made by Ms George. I would say to I think Mr Ekins and Dr Wilcox, in particular, we have a number of the relatives and direct descendants of these men here today. I thought you made some strong statements about the futility of this exercise. But the right to petition the parliament to have something like this done is a longstanding right and tradition. I think the relatives and people involved in looking at this matter have made a petition to the parliament for us to make a representation to the British government to have this matter looked at again. I for one think that is a valid right.

In the evidence that you gave to this committee—and we are here today to explore this—you mentioned the World War I people who were treated in a similar fashion. That is the historical record, and that may be the case. There is certainly something in what you say about the historical circumstances of the times. But those men have been pardoned now by the British government and there are hundreds of them from Ireland and from Canada who Britain have issued pardons for. That is what we are here today to discuss—the issuing of a pardon to these men. The view has been adopted in World War I and in other theatres that a pardon should be issued. There have been valid reasons found. When you look at some of the things that both of you said in your evidence, when you look at Witton, there is primary evidence that suggests that there were orders issued by Kitchener. I cannot interpret that directly, but there is primary evidence. There were people who were there who say that it happened—Witton, notably, being one of them. There is evidence here that something happened.

In relation to this issue of a pardon, I want your views. Why is this a futile exercise when we have relatives here petitioning us directly for this pardon, when governments, including the UK government, have taken the view that a pardon is appropriate for people they shot and executed in World War I?

Dr Wilcox—Firstly, on the question of Witton, Witton is surely a partisan witness pushing his own case. If you have a look at how Witton constructed his book, it is constructed of snippets out of other people's work and sometimes out of his own suppositions. He deletes things which will be unfavourable to him—things like that—as almost any of us would.

Mr HAWKE—Of course.

Dr Wilcox—Of course he does. On the question of futility, yes, I am trying to say that, but it is important to remember that there are other descendants involved. Those are the people who were killed at the time, which is not just Morant and Handcock but more than 20 South Africans. We have to remember that those people count too and their descendants count as well. On the futility, as I said before, I have the standard historian's scepticism that you really can cast aside all of your assumptions now and look back in an older piece of military law in which no-one now practices. I just wonder how we can do that. Then there is the futility of in fact not looking at the past, which, as you concede, is what I am paid to do and what he is paid to do, what Peter Burness is paid to do. But there is a futility in saying, 'No, they got that wrong. Let's go back. Let's not look at the problems before us now. Let's not look at the shortcomings in justice now. Let's pick out one case where a folk hero seems to have had something done which was excusable on technicalities, essentially. Maybe it was wrong as far as we can tell, but we can really get an argument up.' That just does not seem a wise use of your time, frankly.

Mr HAWKE—Dr Wilcox, the parliament just passed a law which prevents the states from passing a law for capital punishment, where we are taking contemporary matters as well. But a foreign power in effect executed some men who were Australians and so we are now looking at that matter as well.

Mr BROADBENT—Perceived to be Australians.

Mr HAWKE—Perceived to be Australians.

Dr Wilcox—But the jurisdictional question is of course that there were no Australian citizens until the 1940s; they were British subjects.

Mr Ekins—I just want to remind the committee that the record will show that in the course of making my statement I actually did acknowledge the understandable anguish of family descendants, of relatives, and I can understand their motivation in doing this. I speak though as a historian and I said, as Dr Wilcox has reminded you, that historians have to cast a cold eye on the past. We are not there to change the past. We are there to bring the past out for a modern readership or a modern Australia to understand the past as best we can. I think you have to understand it in its own terms, not seek to redress wrongs where, in the end, it makes no difference to those poor men who were executed.

Mr HAWKE—Regardless, Australia is committed against the death penalty now, and against execution as a method—and that is a modern interpretation, certainly. But I think that is part of what this is about.

Mr Ekins—It makes us part of a civilised society.

Mr ADAMS—I ask if the whole committee could give me an opinion. I come looking at it from what the politics of the day were. There is the written historical fact but there is also the politics of the day. I think we are trying to exclude that from what the outcome was. The word did go out from Kitchener and his staff to bring to heel the Boers. By that it occurred to go out and shoot people—bring them to heel. It was not only the guys we are talking about—this was going on over the whole battlefield. I do not think that is denied historically. There was a fair bit of this killing going on out there. Then they needed a political fix. The heat got hot. So, what do we do? Do we shoot a couple of colonials, where there is not going to be any trouble? We lose the file of the court martial? England and Germany's relationship—and let us face it, South Africa would have become German if the British Empire had not got on top of the Boers.

CHAIR—Your question?

Mr ADAMS—I ask whether my assertions of the political goings on of the day have any consideration among the people at the table.

Mr Unkles—With respect, your assertions are well put. This case has stink about it from its very outset. Try as the historians do, as sure as night follows day, you cannot walk away. In their haste to convict these men they made some glaring errors in procedure and denied the men a fair trial. But just to be absolutely certain they locked them up with no word to Australia—not even to the Prime Minister. How insulting is it for an emerging nation to have three of its people in a foreign jail waiting trial and execution and for not even the government of the day to be told? And then to push it right through to 18 hours to go, there was no hope of appeal, and then to shoot two of them and let one of them go. The whole case is appalling.

I want to also touch on one principle that is in the materials that you will read about. The British themselves recognised loyal service during the time of custody and trial—principle of condonation. It is covered in the materials. That principle of itself was not applied by the officers trying the case. These three men, whilst under custody and trial, were given arms and did not try to escape. They did not turn the arms on their jailers, and actually fought the Boers who were attacking Pietersburg. Dr Wilcox will say it was not big deal, or something similar, but it was a big deal. These men could have said, 'You're accusing me of something; you have locked me up. Be blowed! I am not going to fight for you.' But they did fight for them. Just on the condemnation argument alone—and I have referred to it in the materials and Dr Helen Sykes, who is sitting behind me, has written about this issue, as well as me—just that principle alone, they should have been given a pardon and the proceedings brought to an end.

CHAIR—Would anyone like to comment on what Mr Unkles has stated?

Mr Ekins—I would like to make one brief comment. There was a fairly strong element of self-interest in Handcock, Morant and Witton fighting—to not be captured by the Boers. That stands to reason.

CHAIR—Dr Wilcox, you thoroughly disagree with what Mr Unkles has just said.

Dr Wilcox—Yes, I am afraid so—and with Dick Adams. One of the problems we have here, and that Jim has too, is: what is our evidence for the condonation argument applying? In other words, what is the evidence of them having fought—having taken up arms during the Boer attack?

Mr Unkles—It is in Witton's book.

Dr Wilcox—That is right. The evidence comes entirely from one of the accused. I have been through the staff diaries for the relevant commands for the brigades and divisions there, and there is no mention of the accused having done that. As a historian, I accept that they did fight, that they did take up arms and that a condonation argument could apply. But if I were a lawyer I could not accept that. Where is the evidence coming from? It is coming from one of the accused themselves. And this is going to be one of the problems because we do not have a very good record of what happened. We just do not know.

As a historian I accept that they did fight, that they did take up arms, that a condonation argument could apply. But if I were a lawyer I could not accept that. I would say, 'Where is the evidence coming from? It's coming from one of the accused themselves.' This is going to be one of the problems, because we do not have a very good record of what happened. We just do not know.

CHAIR—So you are saying that this is virtually the whole problem—there is no evidence.

Dr Wilcox—It is a problem. As a historian I think that there is not much evidence anyway and that we are naturally inclined to interpret things in a way that suits our view of the world.

CHAIR—Some of the people arguing against the proposition—I think yourself in particular—have stated that some of the killings were done with the intent to cover up the circumstances of other killings. What evidence is there to make that statement?

Dr Wilcox—The evidence for the first one comes from Morant's predecessor, Captain Robertson, who said that Trooper Van Buuren was—I cannot remember the polite word used, but something like this—'excised' in the interests of the regiment. That is pretty good evidence. With Heese—people who make light of his death tend to give him a more Germanic name, for some reason, but 'Heese' was his name; he was a British subject—

Mr Unkles—But Morant, Handcock and Witton were not charged with the murder of Van Buren. That is where the matter finishes.

CHAIR—I think we will now go to the deputy chair.

Mr BROADBENT—This whole presentation is like streams in the desert. There are so many small streams that come off the main dry area of consideration on one part, with a very wet area of consideration on the other. Can I put to you that there is another great tragedy that happened. If Thomas had believed that they had had a fair trial he would not have returned to this country

in such devastation and distress as he did, eventually living his life as a hermit. Would you like to comment?

Dr Wilcox—Yes, I would. Thomas is a fascinating example. Cast the wonderful Jack Thompson from your minds and think of a very troubled and very brutal soldier, a man who said, 'I believe the Boers deserve everything they get; the quicker we adopt harsh measures the sooner this war will be over.' Thomas was not a nice man, but he did his best for the accused and he considered himself, in a way, as the film does suggest, a fellow defendant. Thomas does not come back broken-hearted to Australia; he stays in South Africa for 18 months trying to start his own small business. The minister for small business should be here; he would be interested in this! Then he does come back and he gets his life together, but things go wrong. There is an embezzlement case and something odd happens to him. He does seem to have been obsessed with the Morant case. He writes several very sad letters by the 1920s to AG Stephens, a literary critic, saying, 'I know so much about this case. I know more than anyone else knows. I would love to be able to write it down but I just can't find the words.' And in the end poor Thomas does go slightly mad. But, because he believed that what they had done was the right thing to do, because he went all the way for the defendants, because in the end he ended up slightly mad, does that mean that they were any less guilty? I do not think so. Thomas's bizarre idea that in some way the Germans were involved simply reflects his agitated state at the end of the trial and the sudden arrival of news that the Germans had a new kind of interest in South Africa. It is not true that the Germans were the real enemy on the horizon. The Germans and the Brits, in their imperial way, had done a deal five years before the Boer War, saying, 'Britain: you can do anything you want in South Africa; we'll leave you alone, provided …'—and then there was a quid pro quo somewhere else.

CHAIR—But Thomas in his heart of hearts felt that they were under orders.

Dr Wilcox—He felt that they were justified in doing what they did, and at the trial he argued contradictory things: custom, revenge, operating under orders. I should say that Jim Unkles knows more about Thomas than I do, or about his approach to the law. But Thomas was a canny operator. He organised to shift the court somewhere else to interview a senior officer because, as he later wrote, it would buy time for Morant and Handcock.

Mr Unkles—While I had nothing else to do, I wrote this paper about Major Thomas. One of the most haunting photos—you probably cannot see it from here—is of Major Thomas organising and standing over the graves of Morant and Handcock with what was then the Australian flag draped over the grave. He went away a hero; he came back a hero. Most of Tenterfield turned out to welcome him back. He got awards from the Lord Mayor. He had no family of his own. One of his descendants is here with us today. Thomas died from malnutrition; the man was broken. In some of his letters—which I will not read out now, but I will leave you with a couple of copies—one of the salient points he makes, which none of us can walk away from, is that there was no hope of appeal; he did not think that these men would be shot without any hope of appeal, and that is why he rushed off to see Lord Kitchener. Whatever Kitchener was doing—visiting relatives, fighting the war or whatever—the fact is that he left after signing death warrants for three men. He commuted the sentence for Witton, and then he said, 'I think I'll just wander off and go away for a while.' Even by those standards, it is appalling.

CHAIR—Mr Broadbent, do you have any further questions?

Mr BROADBENT—No, I think the others have put all the questions I want to ask.

Ms VAMVAKINOU—I just want to ask you again, Dr Wilcox, similarly to the question I asked you initially: are you satisfied that there is an absolute lack of evidence that there was any verbal order given? You have not convinced me, so I am just wondering why it is that you are so absolute in your knowledge—in the cold eye of the historian—that there was no evidence whatsoever of any verbal order, imputation or whatever being issued. That seems to be the heart of the issue as well.

Dr Wilcox—It is, but then I could also say that there is no evidence that something else did not happen or did happen. It would be easy for me to come up with ingenious arguments.

Ms VAMVAKINOU—That is fine, but I am asking you about this.

Dr Wilcox—Yes, I know, but I just want to say that, as a general philosophical approach to life and to the past, you can easily say, 'There's no evidence that X did not happen; therefore X happened.' But that, philosophically, would be a rather naive position, wouldn't it?

Ms VAMVAKINOU—But I think that is what you are implying anyway. I am asking you why it is that you are so absolutely certain. You are projecting here today that you are absolutely certain, and I want to know where it is that you get that absolute certainty.

Dr Wilcox—I get the absolute certainty from being reasonably familiar with the case and having read most of what is available on it. If Jim or Nick Bleszynski turns up something which is convincing then I will say: 'Yes, that's absolutely right. I've never seen that before. That's a wonderful piece of evidence that changes the way that we look at the case.' But that has not happened so far. I have to go, as a historian, on what I have been able to read—or look at, in the case of photographs, like the one Jim just showed us. If someone says, 'You haven't thought about X, Y and Z,' that is true, but it is not necessarily true when there is an absence of evidence. It does not really help you. Sorry; I have fluffed that last bit.

Ms VAMVAKINOU—I sense that Mr Unkles might disagree, and I would like to hear his view if it may provide you with what you want.

CHAIR—Mr Unkles, I can see that you are getting very excited.

Mr Unkles—I am getting excited and pretty passionate about this. With great respect to Craig and his colleagues, everyone is looking for the smoking gun: 'Here's the written order from Kitchener.' That is not the point. Under the manual, the onus of proof on a charge of murder lay with the prosecution. It then switches to the defence when they say, 'We were acting lawfully.' The question is: 'Prove it. How were you acting lawfully?' The evidence from Witton in his book is evidence that they believed that Captain Hunt had reason to give the order. Captain Hunt gets wounded and tortured and dies.

CHAIR—And mutilated, some historians say.

Mr Unkles—Supposedly mutilated, but I know Craig may not agree with that. But, in any event, Hunt dies. So, when the trial is run—there were terrible directions by the Judge Advocate

on burden of proof, and that is a separate argument—the three accused say, 'We were following orders.' It is like in the film: 'No, I have not got the written ones, but we were acting under the belief that Hunt had that authority.' In the recommendations for mercy which I have already referred to, the court acknowledged that Handcock and Witton were acting under the orders of Morant and deserved a discount. It is a pity Handcock did not get one. If that argument holds true for the court in the recommendations and they are obeying Morant, what is Morant doing? He is obeying Hunt. The orders emanated from up the chain, probably though Lieutenant Colonel Hall and also from Kitchener's secretary. So the chain flows. The intent has to be proved by the prosecution, so it is a furphy to say this whole case falls over without proof of written orders. That is not my position. My position is the exact opposite, and it is covered in the materials that I will give to you: these men acted in obedience to superior orders.

Mr BROADBENT—You used the word 'unsafe' in your opening statement. Isn't the whole issue whether this process was safe or not?

Mr Unkles—Yes.

Mr BROADBENT—The word 'unsafe' meaning?

Mr Unkles—The whole process was contaminated from the moment of arrest through to execution—the arrest, the investigation, the trials. Fancy Major Thomas turning up the day before the first trial thinking he is representing Major Lenehan, also a lawyer, and then he gets to the trial to find, the day before, there are six of them on charges of murder, not minor offences but capital offences. There is no support with an instructing solicitor or friend, no support from the Australian government, and he is told to represent six people—lots of conflict of interest perhaps, no separate lawyers. From the moment these men were arrested in mid-October 1901, the prosecution—lots of lawyers—had three months to prepare their case, and these men were held in solitary confinement. One of their complaints is that there were witnesses like Lieutenant Colonel Hall who could have given evidence for the defence. What happened to Lieutenant Colonel Hall? He was conveniently posted out to India. This whole process is contaminated from beginning to end.

Mr CHESTER—Dr Wilcox, you referred before to the descendants of the people who were killed. What do you think the reaction would be in South Africa if somehow it came about that these gentlemen were pardoned?

Dr Wilcox—It would probably be a divided one. The descendants who I have met, who were the descendants particularly of the Heese family, would be a little upset, but they seem to be reasonably gracious. I do not expect that they would kick up a big fuss. It is impossible for me to speak for them, but my guess would be that it would seem like a bit of a whitewash. It would seem like somebody else with a guilty conscience trying to say, 'It wasn't really us, and why don't we all blame the Brits together?' You can have reconciliation on the basis of a lie—sometimes you need to—but it is still a lie, and it would be in this case. Other people in South Africa probably would not notice. The war is a long time ago. It has diminishing significance now. It seems like a conflict between a white minority which has decreasing political and social influence. It would probably be bypassed. The man who would be most upset is a lovely gentleman, a printer and tour guide called Charles Leach, who takes you around the Breaker

Morant trail and shows you the graves and the little memorials that he and the descendants have painstakingly erected. He would be vociferously unhappy, I would think.

Mr Unkles—The forebears of the South Africans of today were some of the biggest supporters of getting Witton released. That is what it meant to the South Africans of the day. Not only the people of South Africa but the South African government actually joined the Australian government and Sir Isaac Isaacs and put the British government under a lot of pressure to release Witton. Not only was Witton released but 12 months to the day of his release a vote went through the House of Commons. What more do I have to say? This book, *Scapegoats of the Empire*, is a very valuable book. It is one of the original few that have survived.

CHAIR—I have got a copy as well.

Mr Unkles—But you have not got this one.

CHAIR—You have the true copy, have you?

Mr Unkles—I have the true copy. Sadly, when this book was published there were theories around that the publishers were burnt down to get rid of the book. But some copies survived, and Major Beach Thomas, who is here with us today, has produced a copy of this. On the inside cover—I want to be careful how I handle this—there are notes in Thomas's handwriting and they have been typed in translation. It says, 'This book gives only a superficial statement of the facts. Much that Lieutenant Witton probably did not know is not given. The true story of the Bushveldt Carbineers has never been written. These officers were truly scapegoats, shot or imprisoned not so much for their own sins but for those of the system of the militarism in which they were involved and which was responsible for the drastic instructions secretly issued from high places to irregular corps against the indomitable Boers. In the later European war regular army officers were not given the opportunity to season themselves by victimising colonial officers, as was the case in the South African war.' That is Thomas's version contained in the book. So there is a lot to this case, and in my view it just does not shape up as a fair and transparent trial—of the standards of 1902, not 2010.

Mr ADAMS—It has been put to me that in Australia and maybe in other countries—and we have had pressure to take military law into civilian courts in Australia—military law right up to this day has been about 'finding a scapegoat', to use the words of Witton, and then going on from there. Beersheba is another one where we won a great victory and no medals were given out, and there were other incidents. Some would say that the British treatment of Australian troops was appalling, and there were other incidences where this has been alleged. Do you feel that there was a fix in this case and that was why it was unfair and justice was not served?

Mr Unkles—Yes, I do. I have been a prosecutor in cases for many years, not just in the military but out of the military. When I first researched this material my gut reaction was that this was not right. There are so many errors in the words of the Judge Advocate himself. Geoffrey Robertson QC had this to say. I will not read out the full quote but it is in the materials I am going to give you.

I regard the convictions of Morant and Handcock as unsafe.

Tim Fischer, former Deputy Prime Minister, also is quoted with a similar opinion. Helen Styles, who is here with us today, talks particularly about the condemnation issue. Dr Howard Zelling, former Chief Justice of South Australia, has dot pointed all the errors in the trial, and Charles Francis QC, sadly deceased, is also quoted in an article that he wrote for the Adelaide *Advertiser* making comment about the unsafeness of the convictions as of 1902.

CHAIR—I think Dr Wilcox wants to give a different point of view.

Dr Wilcox—I would simply say that I have seen no evidence of a fix. It is quite possible to argue, as Jim is doing, that there were irregularities in the trial, that some procedures were not observed. But what evidence is there for a fix? What we are talking about here is an old nationalist way of viewing Australian history, which was that the Brits somehow turn into our real enemies when we go into the world wars. They have done us wrong, they treated us badly, and here we are fighting for them—and now they are telling us to do this or they are not treating us right. I think that that is an absurd view of Australians history. It does not seem to tie up with the facts on the ground.

Mr Ekins—Madam Chair, might I just add something to that? It tends to get forgotten in modern Australia that the Australians of this period referred to themselves and thought of themselves as members of the British Empire, which they viewed almost as a country. They viewed themselves as Australian Britons first and foremost, and I think we argue completely out of the context of the times when we do not take that into account.

Mr HAWKE—By way of disclosure, I was a young lieutenant with the 1st/15th Lancers. Members of my regiment jumped ship for the Boer War as well so I certainly have some sympathy for young lieutenants. However, I do want to make a serious point about the historical record. Do you accept historically, as a thesis or an argument even, that the fact that two young colonial lieutenants were executed is the only evidence of any improper doing in the Boer War? Can you even accept the thesis is what I am trying to get out of you today—that there were orders from a higher level to engage in conduct of this nature? Why would it be the case that there were just these two young lieutenants executed when Witton's sentence, who was connected, was commuted? If we cannot find the actual evidence to justify the thesis, the thesis could still well be valid.

Dr Wilcox—There is a short answer and a long answer. The short answer is that this is the only case which went to trial where the killing was not of battlefield prisoners. We are not talking about people rounded up in the heat of the moment, or soon after, who were clearly combatants and killing them. We are talking about lining up men and boys by the roadside and shooting them. They were people who were really civilians, and it was only martial law which had made them combatants. That is why it came to this. It has nothing to do with their being colonials. It has nothing to do with any other irrelevant fact, really.

Mr HAWKE—But do you accept that it is possible they had orders?

Dr Wilcox—Anything is possible. It is possible that aliens are listening to our broadcasts right now, isn't it? It is possible in that sense. It is a little more probable than that, but where is the evidence? And as for wrongdoing, I think it is interesting that you should point out your military background. Yet another Australian who almost went up on a murder charge was Captain Cox of

the New South Wales Lancers. He made the appalling error of judgment, early on in the war, of thinking that you could just shoot any black person you wanted—that because it was South Africa it was okay. Early on, he got a policeman who was guiding his patrol to shoot a black man who would not get a bridle for him. Eventually that case went to court in Cape Town, in a civilian court unfortunately for Captain Cox and the policeman, and it was looking bad. But what did the British Army do for us there? The British Army protected Captain Cox, did a series of deals with the Cape Colony government, as it was then, and ensured that Captain Cox would have immunity. And immediately the trial was over, after he spoke as a witness not as a defendant, he was whisked back to Australia to make sure that nothing bad happened to him.

Mr HAWKE—Can I say one thing in response to that—

CHAIR—We wouldn't be sitting here today if that had happened for Morant and Handcock, and—

Mr HAWKE—Just to back up Mr Adams over the conduct of military courts martial, in the modern military context, over a hundred years later, I have seen people put on charges that were minor matters. There is a saying in the army, however, that if you are charged you are guilty—and that is something that is passed around quite often.

Dr Wilcox—All I can say, as a historian who has read over the depositions which were put in by Morant's own men—not by the British Army and not by British people in charge but by the actual men who were made by Morant, Handcock and others to pull the trigger—is that they are the ones who said, 'We don't want our reputations besmirched.' And they were the ones who gave the vital evidence.

Mr Unkles—Just to respond to a couple of Craig's points, if the British military at the time were so confident that they had a hard and fast case that they were going to demonstrate commitment to discipline and fairness, and they have this manual of nearly 800 pages—*Manual of Military Law 1899*—on the conduct of hearings, procedures, courts martial and burdens of proof, why do they go to all the trouble to keep the proceedings secret? The overwhelming inference is that they had something to hide. The other point I wanted to make is that when you delve into the history of this case you could be drawn into thinking that there were three guys in the South African war, Morant, Handcock and Witton, who went on a rampage killing dozens and dozens of people—boys, children, men and women. That is just not the case. There were other instances of other units—the Gordon Highlanders, for example, and the Canadian Scouts—who also followed similar reprisals and orders to take no prisoners. So it is not just Morant and Handcock.

When Handcock and Witton arrived in South Africa, in about April, they were not shooting people then. It was only after the death of Captain Hunt that they then say, 'Cripes, we should have been obeying these orders.' In Morant's case, Witton gives evidence in his book that Morant himself was castigated by his friend Captain Hunt for not following orders. When you read the history and you delve into the materials, be aware that there were reprisals and shootings on both sides. The Boers, operating as guerrillas, were shooting British soldiers and taking their uniforms and ammunition and so on. There were other shootings. The deception here, from the history side, is that Morant and Handcock and Witton have been credited by the historians with shooting lots of people. The only shootings that are relevant are the three they

were put up on charges for, and they say they were following orders. They were not guilty of shooting Hesse. I do not know how Van Buren gets into it, because they were never charged with that either. It is very important that we focus on the proceedings at the time. The historians like to go off on a tangent and round up all sorts of obscure facts and details. They are not needed. This case is about the law. I bow to Craig and his friends—they are great historians and I admire them for that—but this case is not just about history; it is about legal process under the manual, described by Witton in his book. That is what this case is about. It is about fairness at the time according to law.

CHAIR—What I am getting out of today's roundtable is the evidence. You are saying there is no evidence, and I think with the research that Mr Unkles has done as well and the books that we have read it all makes it very interesting. I want to ask the Attorney-General's Department whether, if the answer comes back from the United Kingdom that they would not even consider looking at a pardon for Handcock and Morant, what other options are open to us as a government?

Dr Heriot—There is whatever action the parliament may wish to take, as the parliament. There is whatever action the government may wish to take at a political level. The matter of direct representation would be up to the government, or to the parliament. From a legal point of view, there is a jurisdictional problem that is very significant and one that we cannot just ignore. I am not sure that we should, at this point, anticipate what the outcome of this process should be.

CHAIR—Because we have not heard as yet—

Dr Heriot—We have not heard, and with respect to the UK, this matter has only been put to them by the Attorney very recently and there is a large amount of information that they will need to sort through. As I said, for our own experience in considering RPM matters, which is what it will go to them as, it is complex. I have listened with much interest to many different views on the same point, so I imagine it is difficult to ascertain legally what evidence would be sufficient to consider whatever various requests have gone through in the petition. There are a few of them; it is not just a simple request. There are a number of alternatives that will have to be sorted through. I think that would take some time to do properly.

Mr BROADBENT—If we were in a courtroom—we are not; we are having a roundtable discussion about the issue—Della would look into Perry Mason with a note and hand Perry that note and it would reveal information that would clear everybody and absolve everybody from sin.

Mr Ekins—Mr Broadbent has identified the major problem underlining all of this—we do not have the courts martial proceedings. If we had the transcripts of proceedings we would be having this discussion on the basis of proper knowledge. As has been pointed out, there is a strong assumption still in the military that if a court martial is held the accused is guilty. That was certainly a view prevalent in the First World War. It was part of the legal process. What we are missing there is that before an accused or a group of accused were brought to trial there was a court of inquiry which then lead to the conclusion that a trial was necessary. I think that has been overlooked, too—it did not just happen out of the blue.

Mr Unkles—Sadly, the court of inquiry was conducted very often in the absence of the accused. They were not present, they had no access to legal advice and they were denied even

consultation with the military chaplain. So the investigation stage of the inquiry was probably as bad as, if not worse than, the actual trial. Some folks might think that I am trying to indict Lord Kitchener. I am not trying to indict Lord Kitchener. What I am on about and what I am passionate about are the defects and the injustices of this trial process. I hope that this committee can use its influence with the British government and say, 'Set up a process that is open and transparent,' like this committee has been. Secondly I hope you can say, 'If those transcripts exist, will you finally release them?' We have had all sorts of theories that they have been firebombed, destroyed or lost or are sitting in someone's lounge room somewhere. I do not know what the truth is, but if a copy has survived then it is time for it to be produced. There is a file that I identified to the British government that relates to the matter of Witton's release. That file has mysteriously disappeared. I may be too cynical; maybe it can be found. But this committee could impress on the British government: whatever stuff is there, if it is still there, bring it forward.

I commend the committee again on behalf of the relatives for its time and for giving us the opportunity to be here. I commend you for putting this matter before the Australian public and the Australian parliament. I might have got a bit excited at times, but this material is important and it has to be considered carefully and judiciously, not just as another history book. It is about due process.

CHAIR—Before I close today's meeting I need to just ask this one question. Most probably I am going to get a yes and no answer. I am definitely not a historian, but in my research I found that in 1900 the British commander, Lord Roberts, declared the war was almost over. But, as we know, it dragged on. The new commander, Lord Kitchener, ordered ruthless tactics to quell the Boers, including sending their families to concentration camps and, according to the Australian officers' defence, shooting prisoners. Correct or incorrect?

Dr Wilcox—Incorrect.

Mr Unkles—Correct.

CHAIR—That is an excellent place to finish! We now come to the end of our roundtable session. I thank all of our participants for their contribution. It has been a most interesting discussion about an issue that has evoked strong feelings and a range of views over the years. If the committee has further questions of you, the secretariat will contact you. As participants know, the committee's practice is not to make recommendations on the basis of this kind of public hearing. The aim is to amplify the issues raised by petitions and to look into them further, particularly in the light of any government response. There will be an official transcript which the committee will provide to the Attorney-General and which will be published on the committee's website in due course. I also place on the record my thanks to Hansard and to in-house broadcasting. Especially, I thank the secretariat of the Petitions Committee. Over the last couple of weeks they have done an excellent job. To Catherine, to Brian and to Naomi—we thank you.

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

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

Committee adjourned at 11.50 am