

APPENDIX SIX

AUSTRALIA'S CRIMINAL DEPORTATION POLICY

DRAFT PROPOSED BY DIMA

The following statement entitled "Australia's Criminal Deportation Policy" was prepared by DIMA for the Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock, MP, to table in Parliament. The policy statement has not been signed by the Minister and is cited as the draft policy throughout the report.

Introduction

1. The Australian Government, on behalf of the Australian community, has the right to decide who will be accepted for permanent residence in Australia and, ultimately, for absorption into full membership of the community by way of Australian citizenship.
2. The Parliament vests in the Minister for Immigration and Multicultural Affairs the discretion to determine whether resident non-Australian citizens who have been convicted in Australia of serious criminal conduct are to be removed from Australia by deportation. In exercising that discretion, the Minister is exercising the right of the Australian community to be protected and to choose who will be permitted to remain as a permanent resident.
3. A person liable for criminal deportation has an expectation that a decision on his or her case as soon as possible after sentencing and has a right to appeal to the Administrative Appeals Tribunal against a decision that he or she be deported, except where the circumstances set out in paragraph 4 below exist. Where the right of appeal exists, the Administrative Appeals Tribunal is invested with determinative powers of review and it is therefore able to overturn a decision by the Minister.
4. The right of appeal to the Administrative Appeals Tribunal is not open to a person whom the Minister has declared should be an excluded person because of the seriousness of the circumstances giving rise to the deportation decision. Where the Minister makes such declaration, the Minister has the obligation to table notice of the decision before both Houses of Parliament within 15 sitting days of that house after the day on which the decision is made.
5. As there is no right of appeal to the Administrative Appeals Tribunal against the Minister's decision to deport where the Minister declares a person to be an excluded person, the decision of the Minister to make such a declaration is taken in only the most serious circumstances where it is clear that it is in the national interest for the person to be excluded from Australia.
6. It should be recognised that the decision to deport stems from the Minister's responsibility to the Parliament and the Australian community to protect the community from the possibility of further criminal behaviour or to expel from Australia those non-citizens who have seriously abused the privilege of residence accorded to them by the Australian community.

7. Consistent with Government responsibility to the Australian community, the object of the Migration Act 1958 is to regulate, in the national interest, the coming into and presence in Australia of non-citizens. The policy on the deportation of non-citizens from Australia is to ensure the protection of the Australian society.

8. The purpose of deporting a person from Australia is to protect the safety and welfare of the Australian community, including their property and possessions, and to exercise a choice on behalf of the community as a whole.

9. The Government is mindful of the need to balance a number of important factors in ensuring the protection of the Australian community, primary consideration being given to:

- the seriousness of the crime as outlined in paragraph 11;
- the repugnancy of the crime to the Australian community, particularly crimes involving drugs, children and violence;
- the likelihood of recidivism;
- the length of time the person was lawfully in Australia and whether they have established ties with the Australian community to have become a full time member of the community and whether by reason of their conduct is unsuitable for permanent residence in Australia; and
- the best interests of any children involved; and
- re-offending after warnings were given.

10. Other factors to be considered making deportation decisions are:

- the legitimate human rights of an individual such as the real possibility of torture or slavery or whether they face arbitrary imposition of the death sentence;
- the need to avoid discrimination such as on grounds of race, colour sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
- claims to be a refugee;
- degree of hardship which may be caused to Australian residents and the offender;
- views of victims of the crimes committed.

Guidelines for deportation

11. Examples of serious offences which may render non-Australian citizens liable to deportation include:

- production, importation, distribution, trafficking or commercial dealing in heroin for other 'hard' addictive drugs or involvement in other illicit drugs on a large scale (persons who embark upon drug-related crime for financial gain show a callous disregard for insidious effects on the health and welfare of Australia's young people); this does not necessarily apply to persons convicted of possession of hard drugs solely for their own consumption who were not involved in the above illegal actions.
- It would be invidious if non-citizen residents who seek to profit from the import or supply of drugs, whether or not that profit is motivated by their own need for illicit drugs, were likely to be allowed to remain in Australia. It is important both as a deterrent and to protect Australian society that it is

clearly understood that a person convicted of drug trafficking, which puts at risk the very lives of young Australians, has no place in our society.

- organised criminal activity (whether within Australia only or internationally);
- serious sexual assaults whether or not accompanied by other violence (especially where there has been more than one sexual offence);
- armed robbery;
- violence against the person;
- terrorist activity and assassination;
- kidnapping;
- blackmail;
- extortion;
- crimes against children
 - Because of their vulnerability, crimes against children take on a special significance, especially inducement to drugs, sexual assaults, violence, kidnapping and crimes taking unfair advantage of children.
- Crimes involving violence
 - Such crimes are of special concern to the welfare and safety of the Australian community and are to be given significant weight when deciding on deportation.

12. The sentence imposed for a crime is an indication also of the seriousness of the offence against the community.

13. A person who is not deported but is issued with a warning not to re-offence should expect to be deported from Australia if they commit further offences for which they are sentenced to imprisonment, unless exceptional circumstances exist.

14. Social ties developed after the liability for deportation arose, especially after the liability had been brought to the notice of the offender, may be given less weight than other factors.

15. Australia does not have an obligation to provide sanctuary for people who have committed serious non-political crimes outside Australia. It is neither feasible nor proper for the Australian Government to consider the propriety of the operation of criminal codes in other countries nor, even if it had the resources to obtain sufficient information, to attempt to anticipate likely outcomes of any charges overseas.

16. The possibility of further criminal sanctions in the country in which a potential deportee expects to live if deported are generally not relevant to the main issue of protecting the Australian community and may not be persuasive when making a decision on deportation, unless, as a necessary and foreseeable consequence of deportation, the person would face a real risk of a breach of his or her fundamental human rights such as the right to be free from torture and slavery and not be subject to arbitrary imposition of the death penalty or where there are substantial grounds for believing that the person would be tortured.

17. Civil or military hostilities are more likely to affect the timing of deportation than to constitute a reason that the offender should continue to live permanently in Australia.

18. Judgements that job opportunities and the overall environment of the country to which a person would be deported are not as favourable to them as in Australia, however compassionately viewed, would not be persuasive against the deportation of a person who would be a risk to the Australian community.

19. Cogent and substantiated evidence of any claim of having a well founded fear of persecution in the country to which a person is to be deported would need to be produced. In the absence of such evidence it is very difficult to give weight to the unsubstantiated claim.

20. The important criteria on which judgements will be based are the seriousness of the crime, the nature of the crime; the possibility of recidivism; the length of time a person has been lawfully in Australia, that they have become a full time member of the community and the contribution the person has made to the community or may reasonably be expected to make in the future and the best interest of any children. The following factors in particular will be taken into account when considering the criteria and in making a decision on whether deportation should be ordered:

- the nature of the offence as outlined in paragraph 10 and the length of sentence imposed by the court;
- the person's previous general record of conduct. The total criminal history of a person should be given significant weight. A person who has been previously warned about the liability for deportation and, notwithstanding that warning, commits a further offence should expect that the warning will be given significant weight in consideration of his or her case;
- A person with several previous convictions against Australian society should be judged in the light of that past behaviour;
- the risk of further offences;
- the extent of rehabilitation already achieved, the prospect of further rehabilitation and positive contribution to the community the person may reasonably [be] expected to make;
- the length of lawful residence in Australia, the strength of family, social, business and other ties in Australia;
- the degree of hardship which would be caused to those who may be adversely affected by the deportation including any children concerned;
- the extent of support for deportation from persons directly affected, including victims of the crime/s committed;
- any unreasonable hardship the offender would suffer such as a real risk of breach of his or her fundamental human rights such as freedom from torture or slavery;
- subject to arbitrary imposition of the death sentence;
- ties with other countries;
- the likelihood that deportation of the offender would prevent or inhibit the commission of like offence by other persons.

This list is not exhaustive; if relevant, other factors that come to notice will be taken into account in individual cases.

21. A sensitive issue concerns the liability for deportation of an adult who arrive in Australia as a minor. It is not the Government's intention that such people should never be deported. Where there is a pattern of criminal behaviour indicating a likelihood that the person will commit further serious crimes, deportation should be seriously considered.

22. A person's cultural background should not result in differing applications of the law. While our multicultural society encourages all persons to practise their cultures and pursue their ideals, this practice must fall within a respect for and adherence to the laws and institutions of Australia. Contrary cultural values do not provide an excuse to persons who offend against Australian society.

Claims for refugee status

23. In cases where issues of protection pursuant to the Convention and Protocol Relating to the Status of Refugees are raised, they are considered separately by the Minister, including consideration of cessation provisions for people granted residence in Australia on the basis of refugee status.

24. The deportation of a person accorded refugee status under the Convention and Protocol Relating to the Status of Refugees who has committed a particularly serious crime will be considered under the expulsion provisions of Articles 32 and 33 of the Convention and Protocol.

Deportation action

25. It is for the appropriate State authorities (or in the case of Commonwealth prisoners, the Governor General) to decide such questions as the conditions under which a prisoner is to serve a sentence, the extent of remission of any part of a sentence or the release of a potential deportee on licence or on parole for the purpose of deportation.

26. If a person refused to provide information appropriate and relevant to the question of their deportation, the decision will be taken on the basis of the relevant information available.

27. Whenever possible, departure from Australia will be arranged to coincide with a deportee's release from prison. A deportee may be held in custody pursuant to the Migration Act pending finalisation of the deportation arrangements.

