CHAPTER FOUR

THE TEN YEAR RULE

The ten year rule refers to the residency limitation placed on criminal deportation in s.201 of the Migration Act. Under existing law, once a "permanent" resident has lived in Australia for ten years he or she is no longer liable for criminal deportation.

The ten year rule is supported by some on the grounds that it provides certainty and recognises the fact that, after a considerable period of residency, people have become part of the community even though they have not become citizens. On the other hand, the rule has been seen as an arbitrary historical anomaly which fails to protect the Australian community from long term non-citizen residents who have committed serious crimes. Others have noted that the ten year rule may be too harsh when applied to those who came to Australia as children.

The Committee concludes that changes to the ten year rule should be made to better protect the Australian community.

Introduction to the ten year rule

Description of the rule

4.1 The rule applies to permanent residents (and special visa holders from New Zealand) who have been convicted of a crime and sentenced to more than 12 months imprisonment. The rule prevents such people from being deported, if they have completed at least ten years of lawful residency in Australia, before they committed the relevant crimes. The rule rests on the premise that after ten years of residency, non-citizens have become part of the Australian community and that this should be recognised, even if they commit a serious offence.

4.2 In 1996/97, there were 90 to 100 non-citizen prisoners who were not liable for deportation because they had lived in Australia for more than ten years.[1]

Legislative basis of the rule

4.3 Persons subject to criminal deportation under s.201 of the Act must have been in Australia as a permanent resident:

- for a period of less than 10 years; or
- for periods that, when added together, total less than 10 years.

4.4 The same qualifying period (for criminal deportation) applies to citizens of New Zealand who were in Australia as exempt non-citizens or special category visa holders.

4.5 The ten year rule also applies to the deportation of non-citizens on security grounds (s.202 of the Act) but not to those convicted of certain serious offences (s.203).

1 DIMA, *Submissions,* p. S288.

4.6 Section 204 clarifies and defines the periods of residency which may count towards the ten years for the purposes of ss.201 and 202.

4.7 The effect of the rule is that when a non-citizen has lived in Australia for ten years or more, he or she is exempt from the criminal deportation provisions.

Origins of the rule

4.8 Prior to 1983, the head of power for criminal deportation was the immigration and emigration power (s.51(xxvii) of the Constitution). The Migration Act was amended so that the authority for deportation rested on the naturalisation and aliens power (s.51(xix) of the Constitution). The change resulted from Pochi's case which was decided by the High Court in 1982.[2]

4.9 In that case, the Court found that the deportation powers did not extend to an alien who had been absorbed in the Australian community. The period of ten years was seen as sufficient for a person to be regarded as an absorbed member of the community. While the *Migration Amendment Act 1983* changed the head of power to avoid such difficulties, the ten year rule for deportation was not varied.[3] It can, therefore, be regarded as something of a "quirk of history".[4]

Counting the ten years

4.10 In determining whether the person has resided in Australia for ten years (s.204 of the Act), the following periods are excluded:

- periods of unlawful residence;
- temporary absences from Australia; and
- periods spent in a custodial institutions.[5]

4.11 The periods of exemption make it possible for a person to be liable for deportation, despite having spent considerably longer than ten years in Australia.

4.12 When assessing time limitations, the date on which the relevant crime was committed is the key, and not the date on which the crime was discovered, or when the person was charged. For example the Ombudsman provided information about a non-citizen, who committed the crime for which he was convicted, after he had been in Australia for nine years and ten months. He was not arrested until two years after that, but was nevertheless within the scope of s.201.[6]

4.13 The ten year limit will not exclude a person from liability for deportation if he or she received a warning within the ten year period (as an alternative to deportation), and then re-offended after ten years lawful residency has elapsed. The seriousness of the subsequent

2 (1982) 151 CLR 101.
3 DIMA, *Transcript*, p. 273.
4 ibid.
5 DIMA, *Submissions*, p. S295.
6 Ombudsman, *Submissions*, p. S187.

offence also does not affect liability.[7] Once warned, a person is liable for criminal deportation at any time in the future. The DIMA representative told the committee:

> It [a warning] has no limit in its time period. It actually means that you can be considered for criminal deportation unless you are made a citizen forever.[8]

4.14 On the other hand, the Ombudsman noted that once convicted of a serious offence, a person would probably not be able to get citizenship because they would be unlikely to meet the "good character" test.[9]

4.15 In this context, it should be noted that citizenship itself does not absolutely exclude the threat of removal from Australia. If a person commits a serious offence any time before the grant of citizenship (not necessarily within the first ten years of residency) and the offence is not discovered until after the citizenship certificate is issued, the Minister may cancel the certificate.[10] The Citizenship Act does not prescribe that the offence should be committed within the first ten years of residency.

Concerns with the ten year rule

4.16 A number of specific concerns relating to the application of the ten year rule were raised in evidence. Categories of persons about whom concerns were raised included juveniles, refugees, those convicted of very serious offences and repeat offences. The arbitrary nature of the rule results in difficulties of application to individual circumstances. It can result in unequal outcomes in terms of fairness to the individuals concerned and the interests of the Australian community.

4.17 Before addressing these particular applications of the rule, it is important to consider its philosophical underpinning. The ten year rule must be assessed against the object of criminal deportation which Appendix Five reports is to "protect the safety and welfare of the Australian community".

4.18 The rule underlines the significance and importance of becoming a citizen:

> A non-citizen who has been in Australia for a period of 10 years or more arguably has established close links with Australia ... there is a view that having established such strong links, they should not be liable for removal. Such an approach arguably devalues the importance of Australian citizenship. It is only Australian citizens who have a right to enter and remain in Australia without being subject to entry requirements under the Migration Act other than having to provide evidence of their Australian citizenship.[11]

4.19 Mr Sullivan from DIMA expressed the significance of citizenship as:

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7 Law Society of NSW, *Submissions*, p. S416.
8 DIMA, *Transcript*, p. 244.
9 Ombudsman, *Submissions*, p. S443.
10 Under s.21(a)(ii) of the *Australian Citizenship Act 1948*, a person convicted of an offence with a sentence of more than 12 months, will be liable for removal if the relevant offence was committed before the grant of citizenship. This is so even if the offence was not discovered until after the grant of citizenship.
11 DIMA, *Submissions*, p. S295.

> The whole thing about criminal deportation is that Australia recognises itself as having a right in respect of non-citizens.[12]

4.20 This view of the significance of citizenship is not shared by all. The New South Wales Council for Civil Liberties stated:

> We regard permanent residents as members of the Australian community. If they are convicted of serious offences they should be treated as if they were citizens.[13]

4.21 The Council's view emphasises the importance of ties with the Australian community, which is basis of the ten year rule. Put crudely, the rule assumes that those who have lived in Australia for less than ten years are not inextricably part of this community. They are removable if they prove to be undesirable. This philosophical and legal distinction between the value of community ties and citizenship status is the background to differing perspectives on the specific problems addressed below.

Juvenile Immigrants

4.22 The view has been put that the ten year rule is particularly harsh in relation to persons who came to Australia as children. This evidence will be examined in order to determine whether the ten year rule should be applied to such persons.

Current position

4.23 There is no legislative exemption for those who arrived in Australia as children and who are liable for criminal deportation under the ten year rule and other elements of ss.201 or 202.

4.24 The 1992 Ministerial Policy Statement does not list age-of-arrival in Australia as a direct matter to be taken into account. However, under the policy considerations listed in paragraph 19 of the statement, matters such as "ties with other countries" may have a greater indirect application to those who have lived in another country for only a short period of childhood.[14] Paragraph 20 of the statement provides a very broad guideline:

> A sensitive issue concerns the liability for deportation of an adult who arrived 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.[15]

12 DIMA, *Transcript*, p. 261.
13 NSW Council of Civil Liberties, *Submissions*, p. S77.
14 Australia's Criminal Deportation Policy, Appendix Five.
15 ibid, Appendix Five.

Deportation to a country where a person has no ties

4.25 People who came to Australia as children may also be deported. It was argued that the ten year rule should be amended for this group because such people are unlikely to have significant ties in their country of origin. An example was given by one representative of the AAT:

> There was one instance where a man had migrated with his family from the UK to Australia. He was aged nine when he arrived. At a very young age - I think it was 18 or 19, but prior to him having been in Australia from 10 years - he committed a murder. ... At the age of 32 he was due for release and shortly before there was a deportation order served on him.
>
> ... All his immediate family were in Australia - his siblings and parents. ... There were arrangements for supervision on parole if he was returned to the UK, but he would have had no family or other support in those circumstances.[16]

4.26 The Law Society of New South Wales was presumably referring to the same case:

> ... it is inappropriate for a person to face the prospect of deportation where that person arrived in Australia at the age of nine and is convicted of a deportable offence at the age of 19. Such a person has spent the better part of their childhood in Australia, may have no connections to their country of origin and may still reside with the family unity with whom they entered Australia.

4.27 The Ombudsman also argued the unfairness of the rule in relation to those who commenced living in Australia as juveniles:

> Whilst the "ten year rule" generally works as Parliament intended, there is potential unfairness in relation to people who come to Australia as children and who have lost links with their country of origin.[17]

Australia's responsibility to those who came as juveniles

4.28 The Committee was informed that Australia has a greater responsibility for those who spent all or part of their formative years in this country. It was argued that this responsibility should be reflected in providing immunity from criminal deportation, or in allowing immunity to follow a lesser period of lawful residency than the current ten years. The Law Society of New South Wales submitted:

> ... different considerations should apply to persons who arrived in Australia as children or as refugees. In relation to persons who arrived as children, it is submitted that the appropriate period of liability should be less because of Australia's international obligations to take

16 AAT, *Transcript*, p. 4.
17 Law Society of NSW, *Submissions*, p. S178

> responsibility for the actions of persons who are raised and educated in this country. This is consistent with Australia's role as a world citizen.[18]

4.29 The Ombudsman agreed with this view:

> A particular problem exists concerning children who have come to Australia with parents and offend as young adults within the 10 year period. It can be argued that they have become an Australian problem and that the Australian community must shoulder some responsibility for their subsequent criminality.[19]

4.30 The Ombudsman also favours altering the current arrangements to provide that the ten year rule does not apply or applies in a modified form to those people who entered Australia prior to a specified age (possibly 16).[20]

4.31 The greater Australian responsibility for non-citizens who arrived as children has also been put forward as a reason for allowing greater flexibility in dealing with such persons. This was pressed as a matter of justice:

> The law needs to be flexible in this area because justice demands that it be so. If anyone believes that it is not tough enough, I can give examples of clients who were deported under the current policy, notwithstanding that they had been brought to Australia as children ... When a policy allows for the deportation of men and women brought to Australia as nine year olds, for criminal conduct learnt in Australia, then the so called "protection" of the Australian population is surely starting to smack of ideas more suitable to Europe between the wars.[21]

4.32 Evidence from the Jesuit Social Services draws attention to the particular problems of those who came as refugees. While supporting seriously considering deportation where there is a pattern of criminal behaviour and the likelihood of reoffending, they state that:

> ... such consideration should weigh this carefully with the experiences of that person as a young person, with particular regard to refugees who came to Australia as unaccompanied minors or where they have come as members of dysfunctional families from which they have subsequently become unattached or detached.[22]

4.33 The Ombudsman has pointed to the possible practical difficulties in deporting those who came to Australia as children. The country of birth may deny responsibility because links with the country of birth may be "almost non-existent" and because they might be considered a threat to the community on their release in a strange land.[23]

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18 ibid., pp. S207-208.
19 Ombudsman, *Submissions*, p. S200.
20 ibid., p. S442.
21 Clothier, *Submissions*, p. S2.
22 Jesuit Social Services, *Submissions*, p. S374.
23 Ombudsman, *Submissions*, p. S200.

Arguments against a special rule for those who arrived as juveniles

4.34 DIMA does not favour amending the ten year rule in the case of those who came to Australia as children. DIMA recognises that the deportation of such persons is difficult but there is no intention to exclude such persons from deportation:

> Mr Sullivan:- ... Anything to do with juveniles is a difficult decision ...
>
> Chair: - Even if by the time they have finished their sentence they are 18?
>
> Mr Sullivan: - Even if the sentence may bring them past the period when they are a juvenile. Certainly where a juvenile is sentenced for a very serious crime, I can't see why the fact that they were a juvenile when that serious crime was committed and that they are an adult when released from the institution should be regarded very differently from the fact of an adult committing the crime.[24]

4.35 Many of those who made individual submissions to the inquiry put more weight on the safety of the Australian community than on the implications of deportation for the non-citizens immediately involved.[25] While not necessarily addressing the position of those who came to this country as children, by implication this body of evidence would not support a softening of the ten year rule, if the result would be a greater risk to the community.

4.36 Those emphasising the importance of citizenship in relation to the deportation provisions are also less likely to favour greater flexibility in relation to those who arrived as children. The RSL is one organisation which regards citizenship status as the only grounds for immunity from deportation:

> Similarly young adults over the age of 21 who arrived in Australia as children then committed a crime as an adult should also not be protected by any consideration of time in Australia. Again such a person has had several years in which to seek citizenship. We do not propose juveniles sentenced to detention should be liable for deportation but any imprisonment as an adult, especially for like crimes, should be cumulative with any previous juvenile detention period in determining grounds for deportation.[26]

Conclusions on applying the rule to juvenile immigrants

4.37 Arguments regarding the lack of ties with any country other than Australia, and the greater responsibility Australia should bear in the case of those who grew up here are substantial. They are issues which should be taken into account in determining whether an individual should be served with a deportation notice.

4.38 At the same time, it should be noted that the class of persons who arrived in Australia as children is not homogeneous. At one end of the scale, an example might be a person who arrived as an 8 year old and was convicted with a two year sentence at 17. This

24 DIMA, *Transcript*, p. 261.
25 For example, Fisk, *Submissions*, p. S21; Horsburgh, *Submissions*, p. S23.
26 RSL, *Submissions*, p. S247.

person is liable under the ten year rule for deportation when he/she is released from the custodial institution. If given a warning, the person remains liable unless subsequently he or she becomes a citizen. There is a substantial difference between such a case and a person who arrived as a 16 year old and offended at 25 years old. The argument regarding Australian responsibility cannot be the same in relation to both cases.

4.39 The threshold question is whether the arguments in favour of different treatment for those who arrived as children or young persons, amount to sufficient reason to amend the ten year rule in their favour. On balance, the Committee is not inclined to support amending the ten year rule to lessen its effect on those who came to Australia as children, for the following reasons:

- The primary purpose of criminal deportation is to protect the Australian community from non-citizens who have committed serious crimes. The fact that a person arrived in Australia as a child or young person may not be relevant to their likely future threat to the community;

- The ten year rule applies the criminal deportation process to those who have not become fully integrated into the Australian community because they have spent a relatively short time here and they have not become citizens. This condition could apply to a person who arrived at the age of say 15 and committed a serious offence at 18. It does not necessarily follow that all those who came to Australia as juveniles have ties only with those in this country;

- The ten year rule is not applied in an arbitrary way, but according to guidelines, particularly those in the Ministerial Policy Statement. The Committee notes that both the law and the policy allow discretion to the decision maker. The problems outlined above relating to deportation of those who came to Australia as children (particularly young children) should be taken into account in reaching a decision about such persons; and

- Any special considerations relating to those who came to Australia as children should be addressed in the Ministerial Policy Statement and not by amending the legislation in a way that may leave the community more vulnerable.

Recommendation 2

The Committee recommends that the ten year rule continue to be applicable to those who came to Australia under the age of 18; and the Ministerial Policy Statement be amended to take account of any particular hardship or potential injustice which might arise in relation to those who came to Australia as children.

Former refugees

4.40 There are various international conventions which are relevant to the treatment of refugees in general and the possibility of deporting them in particular. These include the ICCPR, the Convention against Torture and the Refugees Convention (and its 1967 Protocol).[27]

4.41 The latter is the most relevant convention in the context of applying the ten year rule. In summary, the 1951 Convention prevents expulsion (except on the grounds of national security or public order) and/or return to the home country if the person's life or freedom would be threatened on the ground of race, religion, nationality, membership of a particular social group or political opinion. This has implications for the application of s.201 in criminal deportation matters.

4.42 The Migration Act does not contain specific provisions relating to the deportation of former refugees; that is, persons whose permanent residency was granted under a protection visa. According to the UNHCR, in practice, DIMA has ensured that its deportation processes comply with international obligations.[28]

Implications of international obligations

4.43 While the issue of possible refoulement has not arisen, if there were to be a change to the legislation to provide for mandatory deportation in some circumstances, the implications of this for former refugees would have to be taken into account in the drafting.

4.44 In addressing this problem, the DIMA representative noted that there could be two options. First, the deportation order could be made and then deferred. If there were significant changes in the country from which the person fled, the order could then be enforced. Second, there could be a clause providing for the revoking of a deportation order where the Department is unable to effect the deportation.[29]

4.45 In addition to the options canvassed by DIMA, the Committee notes that it is sometimes possible to deport a former refugee to a third country where no risk to the person's life or freedom would result from the person's race, religion, nationality, membership of a particular social group or political opinions.

Practical difficulties in effecting deportation of former refugees

4.46 Even where circumstances are deemed to have changed in the country of origin, there may be cases where a deportation order cannot be effected because of practical difficulties. For example, Vietnam, the origin of many of Australia's refugees, poses particular difficulties. Vietnam will not accept, as deportees, those who left the country illegally - a common occurrence in relation to refugees. Australia is negotiating with Vietnam

27 Appendix Nine.

28 UNHCR, *Submissions*, p. S44. DFAT confirms this in its evidence at *Submissions*, p. S165. For example, in the recent case of *Betkhoshabeh* (AAT, Deputy President Forrest, 26 Sep 1997), the AAT confirmed the DIMA order to deport a former Iranian refugee after it had considered the likely risk to the applicant if returned to Iran. This was in accord with Article 33 of the Convention.

29 DIMA, *Transcript*, p. 259.

to effect a change in that policy.[30] Cuba is another country where practical difficulties pose a problem for deportation despite a bilateral agreement aimed at improving the situation.[31]

4.47 Such difficulties in enforcing deportation orders occur in relation to a number of national groups of former refugees. In relation to some countries, the prisoner has to sign papers in order to obtain travel documents, or consular officials may need to interview the prisoner. The Committee heard that delays of up to a year may result from a lack of cooperation in these circumstances.[32]

Conclusion regarding former refugees

4.48 Australia's international obligations preclude refoulement. The Committee considers that existing discretions, available in the legislation and supporting policy documents and procedures, include sufficient flexibility to meet the requirements for decision making in relation to refugees.

4.49 The practical problems can also be accommodated within the discretions available in the existing criminal deportation arrangements. However, should any amendments to the legislation introduce mandatory deportation in some circumstances, the importance of ensuring that such mandatory orders do not offend international legal obligations against refoulement, would need to be acknowledged in the legislation.

Convictions for very serious offences

4.50 Offences which come within the provisions of s.201 (those incurring a sentence of more than 12 months, or life imprisonment or the death penalty) are all regarded as serious offences. In this section, 'very serious offences' refers to crimes such as murder, rape, drug dealing and armed robbery, which many in the community consider warrant special attention. A complete list of very serious crimes is contained in the current Ministerial policy statement and the proposed draft statement.

4.51 All deportation decisions are based on an assessment of the relationship between protecting the safety and welfare of the Australian community on the one hand, and protecting the interests of permanent residents who commit offences on the other. This balance is at its most controversial in relation to very serious offences.

4.52 Section 203 of the Migration Act provides for deportation for other very serious offences, irrespective of the length of residency. These offences are specified by reference to the *Crimes Act 1914* and relate to crimes such as treason, sedition, helping prisoners of war to escape and conspiracy.

4.53 The Committee received a good deal of evidence which argued that very serious criminal offences should not be limited by the ten year rule. The viewpoint is encapsulated in the following extract:

30 ibid., p. 258.
31 ibid.
32 ibid. pp. 259-260.

> ... there are crimes which may warrant the 10 year period being reviewed. They are so abhorrent to the Australian community that the non-citizen should be deported.[33]

Arguments for ending the ten year limitation for very serious offences

4.54 The Committee found strong support for limiting the protection offered by the ten year rule in the case of very serious offences. This evidence emphasises the safety of the Australian community and pays less attention to the interests of the convicted non-citizen.

4.55 There are a range of opinions on the issue. Some views and arguments propose an extremely strict regime based on mandatory deportation, regardless of time in Australia. Proponents of a very strict regime also proposed the exclusion of appeals and shortening of the qualifying sentence period.[34] A typical comment is:

> ... Australia's immigration system, unique in the world for its pace and generosity, has failed the Australian community by admitting foreign criminals. Criminal deportations must therefore be accelerated to remedy Australia's concentrations of imported crime.[35]

4.56 Other evidence, while not supporting such a rigorous regime, is still inclined to the view that very serious offences should be treated more strictly than lesser offences. An example is the Ethnic Communities Council of Queensland, which strongly supports the ten year rule generally, but which nevertheless endorses extending the types of offences which should not receive the protection of the ten year rule:

> there could be a case for extending the list of "[very]serious offences" included under this provision subject to very careful consideration.[36]

4.57 DIMA supports an end to the ten year rule for very serious crimes, citing community expectations:

> The 10 year time limit within which serious crimes are to be committed if an offender is to be liable for deportation now appears to have limited validity and is out of step with community expectations. It may be timely for consideration to be given to whether the Australian system should be consistent with international practice by removing the 10 year limitation and make deportation apply to all non-citizens, irrespective of when they committed their crime.[37]

4.58 DIMA also raised the option of mandatory deportation:

> One matter the Committee may wish to consider is whether, notwithstanding the discretionary provisions relating to deportation, there should be an obligation to order the deportation in some cases. This could include a differential on the basis of the period of time in

33 ibid., pp. 238-9.
34 For example, Gregory, *Submissions*, p. S13, Smith, *Submissions*, p. S17.
35 Haddon, *Submissions*, p. S56.
36 ECCQ, *Submissions*, p. S26.
37 DIMA, *Submissions*, p. S296.

> Australia and the seriousness of the crime, reflected by the length of the sentence ...[38]

Arguments for maintaining the ten year rule, even for very serious offences

4.59 Evidence supporting the maintenance of the ten year rule rested mainly on the need for certainty for long term residents. The concept of an open-ended liability or mandatory deportation imposes too great a burden on long term residents who may have extensive links to the community. This view is strongest in combating proposals for mandatory deportation, even for very serious offences.

4.60 The Law Society of New South Wales argued:

> Given the serious consequences of criminal deportation there must be a limit on a person's liability for deportation.
>
> While the 10 years is obviously arbitrary, any longer period would leave permanent residents in too uncertain a position. Moreover, any longer period would make it even more difficult for officers and the reviewing authority to make a deportation order as it increases the likelihood that the person will have developed closer ties with Australia and reduced ties with their country of nationality.[39]

Proposals for a sliding scale of liability

4.61 DIMA proposed dispensing with the arbitrary ten year rule and introducing a sliding scale of liability (including mandatory deportation for serious offences where the person convicted had a reasonably short period of residency). The serious nature of the offence (as reflected in the sentence) would be weighed against the length of time spent in Australia. DIMA proposed that mandatory deportation could result following a sentence of:

- not less than 12 months or for life if the person had been lawfully in Australia as a permanent resident for less than 5 years;
- not less than 5 years or for life if the person had been lawfully in Australia as a permanent resident for less than 10 years; or
- not less than 10 years or for life, irrespective of the person's period in Australia as a permanent resident.[40]

4.62 In DIMA's proposal, other cases where a sentence of 12 months or more was imposed would be decided according to the discretionary powers of the Act. The rationale for this proposal is:

> This scheme would reflect the seriousness of the crime as determined by the courts, the repugnancy of the crime to the Australian community, and that non-citizens have, by such action, abused their opportunity to live in the Australian society and lost their right to be part of the Australian community. These time based specifications reflect the concerns of the community and the person has not made

38 ibid., p. S289.
39 Law Society of NSW, *Submissions*, p. S207.
40 DIMA, *Submissions*, p. S290.

> significant contributions to the Australian community to outweigh the seriousness of the crime. They also show that the factors warranting deportation outweigh other primary concerns such as those relating to children or the impact on the family.

4.63 The concept of a sliding scale of liability reflecting both the seriousness of the offence and the length of residency in Australia, is also proposed by the ACT Attorney General:

> Those [current] criteria not only fail to address the situation of serious offences committed after 10 years residence but, by failing to relate the period of residence to the seriousness of the offence, provide inadequate guidance for the exercise of the power to order deportation. The adoption of graduated criteria would overcome both these deficiencies.[41]

4.64 Other evidence expanded the concept of a sliding scale by suggesting a points system:

> We ... submit that in the case of serious crime deportation should be carried out directly upon prison release, with no right of appeal against deportation by that person.
>
> In relation to lesser crimes by permanent residents, there should be a points system established so that repeat offenders can be dealt with in a fair and consistent manner. Where an offender reaches the threshold of points that person is deported, again with no right of appeal.[42]

Conclusion on very serious offences

4.65 The Committee is persuaded that non-citizens convicted of very serious crimes should not be permitted to remain in Australia following their release from prison, solely on the grounds that they have spent a total of ten "lawful" years in Australia. The limitation of liability provided by the ten year rule represents an unacceptable risk to the community.

4.66 This risk can be addressed by abolishing the current ten year rule in relation to very serious offences. The Committee has considered carefully the proposals for a sliding scale to replace the present arrangements and concludes that its complexity is such that it will not be clearly understood in the community.

4.67 In addition, there seems no urgent need to replace a single arbitrary rule with a sliding scale which is, itself, a series of arbitrary rules. The linking of the sliding scale with mandatory deportation detracts further from the proposal.

4.68 The Committee notes that the draft policy statement effectively provides for mandatory deportation for a comprehensive list of very serious offences.[43] These offences should probably result in deportation but only following a decision on the merits of the case. However, to make deportation mandatory is a much more serious step.

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41 ACT Government, *Submissions*, p. S257.
42 Emerton and Salt, *Submissions*, p. S27.
43 Australia's Criminal Deportation Policy - Draft, Appendix Six.

4.69 In the Committee's view, the list of offences which should give rise to an expectation of deportation should be approved by the Parliament, by way of primary legislation or legislative instrument. The best option for dealing with very serious offences is to simply abolish the ten year rule in these cases.

Recommendation 3

The Committee recommends that the *Migration Act 1958* be amended to abolish the ten year rule in relation to those convicted of very serious offences. These offences can be specified in the Regulations and would include murder, serious sexual assaults, drug dealing, armed robbery and the other very serious offences contained in the draft Ministerial Policy Statement.

Repeat offenders

4.70 Much of the argument relating to very serious offences is relevant to repeat offences. The future threat to the Australian community is arguably greater where non-citizens have been convicted of offences on more than one occasion.

Repeat offences when the first offence was within the ten year period

4.71 The first situation involves those who received a warning during the first ten years residency. The ten year rule does not provide protection for those who were convicted and warned within the first ten years of lawful residency, and who then re-offend after that period. Re-offence beyond the ten year limit may still result in deportation as the following interchange demonstrates:

> Senator McKiernan - So the offence is committed in year two and then a subsequent offence is committed in year 22, the deportation can be effected on the offence in year two?
>
> Mr Sullivan - It can be. The weight you would give to the prior warning would not be as significant a weight as you would to a person who, for instance, was warned last month and went out and committed another serious crime next month.[44]

4.72 The word "warning" in this context does not include informal comments. It has a formal, technical meaning. Those who are eligible for deportation because of the provisions of s.201 of the Act are either issued with a deportation order or given a warning. Between 1 July 1990 and 30 June 1996, 538 persons were given warnings rather than being deported.[45]

4.73 DIMA (and a considerable number of other witnesses) views re-offending very seriously and has proposed amendments to the policy statement and possibly the legislation to reflect a stricter view of repeat offences. DIMA notes that the consequences which should flow from re-offending where there has been a prior warning are not given appropriate

44 DIMA, *Transcript*, p. 244.
45 ibid., p. 242. The figures for 1996/97 are from DIMA, *Submissions*, p. S438.

attention in the current policy statement.[46] The possibility of legislative changes is also proposed:

> The Committee may wish to consider whether legislation or guidelines could provide for the deportation of a person who has re-offended after receiving a warning. The provisions could reflect the seriousness with which re-offending is viewed by stating that deportation is to be ordered unless the Minister is satisfied that exceptional circumstances exist or by providing the Minister non-compellable powers to intervene if the Minister thinks it to be in the public interest to do so.[47]

4.74 DIMA proposed a series of options for dealing with repeat offenders:

- the person be deported if he or she re-offends and is sentenced to a term of imprisonment, irrespective of the length of the sentence;
- if a person re-offends within the parole period, they shall be deported unless exceptional circumstances exist;
- if a person re-offends within a certain stipulated period, they be deported; or
- if a person re-offends a substantial period of time after the warning, they be deported only if the sentence is for one year or more.[48]

4.75 The DIMA proposals are not endorsed by the Law Society of New South Wales:

> The concept of mandatory deportation should be absolutely rejected. The consequences for an individual facing deportation are so serious as to warrant a consideration on the merits of each individual case. Mandatory provisions would act harshly and unfairly in certain circumstances. To leave such cases in the hands of the Minister on the basis that he/she might intervene in an appropriate case is unacceptable. Such a system would not only lead to deportation cases becoming extremely political, but may result in breaches of International treaties such as and Convention on the Rights of the Child.[49]

Conclusion on repeat offenders when the first offence was within the ten year period

4.76 The Committee accepts the proposition that those who continue to offend can be an unacceptable risk to the Australian community. Such persons should expect to face deportation. As the object of the deportation system is to "protect the community from the possibility of further criminal behaviour"[50], the fact that a person has offended at least twice raises a strong case to answer about his or her future behaviour.

4.77 The Committee considers that there is no need to change the legislative provisions relating to repeat offences where a warning was issued during the first ten years residency. The power to effect the deportation of such offenders *at any time* should they re-

46 ibid., p. S290.
47 ibid., p. S291.
48 ibid., p. S290.
49 Law Society of NSW, *Submissions*, p. S415.
50 Australia's Criminal Deportation Policy, Appendix Five.

offend already exists. The existing system is sufficient to deal with repeat offenders in this category.

4.78 The community concern surrounding multiple criminal offences should be reflected in the Ministerial statement and the potential deportee should be made aware of the need to demonstrate compelling or compassionate grounds to remain in Australia. The Committee endorses the proposal within the draft Ministerial policy statement that a further offence should, *prima facie*, result in deportation. The weight to be given to multiple criminal offences in the Ministerial policy statement should reflect the scheme's aim of protecting the community.

4.79 The presumption of a *prima facie* case for deportation can still be overturned but only with very strong countervailing evidence. The increased weight given to a second offence should be substantial but it should not equate to mandatory deportation.

Recommendation 4

The Committee recommends that the Ministerial Policy Statement be amended to create an expectation that persons previously convicted of an offence and issued with a warning, and who are convicted of another offence which indicates a pattern of continued criminal behaviour, should *prima facie* be deported.

Repeat offences when the first offence was outside the ten year period

4.80 The other situation concerns those who do not commence their criminal activities until after they have been in Australia for more than ten years. The Committee considered the question of whether the ten year rule for serious crimes provides sufficient protection for the Australian community. Under the current provisions, the criminal deportation regime cannot apply to criminal non-citizens where their crimes occurred after they have been in Australia for more than ten years.[51]

4.81 The Committee heard from many people offended by the idea that non-citizens could repeatedly offend after ten years residency but remain in Australia (following release from prison) on the grounds of community ties believed to exist after ten years residency.

4.82 The rationale of the ten year rule is that a permanent resident has become an integral part of the Australian community after that period. If such a person is convicted of a serious crime after the period of ten years lawful residency has been completed, the current legal position is that the person is not subject to deportation.

Conclusion on repeat offenders when the first offence was outside the ten year period

4.83 In the Committee's view, this rationale gives too much weight to the interests of the non-citizen and insufficient weight to the protection of the Australian community. After more than ten years, a non-citizen who commits a serious offence should not be liable to deportation because of the ten year rule. If that non-citizen commits another similar serious

51 It should be noted that such persons would be liable to removal on character grounds.

criminal offence, the Committee concludes he or she should be subject to the criminal deportation system.

4.84 This conclusion is consistent with the ten year rule, insofar as it recognises that a person who has developed ties with the community deserves a second chance even if convicted of one serious offence after the ten years.

4.85 In the Committee's view, it is appropriate that where a first offence occurs after ten years lawful residency, the Act should not impose liability for deportation (other than for a very serious crime as explained earlier in the chapter) though the non-citizen should receive a warning. The non-citizen, however, should not benefit from the ten year rule if he or she commits another subsequent crime. A second offence committed by that non-citizen should trigger liability for deportation, notwithstanding the fact that the first offence occurred after the first ten years residency.

4.86 The Committee recognises that collecting and processing of information on the criminal history of every non-citizen would create an administrative burden for DIMA. However, it is probable that DIMA will need to collect and keep such records in any case (for use in relation to the character provisions of the removal powers).

4.87 The overall goal of community protection requires the ten year rule to be modified in cases where the non-citizen represents a continuing threat to society.

Recommendation 5

The Committee recommends that the *Migration Act 1958* be amended to render non-citizens convicted of a second offence resulting in a custodial sentence of at least 12 months liable to deportation irrespective of when the offences occurred. A non-citizen convicted of a second or subsequent offence (even if the first offence occurred after the ten year period) should become liable to deportation.

Mandatory deportation

4.88 In evidence, the Committee considered several proposals advocating mandatory detention. Some of this evidence has been reported earlier in this chapter. For example, DIMA proposed a series of options for dealing with repeat offenders:

- the person be deported if he or she re-offends and is sentenced to a term of imprisonment, irrespective of the length of the sentence;
- if a person re-offends within the parole period, they shall be deported unless exceptional circumstances exist;
- if a person re-offends within a certain stipulated period, they be deported; or
- if a person re-offends a substantial period of time after the warning, they be deported only if the sentence is for one year or more.[52]

4.89 Each of these options includes a form of mandatory deportation, where the seriousness of the crime justifies excluding the other factors contained in the criminal

52 DIMA, *Submissions*, p. S290.

deportation policy. The Australian Capital Territory Government also considered mandatory deportation a desirable option.[53]

4.90 Proposals relating to mandatory deportation are opposed by the Law Society of New South Wales:

> The concept of mandatory deportation should be absolutely rejected. The consequences for an individual facing deportation are so serious as to warrant a consideration on the merits of each individual case. Mandatory provisions would act harshly and unfairly in certain circumstances. To leave such cases in the hands of the Minister on the basis that he/she might intervene in an appropriate case is unacceptable. Such a system would not only lead to deportation cases becoming extremely political, but may result in breaches of International treaties.[54]

4.91 Evidence from a number of other sources identified similar philosophical objections or practical difficulties with mandatory deportation. The sources ranged from administrative agencies like the AAT[55] and Ombudsman[56] to religious groups like the Jesuits.[57]

Conclusion to reject mandatory deportation

4.92 Although the Committee recommends strengthening the current criminal deportation policy to reflect the need to better protect the community, the Committee does not support mandatory deportation. At present, a non-citizen remains liable for deportation following a crime with at least a 12 months sentence in the first ten years of residency and that liability is reassessed following a repeat offence. The liability continues regardless of the nature of the crime and regardless of whether it occurs many years after the original offence.

4.93 The Committee believes that the consequences for an individual facing deportation are so serious as to warrant consideration on the merits of each individual case. Mandatory provisions could act harshly and unfairly in the some circumstances by requiring the deportation of persons who, for compelling compassionate reasons, should be allowed to stay in Australia. DIMA records establish that a small number of non-citizens have received multiple warnings which suggests that, when their cases were considered on their merits, countervailing grounds existed for allowing them to remain in Australia.

4.94 Mandatory deportation would not allow other interested parties like family a forum to express their views. Mandatory deportation would not take account of actual community ties and contribution of a non-citizen where the system considered only criminal offences.

4.95 Furthermore, as a number of international conventions (see Appendix Nine) impose obligations upon Australia to provide a formal hearing and, arguably, merits

53 ACT Government, *Submissions,* pp. S257-9.
54 Law Society of NSW, *Submissions,* p. S415.
55 AAT, *Submissions,* p. S386.
56 Ombudsman, *Submissions,* p. S442.
57 Jesuit Social Services, *Submissions,* p. S373.

consideration. A mandatory deportation system, therefore, would require a number of exceptions or procedural safeguards to avoid breaching those conventions.

4.96 Finally, the Committee concludes that mandatory deportation is repugnant to a society which considers reform and rehabilitation as an integral part of our criminal deportation policies.