CHAPTER FIVE

ARRANGEMENTS WITH STATE AND TERRITORY GOVERNMENTS

This chapter addresses term of reference four which encompasses the liaison with the states and territories to identify and handle potential deportation cases. DIMA is constrained in its dealings with state and territory agencies because of limited legislative powers to gather information. The result is a deportation system using differing information and differing verification practices in the various jurisdictions to identify and process potential deportees.

The chapter explores the difficulties inherent in maintaining a national system based on local identification and other arrangements. The Committee notes that the states and territories have supported DIMA in its efforts to enforce criminal deportation laws. It also notes the efforts of DIMA to secure a more uniform approach. The chapter includes recommendations aimed at improving DIMA's ability to negotiate desirable outcomes with state and territory agencies.

Introduction

5.1 The criminal deportation scheme depends on information about potential deportees which is supplied by state and territory agencies and government departments. The terms of reference require the Committee to examine the effectiveness of the existing arrangements with state and territory governments which identify and process potential deportees.

5.2 State and territory governments have expressed their satisfaction with the existing arrangements. The Western Australian submission states:

> The current working relationship between the Offender Management Division, Ministry of Justice and Department of Immigration is considered good with a high level of co-operation and communication being maintained.[1]

5.3 The New South Wales submission also expressed confidence in existing arrangements:

> [T]he arrangements we have at the moment with the immigration people seem to work quite well. We have quite a good relationship with the people at the local level here in Sydney. I think we seem to get on quite well, the arrangements are satisfactory from both sides.[2]

5.4 The level of satisfaction is tempered by a recognition that arrangements could be improved:

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1 WA Government, *Submissions*, p. S79.
2 NSW Department of Corrective Services, *Transcript*, p. 46.

> Generally, the current criminal deportation processes are considered to be working reasonably well, however, it is submitted that the Committee may wish to consider [a range of suggested amendments].[3]

5.5 This chapter identifies difficulties in relation to the practices of various state and territory governments and suggests improvements. The major issues covered in the chapter are:

- the identification of potential deportees within state and territory prison systems;
- the appropriate time to conduct deportation inquiries to maximise rehabilitation opportunities but to avoid detention after the custodial sentence expires;
- the impact of deportation inquiries and orders on prisoners' security classifications (which affects rehabilitation opportunities); and
- the information gathering powers under the Migration Act relating to obtaining information about potential deportees.

5.6 The Committee believes that these difficulties can be overcome through improved dialogue and improved procedures between the parties. The Committee supports DIMA's efforts to formalise communication with the states and territories and to develop a uniform national deportation scheme which identifies potential deportees.

5.7 The final Committee recommendation contained in this chapter is a method of achieving that improved communication. A formal Memorandum of Understanding between DIMA and each state or territory government has the potential to overcome current difficulties and to identify goals for improving processes. The Committee recommends a number of other specific actions to improve DIMA's ability to overcome difficulties with the states and territories.

Identification of potential deportees

The scope of the issue

5.8 During the inquiry, DIMA raised concerns over the potential for possible deportees in state and territory prisons to avoid identification for deportation consideration:

> It is understood that the bio data records of inmates in prisons are not verified by checks of documentation. The information is collected from each prisoner on the basis of information they provide on admission...Conceivably, the details of a person who claims to be Australian born, a fact not usually checked, would not be referred to DIMA. It is possible that some prisoners are not being considered for deportation because they claim to be Australia citizens and no further checking is carried out by prison authorities.[4]

5.9 Other witnesses were concerned about systems that rely on the prisoners themselves supplying citizenship information:

3 Qld Government, *Submissions*, p. S235.
4 DIMA, *Submissions*, p. S297.

> .... that means that one person may be considered for criminal deportation in circumstances in which another person in the same circumstances would not be so considered. It gives rise to issues about equality before the law and also gives rise to questions about the arbitrariness of the actual decision.[5]

5.10 The Committee sought evidence from each state and territory government. Most states and both territories provided specific views on this term of reference, and DIMA provided an overview of the information supplied by the other states.[6]

State or territory government positions

5.11 The information supplied by state and territory governments and DIMA confirms that the most common method of obtaining citizenship information is to ask each prisoner. The information is then supplied to DIMA without verification.

5.12 In Western Australia:

> [The DIMA] Perth Office is provided with a monthly printout from the Ministry of Justice. This lists all persons in prison who have indicated their place of birth outside Australia. This is only taken on the prisoners word and no check is made by the Ministry as to the authenticity of this statement.[7]

5.13 In Victoria, the information is also obtained from prisoners in the following categories:

> Prisoners name, date of birth, place of birth, nationality, year of arrival in Australia (as supplied by the prisoner)[8]

5.14 In New South Wales prisoners supply citizenship information. Again, this is not subject to verification:

> The Department of Corrective Services becomes aware of an inmate's status after the inmate completes a Personal Description Form. The form includes the following questions:
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> - identity, address, date of birth;
> - country of birth;
> - nationality;
> - date of arrival in Australia;
> - Australian citizenship;
> - possession of a passport and location of that passport.

5 HREOC, *Transcript*, p. 58.
6 DIMA, *Submissions*, pp. S349-350. The three states which did not supply specific submissions were Victoria, South Australia and Tasmania.
7 ibid., p. S349.
8 ibid., p. S350.

> It should be noted that this information is provided by the inmate and is not verified.[9]

5.15 In Queensland, the Government confirmed that its system is based on prisoners' self-reporting:

> Information relating to offenders who do not have Australian citizenship, based on self reporting, is forwarded to the Department of Immigration.[10]

5.16 The Australian Capital Territory Government is concerned about the potential for deception:

> Unless the foreign nationality of the offender is disclosed by the offender.... the police, prosecution and criminal court may be unaware that the offender is a person liable to deportation.[11]

Efforts to develop a better identification system

5.17 At least one state government has limited the possibility of misreporting by checking information about potential deportees, using a range of existing sources. DIMA reports that in South Australia, the information systems of the SA Police, Correctional Services and the Courts are linked to the Justice Information Service. DIMA obtains a regular list of persons sentenced to imprisonment for more than 12 months.[12]

5.18 The Committee has been told by police of the processes, both police and Court based, to identify correctly persons accused of criminal offences. Non-citizens representing themselves as Australian citizens should be detected if citizenship information is cross-checked against existing justice records.

5.19 Aware of the shortcomings in the arrangements with some state and territory governments, DIMA attempts to overcome difficulties by using available public records[13] and by encouraging improved and uniform information from the states and territories:

> We are hoping to be able to go to all of the justice and corrections ministries and be able to see whether they are willing to give it to us in a standard way... We are working on a request to states to be able to at least present it in, first, an electronic format, and second, an agreed format.[14]

9 NSW Government, *Submissions*, p. S212, and reinforced at p. S425.

10 Qld Government, *Submissions*, p. S235.

11 ACT Government, *Submissions*, p. S259. Evidence from other state and territory governments does not specifically address the issue though DIMA reports that Tasmania has not supplied quarterly information for 16 months: DIMA, *Submissions*, p. S350.

12 DIMA, *Submissions*, p. S350.

13 MSI 171 "*Deportation - General Policy*" (13/5/97), para 4.2, directs staff to scan available public information including law lists, conviction notices, parole records and newspaper reports.

14 DIMA, *Transcript*, p. 276.

Conclusion on potential deportee identification

5.20 The criminal deportation scheme depends on effective working relationships between DIMA and the state and territory agencies responsible for imprisoning criminal non-citizens. The existing relations, which are based on cooperation between DIMA and state and territory governments, have developed over time and reflect local agreements. At the conclusion of this chapter, the Committee recommends a formal process to assist all parties to work together to improve the present system.

5.21 In the context of identifying potential deportees, the Committee notes that relying on local working arrangements can mean that communication becomes unclear. The reasons behind the information exchange may not be understood completely.[15]

5.22 Because of the differing reasons for creating and recording information, state and territory agency systems contain different information. Variation exists in the type of the information collected, in the format in which information is presented and in the verification processes (if any) conducted on information provided by prisoners.

5.23 The resulting data collected by DIMA does support a reasonably effective identification scheme, but its uncoordinated development limits confidence in its accuracy. The Committee believes adopting a more standard approach will improve information exchange.

5.24 DIMA flagged its intention to discuss and review its information needs on a regular basis at senior levels with state and territory agencies.[16] Such discussions offer a mechanism for resolving past difficulties and improving the current information exchange system. These discussions should aim to ensure all eligible non-citizens are subject to the deportation process and citizenship claims are verified.[17]

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15 For example, the NSW Department of Corrective Services said at *Transcript*, p. 44:

> Senator McKiernan: Is there a possibility that someone could slip through the net? A person might be liable for deportation because of the seriousness of the offence could maintain that they are an Australian citizen and escape.
>
> Mr Guy: There would be that possibility, yes.
>
> Senator McKiernan: Has any thought been given by corrective services in New South Wales as to how to overcome that gap in the system? It may not be a problem to you as such from your responsibility.
>
> Mr Guy: I guess we have to be honest and say no.

16 DIMA, *Transcript*, p. 276.

17 NSW Department of Corrective Services; *Transcript*, p. 51

> CHAIR: Getting back to the question we were talking about before, that you have potential deportees in the system that we do not know about: where do you see the problem in cross-referencing with Migration so that there is a cross-check of your records of who is actually in goal and Migration's records of who are permanent residents and non-citizens?

Recommendation 6

The Committee recommends that DIMA continue to negotiate standard procedures with each state and territory government in order to:

(a) identify each non-citizen held in prison as a potential deportee subject to the criminal deportation process; and

(b) verify any citizenship information generated by prisoners with cross checking of available records.

The most appropriate time for deportation hearings

The scope of the issue

5.25 The most appropriate time to conduct a deportation hearing is a vexed issue. The current arrangement is that DIMA undertakes a deportation inquiry and advises the criminal non-citizen of the decision (whether to deport or warn the offender) at some time during the criminal sentence.

5.26 The relevant MSI instructs DIMA staff to undertake the hearing as soon as possible after sentencing though an offender may request a deferment to a date later in the prison sentence.[18] Following a request, DIMA staff defer the inquiry to a time that (in theory) allows the deportation decision and appeals to be finalised before the offender's earliest release date. In granting a deferral, DIMA takes account of whether:

- the seriousness of the crime is such that a deferral should not be considered; and
- a different decision might be made if it is deferred.[19]

5.27 The timing of the process is important to criminal non-citizens as well as state and territory governments. The argument advanced for delaying a decision until late in the prison term is that non-citizens should be given an opportunity to rehabilitate themselves. Against this consideration is the desirability of resolving the deportation order and finalising any appeals well before the sentence expires.[20] Where the matter is not decided before the expiry of the sentence, further custodial detention is the practice.

5.28 A deportation order, or the potential for a deportation order, may affect the prisoner's access to rehabilitation programs and the security status under which the prisoner serves his or her sentence.

> Mr Nash: There would be no difficulty, from a policy point of view, in allowing them access to all those records if they want to cross-check them.

18 MSI 34 "*Deportation Submissions*" (31/10/96), para 2.3.1.
19 MSI 171 "*Deportation - General Policy*" (13/5/97), para 8.4.1.
20 The Ombudsman explores these considerations at *Submissions*, p. S193.

Proposals to finalise inquiries quickly

5.29 Proposals to finalise the deportation order quickly came from prison authorities. The Western Australian Government suggested that a decision as early as three months after sentence would assist with their prisoner placement.[21] The Queensland Government believes:

> it would be in the best interests of both the prisoner and the [Corrective Services] Commission if the decision to deport was made in the earlier stages of the sentence.[22]

5.30 The Human Rights Commissioner also emphasised that, if deportation is not to be an additional punishment:

> the possibility of continued detention after the completion of a criminal sentence imposed by the court should be avoided in all cases unless there is no alternative.[23]

5.31 Administrative convenience and avoiding further incarceration are reasons for finalising the deportation inquiry quickly.

Proposals to delay inquiries

5.32 The Law Society of New South Wales suggests that a later decision may best serve the interests of Australian community and, perhaps, the non-citizen:

> If deportation is to be used as an additional form of punishment, then consideration will be made as soon as possible after sentence as the factors in favour of deportation will almost always outweigh those against. On the other hand, if deportation is to be used to protect the Australian community, then one would have thought that consideration should have been delayed until the end of the sentence when a proper assessment can be made as to the issues of reform and rehabilitation and the risk of recidivism.[24]

5.33 The timing of deportation inquiries turns on the appropriate balance between good administrative practice and making decisions based on all relevant data:

> So the balance to me lies in determining how late it can be left while still ensuring that all the processes have been completed before the individual moves to a period of administrative detention - because that is what it is - after the completion of the judicially imposed sentence for the criminal offence.[25]

21 WA Government, *Submissions*, p. S80.
22 Qld Government *Submissions*, p S238. A Victorian legal practitioner also recommends that "deportation orders should be made as soon as practicable after a person is [sentenced] and becomes liable for deportation", Howlett, *Submissions*, p. S359.
23 HREOC, *Transcript*, p. 56.
24 Law Society of NSW, *Submissions*, p. S416.
25 HREOC, *Transcript*, p. 59.

5.34 Two practical suggestions were offered, both of which favour conducting deportation inquiries toward the end of the custodial sentence. The AAT suggested holding the inquiry before parole hearings:

> In an ideal world, the decision about criminal deportation should be made before the parole decision, because parole will happen almost inevitably because that is what the sentencing judge ordered, whereas the criminal deportation may or may not happen depending on what the circumstances are at the time of hearing.[26]

5.35 There is, however, some unpredictability in actual parole dates across jurisdictions. The AAT[27] and the Ombudsman[28] both acknowledged the problem.

5.36 The Ombudsman advocated the simple rule of decisions "generally taken at least one year prior to the conclusion of the minimum sentence imposed by the Court".[29] This fixed period would allow ample time to finalise appeals and deportation travel arrangements but still provide some scope to demonstrate reform or rehabilitation.

Conclusion on the most appropriate time for deportation hearings

5.37 Arguments for an earlier decision revolve around administrative convenience and avoidance of detention beyond the custodial sentence. Arguments for a later decision rests on better decision making based on collecting the maximum amount of evidence on rehabilitation. The interests of the Australian community are better served by later decisions, but administrative convenience and avoiding unnecessary detention are also important.

5.38 Determining an agreed position on the timing of inquiries is another matter for dialogue between DIMA and state and territory government agencies. With an agreed timetable, these agencies can work with DIMA to provide parole reports and other information useful to the deportation process in a timely fashion. The deportation decision maker can use this documentation about the non-citizen's experience in prison to reach a fair decision.

5.39 The timing of deportation inquiries in each state or territory could be included in a memorandum of understanding with DIMA. It may be that different parole and other procedures in the various states and territories would result in agreeing to conduct inquiries at different periods in the sentence. However, uniform timing is obviously desirable.

5.40 Important considerations for the non-citizen include the need for certainty and the need to avoid periods of detention (additional to the custodial sentence) while awaiting appeals or administrative arrangements.

5.41 As a starting point for discussion, the Committee endorses the Ombudsman's suggestion. Discussions with each state and territory government can resolve the actual times,

26 AAT, *Transcript*, p. 11.
27 ibid., pp. 8-11.
28 Ombudsman, *Submissions*, p. S193.
29 ibid. Where the minimum term of imprisonment is likely to be 12 months or less, the Ombudsman suggested that the decision should be taken within six months of sentencing.

taking account of local considerations and any changes to the average appeal timetable of the AAT (currently seven to eight months[30]).

Recommendation 7

The Committee recommends that DIMA :

(a) commence the deportation inquiry when a criminal non-citizen has 12 months of his/her sentence remaining before the first possible release date;

(b) complete the deportation inquiry and advise those concerned of the decision within three months; and

(c) for sentences shorter than 15 months, complete the deportation inquiry within six months of sentencing.

Security classification of deportees

5.42 During the inquiry, some parties raised the problem of identification as a potential deportee affecting a prisoner's security classification. This, in turn, affects access to rehabilitation programs and other privileges.

5.43 The Ombudsman argues that the relationship between deportation status and security assessment ought to be based on the merits of each individual case:

> In my opinion, once a deportation order has been made, the State authorities should make an individual assessment of the risk of escape in deciding the future classification of the prisoner and what access to provide to rehabilitation programs. The convicted person should then serve the remainder of their custodial sentence until paroled and be promptly deported.[31]

5.44 The evidence from several states, however, suggests that a standard approach rather than merits consideration occurs following advice of deportee status. The Western Australia authorities have a standard policy:

> [T]he current policy of the Offender Management Division is to rate prisoners medium security if liable to be deported.[32]

5.45 This is also the case in Queensland:

> [I]t is noted that the decision to remove a prisoner from Australia is at times made at the later stages of the sentence and in many instances the prisoner has already been permitted to progress through the correctional system to open custody. On occasions, the receipt of

30 AAT, *Submissions*, p. S387, puts the average at 216 days. DIMA, *Submissions*, p. S293, puts it at 232 days.

31 Ombudsman, *Submissions*, p. S191.

32 WA Government, *Submissions*, p. S80.

> advice of deportation results in the prisoner being returned to secure custody as current Queensland Corrective Services Commission policy states that a prisoner facing deportation cannot be classified lower than medium security without the approval of the Director-General.[33]

5.46 A Victorian lawyer, Mr Howlett, contends that the same situation applies in Victoria.[34] The New South Wales authorities, however, do not determine security classifications according to deportation status but, following the expiration of their custodial sentence, non-citizens are kept in maximum security detention.[35]

5.47 These decisions by state and territory governments have been criticised because of the arbitrary nature of the policy:

> [A]nything that arbitrarily decides that a whole category of people singled out for harsher treatment - whether it is by detention after the head sentence is served, by refusal of work release or educational opportunities or, in this case, by maximum security or even solitary confinement - is unacceptable ... The establishment of a general rule that this is how all these people are going to be treated denies individual assessment of the risk to the community or even to the prison environment, and therefore inflicts a harsher form of treatment upon the individual than is warranted by the individual circumstances.[36]

5.48 Furthermore, case law suggests that an obligation may exist for 'merits' consideration rather than a strictly applied policy to potential deportees. In McCafferty's case,[37] Davies J. required the NSW Commissioner for Corrective Services to reconsider a prisoner's security classification which had been changed only because of a deportation notice from DIMA.

5.49 DIMA has the view that determining the security classification of criminal deportees is a matter for each jurisdiction.

> Liability for enforced departure should, wherever possible, not affect decisions concerning work release, rehabilitation or reclassification of prisoners. These decisions should rest solely in the hands of prison authorities. It would be improper for the Department to seek to influence this decision in any way, other than to provide factual information to the prison authorities on the person's immigration status and liability for deportation. This is consistent with long-standing

33 Qld Government, *Submissions*, p. S238. See also Prisoners' Legal Service, *Submissions*, pp. S478-479.
34 Howlett, *Submissions*, p. S357.
35 NSW Department of Corrective Services, *Transcript*, pp. 48-49.
36 HREOC, *Transcript*, p. 65.
37 *McCafferty v Minister for Immigration and Ethnic Affairs* (1995) 134 ALR 14.

> DIMA policy not to encroach upon the role of corrective service agencies to decide the terms and conditions of a prisoner's sentence.[38]

Conclusion about security classification

5.50 DIMA's policy rests on a view of appropriate Commonwealth and State relations: the classification of prisoners is a matter for the state authorities. The dialogue which the Committee hopes will commence with state and territory governments regarding a memorandum of understanding offers an opportunity to address this issue. The discussions could clarify the impact of deportation status on state and territory agency decisions about the security classification and parole status of criminal non-citizens.

5.51 DIMA should encourage decision making based on particular circumstances of the prisoner rather than his or her immigration status. The final decision on the security classification, of course, will be one for the state and territory prison authorities.

DIMA's information gathering powers

Privacy and confidentiality considerations

5.52 In its submission, the Northern Territory Government advised that, in 1995, it sought an indemnity from DIMA against actions by prisoners under the federal Privacy Act. The Northern Territory Parole Board wanted legal protection before supplying copies of parole reports on selected prisoners. DIMA could not supply the indemnity and consequently the Northern Territory does not supply parole documents.[39]

5.53 DIMA suggests that clarification of the authority to obtain information about potential deportees will overcome this problem in the Northern Territory and elsewhere.[40] The Privacy Commissioner encouraged DIMA to establish lawful authority to collect and exchange information with state and territory agencies and to follow the principles established in the Privacy Act.[41]

Law to cover information requests

5.54 The *Migration Act 1958* does not expressly authorise DIMA officers to require agencies to produce information relating to prisoners, such as criminal histories and parole reports. Section 18 of the Act does provide authority to obtain information on already identified unlawful non-citizens.

5.55 Citing state and territory government requests, DIMA sought support to expand the power of section 18 to encompass information about "potential deportees":

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38 MSI 168 "*Non-citizens held in prison liable for enforced departure*" (2/5/97)**,** para 5.1. This MSI refers to *R v Shrestha* (1991) 100 ALR 757 which states at 773: "[This country] has a responsibility, both moral and under international treaty, to treat all who are subjected to criminal proceedings in its courts or imprisonment in its gaols humanely and without discrimination."

39 NT Government, *Submissions*, p. S83.

40 DIMA, *Transcript*, p. 278.

41 Privacy Commissioner, *Submissions*, p. S50 who suggested that "the establishment of formal agreements would assist in this regard."

> Some states would like our legal position to be put beyond any doubt in respect of our capacity to be able to access data. Potential deportees fall into a difficult category of person, in that we have broad powers in respect of non-citizens, but a potential criminal deportee is not an unlawful citizen; they are a potential deportee. We are seeking some further advice on whether we need to be able to make our position stronger in respect of our cover for the requests for information and the matching that we do, and also to make sure that we meet the Privacy Commissioner's guidelines.[42]

Conclusion about information powers

5.56 The effective operation of DIMA's administrative scheme to identify potential deportees depends on clear and uncontestable authority to obtain information about potential deportees throughout Australia. While DIMA has created a working system based on local contacts and requests for cooperation, the absence of clear authority to ensure the supply of adequate information continues to be a problem. Confirmed powers to seek information will allow DIMA to press for uniform verification processes in relation to information supplied by state and territory agencies.

5.57 In the context of ensuring access to potential deportee information, the Committee encourages DIMA to clarify the legal position in relation to:

- its existing powers to require production of information about potential deportees from state and territory agencies under the *Migration Act 1958*; and
- its existing procedures that may place state and territory officers providing information about potential deportees to DIMA at risk of breaching the federal Privacy Act.

5.58 The Committee supports an amendment to the Migration Act (or Privacy Act, if necessary) should the advice be that the Commonwealth does not have existing power to require information from state and territory governments about potential deportees.

Recommendation 8

The Committee recommends that DIMA clarify the legal position regarding its powers to obtain information from states and territories on potential deportees.

Memorandum of understanding

5.59 The existing arrangements leave DIMA dependent on state and territory governments participating in the criminal deportation scheme. In the absence of their continued cooperation, the deportation scheme could not operate effectively.

5.60 Generally, state and territory governments do cooperate with DIMA and the scheme does identify and process potential deportees. The scheme, however, would benefit from more formal contact by DIMA with each state and territory government to discuss

42 DIMA, *Transcript*, p. 276.

common problems, resolve differences and organise information exchange in an orderly and timely manner.

5.61 The Committee notes that DIMA supports a national register of prisoners with standardised information and procedures to verify the identity and citizenship status of all inmates in Australian prisons.[43] The development of the register would require continued cooperation with the states and territories.

5.62 DIMA advised that it will organise discussions with state and territory governments about the criminal deportation scheme.[44] These discussions should be wide ranging and seek formal agreement on the lawful authority for, and the mechanisms to facilitate, information exchange with state and territory agencies.

5.63 The Committee believes developing a Memorandum of Understanding is the best option to formalise agreement between DIMA and each state and territory government.

Recommendation 9

The Committee recommends that DIMA formalise its relations with each state and territory government using a Memorandum of Understanding in order to:

(a) overcome deficiencies in current practices;

(b) ensure each party is aware of their agreed obligations; and

(c) clarify the exchange of information under the *Migration Act 1958*.

5.64 In the absence of DIMA finalising standard agreements within a reasonable timeframe, DIMA should request the assistance of the Commonwealth and State Attorneys-Generals to seek a uniform procedure for each jurisdiction.

43 DIMA, *Submissions*, p. S297.
44 DIMA, *Transcript*, p. 276.