COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE ON MIGRATION

Reference: Criminal deportation

CANBERRA

Wednesday, 13 August 1997

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON MIGRATION

Members:

Mrs Gallus (Chair)

Senator McKiernan	Ms Gambaro
Senator Stott Despoja	Mr Holding
Senator Tierney	Mr Kerr
Senator Troeth	Mr Martin
	Mr Sinclair
	Dr Theophanous

Matter referred for inquiry into and report on:

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

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

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

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

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

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

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

WITNESSES

JOINT STANDING COMMITTEE ON MIGRATION

Criminal deportation

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Wednesday, 13 August 1997

Present

Mrs Gallus (Chair)

Senator McKiernan
Senator Tierney
Senator Troeth
Ms Gambaro

The committee met at 2.06 p.m.

Mrs Gallus took the chair.

[2.06 p.m.]

HERINGTON, Mr Andrew David, Senior Assistant Ombudsman, Commonwealth Ombudsman, 1 Farrel Place, Civic, Canberra, Australian Capital Territory

SMITH, Ms Philippa Judith, Ombudsman, Commonwealth Ombudsman, 1 Farrel Place, Civic, Canberra, Australian Capital Territory

CHAIR—Welcome to today's public hearing on the inquiry into criminal deportation by the Joint Standing Committee on Migration. Australia's criminal deportation policies and practices have been the subject of recent public debate with some cases attracting media and community interest. With over 300 people currently in Australian prisons who come within the criminal deportation provisions, the committee is eager to ensure that the laws and administrative arrangements for dealing with such people operate fairly, efficiently and effectively.

This afternoon we will be hearing from the Commonwealth Ombudsman—or ombudsperson, if they prefer—whose office has been involved with investigating complaints in respect of the deportation process. Before commencing with our first witness, I remind everyone that these are proceedings of the parliament and warrant the same respect which proceedings in the parliament deserve. The committee does not require witnesses to swear an oath or make an affirmation but this does not diminish the importance of these hearings. Thank you for your submission to the inquiry. I see you prefer man to person.

Ms Smith—It is the Swedish origins.

CHAIR—Fine point. I now invite you to make a brief opening statement before the committee proceeds to questions.

Ms Smith—Thank you, Madam Chairperson. You have received a copy of our submission so I will make some brief opening comments and then Andrew and I will be pleased to answer questions. We receive in the Commonwealth Ombudsman's office a fairly regular number of complaints from people under consideration for criminal deportation. Our jurisdiction does not go so much into the merits of the actual decision of deportation, but we do certainly look at the administrative procedures surrounding that and the fairness of some of those procedures.

The comments that we have made in our submissions, and the case studies that we have used to highlight some of the issues, really highlight the importance of the need for more timely decisions and better coordination with the states and the state prisons. What we are really underlining is the importance of quicker decisions, clearer decisions and grounds on which those decisions are being made. In that way, it should be more efficient, from the community perspective of not having people being left in prisons or detention

centres, and fairer for the individuals concerned.

One of the key issues we found is that the decisions are being made too late in the period of non-parole sentence—that is, whether deportation should or should not occur. The timing of the decisions has been done in a sequential order and really far too late, which does not allow for the possibility of any appeals or creates difficulties or delays in getting travel papers and the like.

So the implication of that is that people are being held inappropriately in immigration detention prisons beyond the end of their sentence. I will come back to the place of where they are being held later, because that is another significant issue as to whether it is in prisons or detention centres. The key point is that the period of detention could have been avoided if the process had commenced earlier.

The other issue that we want to emphasise is the need for better coordination between the Commonwealth department and the states, especially as to what status people are to have. The impact of determining that status becomes important for people and their access to rehabilitation, work release and, indeed, for decisions of parole itself where they are not being given access to those privileges, if you like, or normal decisions that would be made.

The states identify people who may be of interest to DIMA. The use of the letters of notification where a person may be subject to future consideration for deportation brings with it a number of problems about the limbo nature of the status of those people. Page 12 of our submission looks at that in a bit more detail and raises questions as to the numbers of people that have been left in this limbo status.

We have not been able to update those figures because the figures have not been made available to us, but it does indicate in that submission that there are quite significant numbers of people. Indeed, when we first raised it with the department, they themselves had to track back—I think there is a rather nice word there about purification of the data—through their own data to find out what the real numbers were. But there are quite significant numbers of people.

The department argues that the possibility of deportation should not affect the decisions in the state prisons as to the security classification that is given to these people. In our experience, in the case studies we have profiled and in our further inquiries, it indicates that it does have an impact on how they are classified. If there is the possibility, they are generally classified as a higher risk and, therefore, their access to rehabilitation, work release, et cetera, can be denied.

So in our submission we are saying that the decision about deportation needs to be made earlier, generally at least one year earlier than should be the parole period for those people. Then the state authority should make the individual assessment about the risk of

those people. The convicted person then should serve the remainder of their custodial sentence until parole. Hopefully, they can then be promptly deported if that is the decision that is going to be made.

The other point I would like to stress—and the reason why we are emphasising this—is that, for the practical consequences of problems of denial of access to the rehabilitation and work release, this does eventually impact on the ability of that person to return to society. They will be returning to society either in Australia or in their home country. So it can be of importance for the community here—and there are important issues about trying to ignore these issues or sweep these issues under the carpet regardless of the final outcome.

On page 14 we also raise the option or the possibility of perhaps looking at bilateral arrangements with other countries. If rehabilitation programs are considered necessary, then the possibility of bilateral arrangements should perhaps be negotiated because they are not there at the moment. We must bear in mind that a lot of these people do relate to New Zealand or Britain. So there are a number of countries where those arrangements could be sorted through.

The last point I want to raise is the delays in arrangements, for example, for people being kept in detention beyond the end of their sentence, which raises with it the question about where they should be kept in detention after the period of their criminal sentence has been finished. In December 1995, we released a report about the transfer of immigration detainees to state prisons. In that report, we made the recommendation—and the department agreed—for improved procedures and protocols to ensure that it was a very limited set of arrangements that people would be transferred to prisons from detention centres and only where other detainees would be at risk.

In a similar way, we would say that once people have finished their criminal sentence and if they are being kept in detention for a longer period—and, say, pick a week or seven days as being the period—in most situations they should be transferred to a detention centre rather than that detention continuing on in a prison setting. I think the situations and the level of risk should be very carefully assessed so it does not happen that people are just left in prisons in what really comes down to an administrative requirement rather than it being a criminal aspect at that point. I will leave it there and open up for any questions that people have.

CHAIR—Do you see that the victim has any rights in this process at all?

Ms Smith—Yes. I guess that is why I was raising the last point. I think there has become a confusion in terms of the administrative arrangements required for the purposes of the Migration Act. What has been happening in recent times is almost an additional punishment or penalty being imposed upon these people. One has to be very careful, I think, that the rights of the people in these situations are considered in terms of what

processes and decisions are applicable to them and protect what protections are applicable.

CHAIR—So do you think it is appropriate that when you come to the question of the deportation order the victim of the crime should be consulted?

Mr Herington—There is actually some material on this on page 17. I think the view that is expressed is that the interests of the victim need to be considered and that the minimum parole period is the particular benchmark that people should not be deported prior to completion of the minimum parole sentence. In other words, they should serve the sentence that the court has required them to do and not be released overseas at an earlier date.

However, the issue as to what extent should victims of crime have in subsequent considerations is a complex one. Whether they ought to be allowed to make submissions at AAT hearings, for example, to provide countervailing arguments against allowing the person to remain in Australia is really a policy issue that we have not looked at. But it certainly has been present in a couple of cases which we have been aware of where a victim is firmly of the view that they do not want that person to be released.

The extent to which that can go too far and be, in a sense, a bit of an expression by that individual of dissatisfaction with the original court decision and a desire to extract a higher penalty than society has set by law is a bit of a problem. But that is really a policy issue that we have not formed a view about.

CHAIR—Although, it does relate to what you say because you expressed concern that the deportation should not be seen as a further punishment—that it is not a punishment, that the crime is punished by a gaol term and the deportation can follow administratively from that but should not be seen as an extra punishment. I think you expressed some concern that it is. So I was really wondering where you did see, from the point of view of the Commonwealth Ombudsperson, a situation where the victim wants to be consulted because they feel the presence in the country of the person who perpetuated the crime endangers their safety—for instance, in the cases of domestic violence.

Mr Herington—As I said, I think that is a policy issue before the committee.

CHAIR—You do not have any position on it?

Mr Herington—I think we are saying in the submission that deportation itself is an additional punishment that is set by parliament—the withdrawal of rights of permanent residency on the basis of the person's criminality—so that a person who has committed a particular offence is subject to the additional punishment of deportation is not in dispute. The issue is whether the further punishment of another period of additional administrative detention is justified given that that can arise purely because of bureaucratic delay.

CHAIR—I was more interested in whether you had any feelings about the victim giving their point of view. I take your point about the additional term of imprisonment.

Ms Smith—The point Andrew made before is that hopefully that assessment of the seriousness of the crime should come earlier in terms of the initial length of criminal sentence that is imposed.

CHAIR—I am sure my colleagues would like to ask you about that because that has been raised. One of the problems with it was that it was felt they preferred to leave it as long as possible to give the criminal a chance of rehabilitation. In a short sentence—it is obvious it is over one year, but in a shorter sentence—you need time for the criminal to show that they can be rehabilitated. If you make the decision too early in the sentence, there is no chance to show the rehabilitation, which, of course, is one of the criteria.

Senator McKIERNAN—I would like to follow through the comment that Mr Herington made just now about deportation being seen as another form of punishment. That concerns me greatly because it is not meant to be. It has been clearly enunciated in the parliament on a number of occasions that deportation is not a form of punishment or, in fact, to be taken in any way as a punishment or a sentence for a crime that an individual has committed. I have a concern that an office such as yours could make such a statement. Obviously you believe that it is. Is that something that you, Ms Smith, would endorse, that it is seen as a punishment?

Ms Smith—I think the person would see—

Senator McKIERNAN—With all due respect, though, I am asking the ombudsman if they see criminal deportation as being a punishment rather than it being an administrative act to control who enters and remains in Australia.

Ms Smith—The government always, obviously, has the right to decide who it wants as citizens. The distinction we were trying to make is that my primary concern is that people are being held in prisons for a longer period than the prison term because of delays in administrative decisions that have occurred. So they are being held, in an administrative sense, in prisons in situations that they should not.

Senator McKIERNAN—I understand that part of it, but my question is more specific.

Ms Smith—That is our primary concern. I do not think it is the intent of government, because it is their intent that they have the right to choose who can be here or not, that it is an additional punishment that people go. But the individual person who is being deported would see it as a consequence of their behaviour. It becomes a fine line of how you express yourself.

Senator McKIERNAN—It is a very serious question and I have to press the matter. Does the Ombudsman's office see criminal deportation as being a punishment?

Ms Smith—I see it as the right of government to decide who can be deported or not. If you are asking me do we take it into account in weighing up who should be allowed to be deported and what recommendations we would make, we would take the policy decision of the government in that regard as given.

Senator McKIERNAN—It was Mr Herington who made the comment. I was challenging your saying that it was a punishment. Do you retract what you said earlier?

Mr Herington—I think in the formal sense, yes. It is not a punishment under law for the breach of a law or for an act of criminality. But certainly the people we deal with consider it to be a substantial punishment. I guess we accept that it is right and fair that parliament and society should be able to determine who has the right to remain in Australia as a resident if they are lacking citizenship but have been convicted of criminal acts. In view of the distinction that you are raising, perhaps we could express the sentence that starts our conclusions using a different word.

Senator McKIERNAN—I think you ought to. It is of concern that an office such as yours should tread that line.

Ms Smith—Yes.

Senator McKIERNAN—Let me just quote something. I do not want to labour that point. It is a serious point and I had to take it up but I do not want to labour it.

Ms Smith—We were not using it in the context that you were obviously interpreting it as. We can perhaps elaborate on the distinctions we were making.

Senator McKIERNAN—Let me quote Stewart West when he was the minister in 1983. He said in the House of Representatives:

> Deportation is not imposed as a punishment and must not in any sense be regarded as a punishment. It is not for me as Minister for Immigration and Ethnic Affairs or anybody else to form opinions as to the adequacy or otherwise of the sentence imposed by the courts for offences committed.
>
> 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 citizenships.

I think it is a very important statement, in terms of the separation of powers, of who imposes sentences and what role the courts have. It is their job to do it and not the parliament's nor indeed the minister's role to do it. That is why I pressed the point. But I do not want to spend the rest of the hearing—

Ms Smith—Yes, I think that is why we were making the distinction between administrative and criminal decisions. There is still the practical consequence of what happens and that is what we are trying to deal with.

Senator McKIERNAN—But with due respect, the practical consequences of criminal deportation is the removal of the person from Australia. The matter which you sought to raise with me after I pressed the point with you was the holding of the person prior to the physical deportation and physical removal and now I want to follow through on that. I am sorry, I do not want to spend all the hearing on those things.

The case studies that you included with your submission I found to be useful but I would put it to you that all of the case studies you have given to us do not relate to the committee's terms of reference, particularly, I would argue that No. 3 was not a criminal deportation matter as such. Would you agree or disagree with me?

Mr Herington—Strictly it is a removal but I understood that partly you were dealing with removals under term of reference No. 6.

Senator McKIERNAN—Yes, that does deal with it. It is not in the strictest sense of the word criminal deportation though, is it?

Mr Herington—No. I think one of the problems we encounter with all of these issues is how complex the law is and how difficult it is to get people to understand the many categories that are created by the migration legislation. It is very common for people to use the term deportation to be applied to a whole range of situations where people leave Australia. We understand the distinction between removals and deportations.

This case I think was relevant because the person was serving a criminal sentence in Australia and was subject to removal at the end of the sentence, and exactly the same problem of delay arose which resulted in the person spending a number of months in immigration detention in prison. We were particularly concerned with this case because we were unsuccessful in our efforts to have the person relocated to an immigration detention centre despite his good record in the prison system and his anxiety, because of the circumstances he found in the prison system, that he was the subject of some attention.

Senator McKIERNAN—Thank you for that clarification. I agree with you that it is a very complex area. Among the matters that you have argued with some weight here this afternoon is the matter of when the individual and the state authorities who hold the prisoner are informed of the decision to deport the person or the fact that a person is of concern to the department of immigration. We have had a very strong submission from the Western Australian state government suggesting that their prison authorities be advised that a person is of interest to the immigration department within a period of three months from the date of sentence. Your proposal is that it be within 12 months prior to the conclusion of the sentence. There could be quite a disparity. What would you say to the

suggestion from Western Australia that they be notified within three months of sentencing?

Mr Herington—This is a critical issue. The department's official policy at the moment actually says that the decision should be made at the beginning of the sentence, but the practice is for it to be made at the very end, for a combination of reasons. One, which the chair referred to before, is the common argument that it allows the person time to establish some bona fides, if you like, to advance their case with the department or, subsequently, at the AAT. There is some merit in that argument, particularly for longer-term offences, and for younger people who are placed into the prison system and have outside associations.

Our view was to balance between those two positions and to highlight the real issue, which was that a lot of thinking was based on people's maximum sentence, not their minimum parole sentence. One of the problems is that in some states it is hard to predict the earliest parole date and you have to tic-tac with the agencies involved to establish when an early release might occur. Then you have to work back from that as to when you should start the process if you want to leave sufficient time for an AAT appeal and for the other processes, such as obtaining travel papers and, potentially, Federal Court appeals.

So we believe that 12 months is a period that is reasonable to work with, and that you should try and make sure that everything is happening before that. As to whether it would be better to go further and take the Western Australian line and say, 'That's all very confusing because it is hard to measure and it is easy to measure what is three months after the beginning of a sentence,' there is possibly some merit in that approach as well. But we were trying to balance the two different arguments and suggest a middle course.

Senator McKIERNAN—Western Australia supported their argument by saying:

As the current policy of the Offender Management Division is to rate prisoners medium security if liable to be deported, it would be beneficial if the Department of Immigration and Multicultural Affairs could advise the Offender Management Division at the earliest time possible (preferably within 3 months of the date of sentence) whether a prisoner is liable for deportation to assist with prisoner placement.

They later said:

From a cost perspective minimum security prisoners are cheaper to maintain than medium security prisoners.

Would you support that rationale for a detention policy?

Mr Herington—In some ways I understand what they are saying because one of our concerns is that if you are in immigration detention or if you are denied what you

would normally get in the course of events of classification, what happens is that you are held in a higher security facility than is justified in the circumstances of your case or your behaviour. A lot of people find that very frustrating in the prison system where small differences between prisoners are the cause of a lot of tension. Hence I can understand that, where a question mark is placed against a person on the basis that they may be liable to deportation—and this is prior to a deportation order being made out—if that has the effect of keeping them in a high security classification or in the remand section where they do not have access to rehabilitation or to conditions that are available to other people who would normally be in that circumstance.

If you take the example of two people who commit a crime together, one an Australian citizen and one not, equity would tend to argue that their progress through the prison system should be of a parallel nature if they are of similar behaviour and that they should have similar opportunities for rehabilitation. The way the system works at the moment tends to be that if you have a notice of liability issued against you, then you may not be treated in the same way. You may be held in higher security. I think what Western Australia are arguing there is not necessarily just a fiscal question but that it is unreasonable and unnecessary to do that.

Senator McKIERNAN—You have made a suggestion that it be a year prior to the release, which in turn would allow for appeal times and so forth and also parole considerations to be completed before the formal end of the sentence. How real a proposition is that, given that each state probably has different parole provisions and different conditions and guidelines that have to be met for the release of a person on parole? Indeed, the court systems and criminal law systems in each of the states have different sentencing procedures and the eligibility for parole period is specified in some crimes and not in others.

Mr Herington—That is correct. Each of the states has introduced different legislation and they are trialling different approaches to alternative punishment processes—detention at home and all sorts of things are being looked at—so it does have to be done by the department consulting with each state. This issue has been on the agenda since 1995 when we first had some correspondence exchanged with the department and they undertook to go and talk to each of the states about how they could improve their coordination. That would be a very useful outcome of this process to try and get some direct matching of data so that the records kept by the states and the records kept by the Commonwealth are compared properly and the information about minimum terms is available to the department so that the department can set priorities and make sure they get things done in the appropriate period of time.

Ms GAMBARO—Ms Smith, one of the submissions yesterday was from the Department of Corrective Services in New South Wales. I put to them a question about the detention when the person's deportation order is being considered and they said that it ranged from two days to one month. In your experience, is that the case? Or have there

been longer periods where they have been kept in the prison system or in a remand section while they have been waiting deportation orders?

Ms Smith—Our experiences have been a lot—

Mr Herington—It can often range up to six or nine months. Normally, seven days is provided for in the migration policies—what are called the MSIs. In the normal course of events, a removal or a deportation should occur within seven days of the end of the custodial sentence and in those events a review of the relocation to a detention centre is not necessary. As soon as the sentence is concluded, it is really a matter of the practical arrangements—the obtaining of a temporary travel paper, or something of that nature, and taking the person to the airport, having booked a flight. The great bulk of those do occur within the seven-day period. But with those which do not and those where the deportation order has only been made late in the process and there is a review on, or where the person has made a refugee application late in their sentence, the person then goes into a state of immigration detention and quite frequently will remain in the prison system for a considerable period of time after that.

Ms GAMBARO—I also asked that particular department about the system of cooperation between private prisons and public prisons. I asked if they were able to get reports on the prisoners and whether private prisons were more efficient in that. The answer I got was that obtaining reports about prisoner status sometimes can take quite a lengthy period of time. Again, in your experience, considering that now we do have a considerable number of private prisons coming on board, have you found a difference between the two systems, procedurally? Is there a difference if a person is in a private system or a public facility?

Mr Herington—Not in respect of this issue so far. Partly that is because the processes usually stretch over a couple of years, from the point of initially notifying a potential liability. We are not aware at this stage of any difference in the availability of records, but if that has been raised by other people it goes to the same issue. DIMA need to have very clear processes for matching records to see who they think are non-citizens, to check with people who have got sentences of longer than one year against offences which might merit the examination of deportation.

Ms GAMBARO—You have mentioned the area of non-citizens and how to identify them more accurately. That has come up in a number of submissions, and you have said DIMA needs to match that up a lot better. But when you are dealing with people who have criminal convictions they do not always give the correct names, and they may have many aliases. Is there any other way that that can be tightened up, so that if they are non-citizens they can be identified pretty quickly and their citizenship status can be verified?

Mr Herington—If a person is purporting to have the identify of an Australian

citizen then that could be a problem; but normally, if you checked against the Australian citizenship index you could determine whether or not the person was an Australian citizen. There needs to be a process where the two parties get together, because at the moment it depends on two separate processes. One involves the department writing to the state about people that they might be interested in, and the other involves the state writing to the department about a list of people that have recently been sentenced who they think might be non-citizens.

It is not that they check all the people who have been convicted for serious offences to see which of them are non-citizens, though that could be done. There just needs to be some more ordered way of doing this to make sure that people are picked up if they fall into the category that has been identified by parliament as being the sort of people who should be considered for deportation.

Senator TROETH—I am interested in how often you receive complaints from deportees and people who are to be removed.

Mr Herington—We would probably be looking at something like 20 complaints a year. We would probably have more inquiries from people who are in that process but do not raise issues which go to defects of administration. If people ring up and say, 'I am at this stage in my process', we will say to them, 'That is correct. All the right things are happening.' But there are people who ring up and say, 'I was told nine months ago that I might be deported and I have not heard anything since. What is going on? Nobody has come and see me, and my sentence finishes next week.' I think we would probably be looking at about 20 of those sorts of cases a year.

Senator TROETH—Of that average of about 20 a year, how many would be justified complaints against the process?

Mr Herington—We do not actually classify our complaints in terms of what is justified or what is the fault of the department. We tend to classify them by whether we get a satisfactory outcome. In a number of these complaints we facilitate the process, and the removal proceeds earlier.

We have very little role in relation to overturning the merits of the decision. I cannot think of any case where a different outcome has arisen because of our action, though some of the people that we have dealt with have gone on to the AAT and had their deportation order overturned and have remained in Australia. But our focus is not on changing the decision or deciding the merits of that, our focus is trying to get the process to work. We are a little bit frustrated that it is so protracted, and unfortunately it frequently does result in people being held in detention for unnecessarily lengthy periods.

Ms Smith—One of the reasons why we prepared this submission was because of the repetitive nature of some of the issues that have been raised. To my mind, the

systemic issues that go behind causing some of the dilemmas are the things about the timeliness of when certain decisions are made and, indeed, it is almost the sequential way that the decisions are made at the end of the process rather than a more strategic decision making process right up front. In all of them they all start in a systemic way, highlighting the broader public administrative issues that are there.

Senator TROETH—Do you think the proposed amalgamation of the administrative review bodies into a single tribunal will have any effect on the process you have just described?

Ms Smith—That is a different set of questions in terms of the quality of the review arrangements which we do not go into here. If it has the effect of making the decisions more timely and quicker, I think that will certainly improve some of the issues we have been raising here.

Mr Herington—Having a single appeal process instead of the three separate processes for the three different sections under which people can be deported would be a plus. And having some closer links between consideration of claims for refugee status made by people who are subject to deportation orders, it probably would be a plus for those things to at least travel a parallel track. It is this one thing after another that drags on which is the real cause of some of the longstanding cases.

Senator TROETH—I was also interested in your suggestion that assistance should be provided to deportees to obtain visas to third countries so that if they do not want to return to where they came from, and they are not forced to, that they could choose to go somewhere else. Do you know of any countries which would be prepared to receive such persons from a humanitarian point of view?

Mr Herington—A number of people who are in this situation will have prior occupancy in different countries and it may then be a question of their country of birth or their country of citizenship. There are some countries which cease to exist, like Liberia and Somalia, in a substantive way and people who come from those countries have options, if they are unable to satisfy refugee standards, to try to seek adjacent countries which might accept them back.

People who have reasons for not wishing to go back to a particular country or a particular part of the country also often are looking at options of that nature. It is just an issue that would defuse some of the claims made by people subject to deportation orders, that they have a very specific reason why they do not want to go back to that particular country. It has occurred in a couple of cases where people have been able to obtain visas.

Senator TROETH—Yes, it would defuse some of that either/or situation where they could not remain here but had to go somewhere else.

Mr Herington—Yes.

Senator TROETH—Thank you.

CHAIR—I was curious about one of your case studies, that of No. 5 and Mr Q. In the last sentence on page 10 you suggest:

> . . . the opening and delay of his mail and other problems related to the difference between him as an immigration detainee and other prisoners.

Why would there be an opening of mail simply because he was an immigrant detainee?

Mr Herington—Partly that relates to him being held in a remand section and the remand section in New South Wales had pretty tight conditions in relation to interception of contraband and so forth which do not exist in IDCs.

CHAIR—So you are not talking about prisoners in the same institution; are you talking about prisoners in a different institution?

Mr Herington—No. He was being held in immigration detention with prisoners, and thereby was subjected to much tougher conditions than would have existed had he been moved.

CHAIR—You are saying that in fact he was treated similarly to the other prisoners, and he thought that he did not deserve that because he was there as an immigration detainee?

Mr Herington—Yes; and he was pointing out that the migration regulations did not provide for that to be done to him. He was taking a position of saying, 'I'm detained by Philip Ruddock, and I therefore should be subject to all the things that are decreed by the minister, and here's the body of the legislation.'

CHAIR—That clarifies it. From the way it read, I thought that he was being treated differently from the other prisoners, whereas in fact he was being treated the same, although he thought under the circumstances it was inappropriate. That has clarified it for me.

Senator McKIERNAN—I seek clarification on the 10-year period. Do you have any problems on the 10-year period as such?

Ms Smith—The only question we raised about the 10-year period really related to children and whether it perhaps needs to be reconsidered in terms of where children's linkages and support networks are after such a substantial period of time. So we were raising that more as a question mark in terms of the suitability of the 10-year period for

that category of people.

Senator McKIERNAN—You have elaborated on that part of it in regard to children or people who come in as minors. But you do not have a problem with the 10-year period otherwise? It is an arbitrary figure. In one of your case studies, I noticed you mentioned that—

Mr Herington—It is arbitrary.

Senator McKIERNAN—One of the individuals was nine years and 10 months.

Mr Herington—He was most distressed by this, because originally the department did not think he was eligible. Because he was not apprehended for a further three years, his conviction was 13 years after his arrival in Australia. So, on the initial examination, they said that he was not eligible for deportation. But it became known that in fact the offence fell two months inside the 10-year period and so, late in his sentence, the department took action to deport him. He was, if you like, an example of the effect of an arbitrary cut-off. But, as a period, it is as good as any. You are actually eligible to take out citizenship after two years, so exactly how that relates is not clear: if one were a criminal and about to advance one's career, then one could take out citizenship after two years and avoid that whole process. But 10 years is as good as anything.

Senator McKIERNAN—With regard to your suggestion at 4.5 that it be a minimum sentence of one year or greater, I am actually attracted to this proposition because it adds more clarity to the rules. But what would you say about the accusation that that is making things softer for people? You could be lengthening the sentencing term. It would be possible, I think, that somebody could be sentenced to three years imprisonment with one year before they are eligible for parole. Are we softening it up, if we take up your suggestion?

Mr Herington—Potentially; but it also raises the other question as to the definition of a serious crime: in terms of the practice of what people actually get deported for, if you got a maximum sentence of one year, would you really come to the attention of the department in terms of being a likely prospect for deportation? In one sense it is a softening, but in another it is probably not; it would bring it more into alignment with the reality of the current practice, which is that the people who have committed serious offences and have got more substantial sentences are the people who actually come under scrutiny for removal.

Senator McKIERNAN—My final question is on the matter of information that is non-disclosable before the AAT or before the Federal Court or other courts. Security matters come under that heading, and we have received strong argument that matters of criminal intelligence that relate to the individual who is in Australia should also be brought under that category of non-disclosable information. Would you have any problems

with that, were the suggestion to be picked up? You are looking quizzically at me.

Ms Smith—It would really depend on the set of circumstances. I would need to know the arguments around a particular case: whether it was current surveillance that was happening or a current operation, or whether it was in fact something that had been concluded and therefore was a matter of history and was not going to interfere with current operations. My hesitation is that the arguments about that would depend on the sets of circumstances in particular cases. I am not sure if I could give a general set of words for how you could phrase that.

Senator McKIERNAN—The type of argument put to us was that if information gathered on an individual would lead our law enforcement people here to believe, understand and accept that the individual or individuals were part of an international criminal organisation, the actual disclosure of that information at an AAT or a Federal Court hearing might give the individual knowledge of where that information came from. If that happened, it could impact.

Ms Smith—I can understand the problematic nature of that. I do not think I have a sensible response to that in an immediate way. Did the law enforcement bodies give any recommendations on that particular point?

CHAIR—I think we could assume that it was not coming from the prisoners! Thank you for appearing before us today. If *Hansard* have any questions, they will catch up with you about details of your submissions. If we have any more questions, we will take the liberty of getting back in touch with you. Also, if you have anything else you would like to submit, we would be happy to hear from you. I declare this inquiry adjourned until a time and date to be fixed.

Resolved (on motion by Senator Troeth):

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

Committee adjourned at 2.58 p.m.