CHAPTER EIGHT

ADEQUACY OF THE EXISTING DEPORTATION ARRANGEMENTS

This final chapter considers the first term of reference, which refers to the adequacy of the existing deportation arrangements. The chapter considers those matters raised in evidence and not previously discussed in the report.

The chapter makes a number of recommendations. The Committee recommends expanding the liability to criminal deportation to include acts by the mentally ill and multiple criminal offences by recidivists. The Committee endorses the continued liability to deportation for juvenile offenders. The Committee recommends deleting the reference to a death sentence still contained in the legislation. The Committee recommends changing the lifetime exclusion from Australia to allow a rehabilitated deportee to request the Minister for a visa to return to Australia.

The Committee recommends that the ministerial statement more clearly set out the weight to be given to factors. The Committee also supports DFAT and DIMA in negotiating effective deportation arrangements with other countries.

The chapter considers the general consensus that the existing deportation arrangements are adequately managed by DIMA. The Committee concludes that, though parts of the scheme should be amended, the scheme should remain as a key Government initiative protecting the community from the unacceptable criminal actions of non-citizens.

Introduction

8.1 This chapter addresses those aspects of existing deportation arrangements which have not been considered in the preceding chapters. The evidence to the inquiry proposes various changes to overcome perceived inadequacies. In some instances, the Committee endorses the calls for change.

8.2 The matters considered in the chapter include:

- widening liability to criminal deportation to better protect society from the actions of criminal and mentally ill non-citizens;
- deleting the references in the Migration Act to the death sentence as ground for liability to criminal deportation;
- providing the Minister with a discretion to permit rehabilitated deportees to return to Australia;
- clarifying parts of the ministerial policy statement, especially the weight to be given to factors in the deportation process; and
- instructing DIMA to assist potential deportees present their best possible case.

8.3 The Committee also reports on negotiations with other countries to facilitate deportation. The chapter concludes with an analysis of the evidence about DIMA's management of the scheme and the scheme's overall effectiveness.

Widening liability to criminal deportation

Mental illness

8.4 The present liability to deportation arises only for criminal offences proved in a court of law. It does not extend to non-citizens whose mental illnesses do not permit them to be held accountable for their actions.

8.5 DIMA advocated expanding liability for criminal deportation to include persons in mental institutions who have been involved in acts which, if undertaken by a sane non-citizen, would result in deportation:

> Often it is found that the crime occurred, the person murdered someone, and often they are at the very serious end of crime. It is about competence to stand trial, a competence in respect of the actions they took. To extend your view of criminal deportation to a person who was involved in crime but, on the basis of illness, was not convicted but was confined in a place of care for a significant number of years until they were releasable, ... you should consider the deportation of that person against the same criteria as the sane ...[1]

8.6 Non-citizens in this category may become liable for removal. The Government has included a provision in the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 to cover such people. The Bill proposes a new s.501(7) expanding the definition of "substantial criminal record" for removals to include detention in a facility or institution as a result of being acquitted of an offence on the grounds of unsoundness of mind or insanity.

8.7 Evidence from other sources was limited. The Queensland Government did not support the extension of deportation liability to the criminally insane. It did not agree that DIMA should consider deporting a person who was unfit to stand trial, when the person had the benefit of the presumption of innocence and had not been subject to a trial.[2]

8.8 While the Committee appreciates the values underlying the Queensland Government viewpoint, the release of a mentally ill non-citizen into the community may represent an unacceptable risk to the community. In addition, the Migration Act should have internal consistency. If non-citizens who pose a threat to the community through mental illness are liable to the removals power, they should also be liable to deportation.

1 DIMA, *Transcripts*, pp. 261-2.
2 Qld Government, *Submissions*, p. S434.

Recommendation 14

The Committee recommends that the *Migration Act 1958* be amended to expand criminal deportation to include consideration of mentally ill non-citizens who have committed actions that would normally be expected to attract a sentence of at least 12 months, and whose actions demonstrate their continuing threat to society.

Cumulative sentences

8.9 In chapter four, the Committee recommends amendments to extend deportation liability to persons who commit a serious crimes in certain circumstances. The trigger for that extension to deportation liability, however, remains a sentence of twelve months or more. The issue dealt with in this section relates to multiple criminal offences occurring in the first ten years of residency where each individual offence results in a sentence of less than 12 months.

8.10 The present legislation can create anomalies as DIMA explains:

> A person may have been convicted of three offences each attracting a sentence of 11 months, but would not be considered for deportation if each sentence is to be served concurrently, even if the offences occurred soon after arriving in Australia.[3]

8.11 Non-citizens in this situation may become liable for removal. The Government has included a provision in the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 to address these concerns in the area of 'bad character'. The Bill proposes a new subsection 501(7) to expand the definition of "substantial criminal record" to include a total sentence of 2 years or more where the person has been sentenced to multiple terms of imprisonment.

8.12 The RSL proposes including periods spent in juvenile detention in calculating liability to deportation:

> ... [A]ny imprisonment as an adult, especially for like crimes, should be cumulative with any previous juvenile detention period in determining grounds for deportation.[4]

8.13 The current deportation legislation does not take into account the 'serious' criminal history of non-citizens if sentences are of periods of less than 12 months; this can result in anomalies. The Committee believes that the deportation process should apply to a non-citizen who commits numerous crimes where no single crime meets the 12 month sentence threshold. The community is threatened by persons who regularly commit crimes.

8.14 The Committee proposes in chapter four to extend non-citizen liability to criminal deportation. In accord with the broad tenet of protecting the general community, this proposal would allow the deportation scheme to apply to regular criminal offenders before they can commit an even more serious crime.

3 DIMA, *Submissions*, p. S289.
4 RSL, *Submissions*, p. S247.

8.15 Furthermore, the deportation scheme should remain consistent with the removals power. The Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 proposal of a two year cumulative threshold appears a reasonable balance. This new level should not include petty offenders but should include non-citizens who regularly commit crimes in their first ten years of residency.

Recommendation 15

The Committee recommends that the *Migration Act 1958* be amended to:

(a) combine the sentences of non-citizens convicted of multiple criminal offences for the purposes of calculating liability to deportation; and

(b) introduce a sentence threshold of 24 months or more (where each single offence is less than 12 months) when calculating liability to deportation.

Juvenile offenders

8.16 This issue is linked closely to calls for a different liability to deportation for persons who arrived in Australia as minors. In chapter four, the Committee recommends retaining the 10 year rule for non-citizens who migrated to Australia as juveniles. The issue addressed in this section is whether the deportation legislation should continue to apply to juvenile non-citizens who commit crime while under the age of eighteen years (within that 10 year period).

8.17 The Queensland Government expressed concern that people who were juveniles when they committed a serious offence, but who were adults at the time of release, should be treated the same as those who committed crimes as adults.[5]

8.18 The DIMA representative, however, suggested that a consistent approach to deportation liability would continue to include acts committed by juvenile non-citizens sentenced to custodial institutions:

> 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 adult when released from the institution should be regarded very differently from the fact of an adult committing the crime.[6]

8.19 The current MSI reports that juvenile offenders (those under 18 years of age) are liable to deportation under s.200 of the Act if s.201 applies to them.[7]

5 Qld Government, *Submissions*, pp. S434-5 advises it could only support deportation of juveniles if certain criteria are met.

6 DIMA, *Transcripts*, p. 261.

7 MSI 171 "*Deportation - General Policy*" (13/5/97), paras 3.1.2 and 3.1.3. DIMA reports that juveniles can be detained in a manner which may not satisfy the imprisonment requirements of section 201 of the Migration Act. DIMA, *Submissions*, p. S292 also states that juveniles are subject to the deportation program.

8.20 The Committee concludes that the deportation policy should remain focussed on protecting the community. Excluding juveniles convicted of a crime from liability to deportation would be inconsistent with that policy. An internally consistent deportation scheme should apply to all non-citizens. Retaining liability to deportation for acts committed as a juvenile allows the decision maker to consider the merits of cases.

8.21 In many cases, the young adult non-citizen will not be deported because they satisfy the requirements in the ministerial policy statement to remain within the community. The deportation legislation, however, must continue to encompass these cases to ensure community safety.

Liability arising through a "death" sentence

8.22 In 1983 when the Migration Act was redrafted, one state had not abolished the death penalty. That state, Western Australia, subsequently enacted the *Acts Amendment (Abolition of Capital Punishment) Act 1984*. The death penalty no longer remains on the statutes in any Australian jurisdiction.

8.23 The current section 201 continues to refer to liability arising from a "sentence to death". This sentence is no longer a possibility in Australia. The Act should reflect the actual liability to deportation rather than cite an anachronism.

Recommendation 16

The Committee recommends that the *Migration Act 1958* be amended to delete all references to a "sentence to death" within its deportation provisions.

The deportation exclusion period

8.24 The consequence of a deportation order on a criminal non-citizen is a lifetime exclusion from Australia. Special return criterion 5001, a regulation under the *Migration Act 1958*, establishes in law that deportation is a "banishment" for all time from Australia (with only the faintest prospect of Ministerial intervention[8]).

8 Cronin, *Transcript*, p. 113:

> You cannot really envisage it because the only way you can apply to get back in, under any circumstances, is if you were overseas and you were able to apply for one of those visa classes that gave you a review right, and, as a condition of that review right, you were allowed to access the minister and get the minister, in their residual discretionary capacity, to say "We will set aside a review decision and let you in.." And that has to be tabled in parliament. It is a very, very severe test to get back in.

Options for change

8.25 One international expert asserted such a restrictive regime is unusual:

> The way the exclusion period operates in the UK is that the deportation order survives for three years. In criminal deportation cases, you have to apply for it to be revoked.[9]

8.26 A social work organisation cited examples of deported non-citizens allegedly reformed but precluded from putting their case through the absolute bar imposed by deportation.[10]

8.27 The Law Society of New South Wales submitted that the operation of special return criterion 5001 was unfair. They remarked:

> [It] fails to take into account the fact that a person may be rehabilitated and so pose no future risk to the Australian community. It works even more unfairly in that it discriminates against former permanent residents of Australia, who may have close connections to this country, by barring them for life for their crime while allowing others, possibly with no connections, to enter Australia permanently regardless of their criminal history provided that they are currently of good character within the terms of s.501.[11]

8.28 Professor Neave from the ARC also thought that deportation for life could have harsh effects:

> The notion that if you are deported you are deported forever could, in some circumstances, have relatively harsh effects, if the person's family is here. You can imagine a circumstance in which they...come to Australia as a child, they commit a serious offence in their adolescence and they are then deported: if they then have a period of 10, 15 or 20 years during which they are completely crime-free, I would have thought that there should be some possibility to reconsider.[12]

8.29 Dr Cronin proposed that the scheme would be improved by having a graded set of exclusion periods with permanent exclusion from Australia reserved for only the most serious of cases. She suggested the lifetime consequences of deportation could create psychological barriers for decision makers. These barriers may result in deportation not being imposed for borderline cases because of the lifetime ban.[13] DIMA and the AAT, however, do not refer to such barriers in their submissions.

9 ibid.
10 Jesuit Social Services, *Transcripts*, p. 162.
11 Law Society of NSW, *Submissions*, pp. S206-207.
12 ARC, *Transcripts*, p. 149.
13 Cronin, *Submissions*, p. S366.

Conclusion on lifetime exclusion

8.30 The Committee notes the apparent anomaly of persons previously removed from Australia being able to apply to return after three years (and in some cases one year). The removal decision could, in some of these cases, have been as a result of a criminal conviction.

8.31 While the Committee accepts the DIMA proposition that "deportation is more serious than visa cancellation and subsequent removal"[14], a lifetime banishment following deportation compared to a short exclusion period following removal requires close scrutiny. The explanation for this apparent anomaly lies in the differing rationales for the criminal deportation and removal schemes.

8.32 Criminal deportation is not a punishment; it is an outcome of a detailed administrative process that determines if the non-citizen should remain as part of our society. The process includes an assessment of a range of considerations including the non-citizen's rehabilitation prospects and existing community ties. In effect, a criminal deportation order is a decision taken on behalf of the Australian community to exclude the person from continuing to live in our society.

8.33 The removal process does not involve such detailed procedures nor include consideration of wider community views. The sanction in the removal process is to transport the person to their country of origin and to limit their possible return to Australia for a fixed period.

8.34 Although the Committee acknowledges the logic underpinning the schemes, lifetime banishment without review is a daunting sanction that conceivably can lead to individual instances of injustice. The Committee accepts the widely held view that the deportation process should have a mechanism to reconsider cases of apparent rehabilitation.

8.35 One option might be to implement a fixed exclusion period of, say, 10 years to provide administrative certainty and convenience. Such a period would address those numerically few cases of hardship but also would allow all other persons previously deported to apply to return to Australia at the end of the period. This result would place additional administrative burdens on DIMA and the Minister as well as impose further costs on, and create safety concerns for, the community.

8.36 The Committee notes that the *Migration Act 1958* contains a power in section 417 for the Minister, on the basis of public interest, to substitute a more favourable decision than that made by the Refugee Review Tribunal. A power based on this model offers an alternative that would provide a form of public interest review for individual cases without significantly altering the criminal deportation scheme.

8.37 The Committee suggests the Minister should have a power to consider applications from persons previously deported to return to Australia for a resident or visitor visa. The Minister should not have a duty to consider each application but a discretion to act, in the public interest or on compassionate or humanitarian grounds, to allow the return of a rehabilitated deportee.

14 DIMA, *Submissions*, p. S465.

8.38 The Minister should not be constrained in the evidence he or she accepts, the type of visa provided or the duration of the visa granted to the previous deportee. As the power would be a personal discretion, a ministerial decision not to intercede should not be subject to appeal to the Tribunals or Courts. The discretion should not be constrained by any time limit though the Minister should advise Parliament after exercising the power.

Recommendation 17

The Committee recommends that the *Migration Act 1958* be amended to:

(a) provide the Minister with a power to grant, in the public interest or on compassionate or humanitarian grounds, a visa to a previously deported person;

(b) state that this power can only be exercised personally by the Minister and is not subject to either merits or judicial review; and

(c) provide that, when making a decision under this power, the Minister advise Parliament of the reasons within 15 sitting days.

Strengthening the ministerial policy statement

8.39 Two interwoven issues were raised in evidence which relate to improving the community's understanding of, and practitioners' use of, the ministerial policy statement. The current policy statement was criticised as not providing sufficient guidance on the weight to be given to specific factors. Proposals to improve the ministerial policy statement did not stop at clarifying the weight to be given to factors in the policy but extended to transferring the policy statement to the regulations.

Weight to be given to factors in the policy statement

8.40 During the hearings, the present ministerial policy statement was criticised for a lack of precision. In particular, evidence was provided that it was difficult to determine the weight to be given to particular factors. Dr Cronin considers that the review process may be improved through clarifying the weight to be given to factors which would reduce the continuing conflict between the AAT and Ministers generally:

> The situation may be improved if the guidelines under which the tribunal exercises its discretion were clarified, given concrete, perhaps legislative form, and the balancing exercise necessarily involved in such cases made explicit.[15]

8.41 The AAT stated its preference for improved clarity on the weight to be given to factors:

> One particular concern with the current guidelines is the lack of guidance which they give on the weight to be accorded to particular factors weighing in favour of, or against, deportation. .... The

15 Cronin, *Submissions*, p. S365.

> guidelines should state more clearly those factors which were considered by the Government to be of primary importance ... and those which were to be accorded lesser weight in the overall balancing of factors.[16]

8.42 A legal practitioner pointed to the practical problems in interpreting the statement:

> It is enormously difficult for the decision maker. ... you have this government policy and you have all these things that you have to take into account, but none of them are hierarchal. The more things you put in the policy the more difficult it is.[17]

8.43 These statements reflect a view held by interested parties that the discretionary process outlined in the Ministerial statement needs to be clarified. The revision should identify all the factors that may be taken into account in considering a deportation case and clarify, as far as possible, the weight given to each factor.

8.44 The alternate view was put by the Law Society of New South Wales. It advocated greater discretion for the decision maker:

> You have a very broad discretion under the act -- 'The minister may deport'; that really is all it says. The guidelines are basically there to give guidance and not much more. I think that, once you start stepping over the line and you lay out too clearly 'You will have account of this,' 'You must then account for this,' and 'This will be given this much weight' you fetter the broad discretion that the Minister has and that is then given to the AAT.[18]

Conclusion on the weight to be given to factors

8.45 The policy statement should be revised and expressed in unambiguous terms. While unfettered discretion will be affected by codifying all relevant considerations, on balance, the scheme would be improved by more precise descriptions of the weight to be given to factors in the policy statement.

8.46 In circumstances where review is a real possibility, a policy statement that presents the complete "shopping list" of considerations would have the benefit of transparency, ensuring that all relevant considerations are included and are seen to be included by the decision maker in arriving at the final decision.

8.47 The Committee acknowledges the difficulty in expressing the weight given to each factor when the circumstances of cases vary so markedly. Failure to outline at least the broad principles, however, will only continue to encourage reviews disputing original findings, as parties ascribe their own weight to the factors. The absence of a clear weighing process in the current ministerial statement possibly accounts for some of the differences in decisions between the DIMA, the AAT and the Federal Court.

16 AAT, *Submissions*, p. S147.
17 Clothier, *Transcripts*, p. 186.
18 Law Society of NSW, *Transcripts*, p. 32.

8.48 The Committee notes that the revised draft ministerial statement addresses some of the concerns raised in evidence by more clearly identifying the weight to be given to most factors in the statement.

Recommendation 18

The Committee recommends that the Minister revise the current policy statement to identify all the factors that may be taken account in considering a deportation case and clarify, as far as possible, the weight to be given to each factor.

Maintaining the detail in a ministerial policy statement rather than in a regulation

8.49 The current deportation scheme might be characterised as being almost totally under the control of the Executive except for the broadest of parameters in the Act. The detail of the scheme is provided in an executive policy statement supported by detailed departmental instructions.

8.50 Overseas experience suggests providing the policy in primary and secondary legislation is the norm:

> Most of the overseas regimes that I am familiar with tend to have their policy as part of their legislation or their regulation or rules. We are somewhat different in having them in the form that they are in this guideline that is appended to the migration series instruction. ...
>
> For example, the British rules simply say ... that you consider the public interest as against any compassionate circumstances. Then they go on to recite a variety of things that you look at, which are all entirely in keeping with what we have in our guidelines, but they are stated briefly.[19]

8.51 Dr Cronin suggests that using regulations rather than a ministerial statement may reduce the conflict between the Minister and AAT:

> Generally, the issue in dispute between the Minister and Tribunal has concerned the weight which the Tribunal has given to the offence itself, as compared with the variety of mitigating circumstances, whether family ties in Australia or any risk of recidivism. ... The situation may be improved if the guidelines under which the tribunal exercises its discretion were clarified, given concrete, perhaps legislative form, and the balancing exercise necessarily involved in such cases made explicit.[20]

8.52 The AAT endorses the proposal to enact the policy guidelines in legislation.[21]

19 Cronin, *Transcripts*, pp. 105-6.
20 Cronin, *Submissions*, p. S365.
21 AAT, *Submissions*, pp. S390-1.

8.53 The question of whether the policy statement should continue to be the pre-eminent location of the policy detail was considered by the Committee. The proposal for a regulatory form has some merit. A clear statement of the goals of the deportation process and the actual test used to justify deportation could be contained in subordinate legislation. Parliament would be able to closely scrutinise the main elements of the deportation scheme leaving the ministerial statement to deal with the detail.

8.54 Transferring the deportation test into regulation, however, would come at some cost. DIMA points out that codifying parts of the policy would limit appeals to the AAT[22] but may create additional appeal rights to the Courts. The result could be confusion about the appropriate review body resulting in further delays and additional costs.

8.55 For 15 years, the ministerial policy statement has provided the deportation rules. The absence of widespread suggestions for change in its format can be interpreted as general support for the present scheme. The continued use of a ministerial statement has the advantages of providing a single reference point for persons interested in understanding Australia's deportation scheme and a single source for practitioners advising on that scheme.

8.56 The Committee thought it inappropriate to recommend the use of regulations to replace parts of the ministerial policy statement. A regulation could not include all the matters contained in the ministerial statement nor could a regulation respond quickly to changes in government priorities. The benefit of including parts of the deportation process in subordinate legislation does not outweigh the benefit of maintaining a single location for the policy detail.

DIMA support for deportees

8.57 Criminal removal and deportation cases result in banishment from Australia for non-citizens. This sanction can be devastating for deportees who want to stay in Australia with their family and friends, and who want to avoid the potential consequences of their crime in their country of origin.

8.58 One AAT member characterised the matter as "the most devilishly difficult type of decision that I think the Tribunal has to grapple with"[23] and assessed the importance of the issue as follows:

> In terms of dealing with people's lives, to banish them from the country is a profound consequence, and to banish them permanently, obviously there is an impact on their families and on their ties to the community; those things are all affected. Even though most of them have done very nasty things, they are clearly entitled to deep consideration.[24]

8.59 Despite the serious consequences of deportation, deportees often do not have the capacity to properly represent themselves. The AAT suggest at least a third of cases before it are unrepresented by lawyers, and most persons being considered for deportation are in prison (limiting their capacity to represent themselves) while the Tribunal reviews their

22 DIMA, *Submissions*, pp. S289-290.
23 AAT, *Transcript*, p. 8.
24 AAT, *Submissions,* p. S145.

cases.[25] DIMA records indicate that 56% of all review applicants appearing before the AAT over the last two years were unrepresented by lawyers.[26]

Suggestions to improve support

8.60 This combination of a significant sanction and limited capacities for representation can lead to criticism of the deportation process. One solution to overcome perceptions of injustice in adversarial forums (such as the AAT) has been the use of publicly funded legal aid programs. Several witnesses suggested that deportation cases were worthy of priority for legal aid.[27]

8.61 However, the Committee was told that the prospect of non-citizens obtaining legal aid in deportation cases was unlikely. The Law Society of New South Wales said that the NSW Legal Aid Commission had "very stringent tests in respect of merits and means" which would exclude most deportation cases.[28] A Victorian practitioner commented that Victorian Legal Aid was unlikely to provide legal aid in deportation cases:

> Legal Aid issues guidelines to say what sort of matters are normally granted legal aid and deportation matters are not included in those guidelines. The cases that would go outside those guidelines but where you would still get a grant of legal aid would normally be where there is some sort of refugee related matter.[29]

8.62 The Commonwealth's legal aid funding guidelines (effective from 1 July 1997) provide that assistance in migration and/or related administrative law matters will usually be given only to refugees.

8.63 The AAT states that "it is experienced in dealing with unrepresented applicants, and takes a number of steps to minimise the disadvantage suffered by applicants and to ensure they are given a fair hearing."[30]

Conclusion on DIMA further supporting potential deportees

8.64 The Committee examined other ways of assisting potential deportees present their case to the decision maker. One option is for the DIMA case officer to provide further assistance to the non-citizen during the inquiry process.

8.65 In gathering evidence for the decision maker, DIMA staff follow MSI instructions to interview those people nominated by the criminal non-citizen; the current list, however, only prompts DIMA staff to suggest family, friends and past employers. The instructions assume the non-citizen has the capacity to identify all persons who may supply supportive information. In some instances, the non-citizen may not have that capacity.

25 ibid.
26 DIMA, *Submissions*, p. S439.
27 For example, AAT, *Transcript*, p.15.
28 Law Society of NSW, *Transcript*, p. 34.
29 Howlett, *Transcripts*, p. 173.
30 AAT, *Submissions*, p. S145.

8.66 While in most instances, DIMA staff may prompt the non-citizen for persons who could support his or her case, the process may be strengthened by including a complete list of the categories of persons who have supplied supportive statements in the past. The sources could include ethnic community leaders, church and other religious supporters, medical practitioners, social workers and others who can comment on the rehabilitation of the criminal non-citizen as well as the already nominated family, friends and employers.[31]

8.67 Expanding the list of persons consulted would improve perceptions of fairness to non-citizens in the deportation process. Departmental guidelines and practices would require only minor amendments to include:

- an expanded list of common sources that might provide information beneficial to the non-citizen; and
- a mandatory instruction to the case officer to contact those sources if the case officer considers recommending deportation to the decision-maker.

Recommendation 19

The Committee recommends that the Minister revise the Migration Series Instructions relating to criminal deportation to:

(a) expand the list of suggested sources who may be contacted to provide information about the non-citizen; and

(b) require DIMA staff to seek relevant information from those sources if recommending deportation.

Bilateral arrangements with other countries

8.68 Criminal deportations raise international relations issues which require negotiations with foreign governments. These issues are addressed by DIMA and the DFAT. The possibility of bilateral and multilateral agreements dealing with deportation offers the prospect of cheaper and more timely transfers between nations.

8.69 DFAT identified a number of issues arising in international relations:

- identification by Australian authorities of the correct country of nationality of a person or, alternatively, ascertaining that a stateless person has a right of residence in another country;
- negotiation with the target country to achieve agreement with Australia's view of national status and/or entry and residence rights of a person;
- representations to a target country to achieve the issue of a foreign national passport or other travel document for a person;
- negotiation with a target country to ensure that it will admit a person on arrival; and

31 MSI 171 "*Deportation - general policy*" (13/5/97), para 6.4.3.

- liaison with a target country to ensure it receives appropriate information on the timing and means of a person's removal.[32]

8.70 DFAT states that proposals to expel criminal non-citizens from Australia can cause tensions in relations with the country of nationality. These understandable tensions can manifest themselves in the form of delays to the process. Australia can only seek to persuade or influence foreign governments to undertake those actions necessary for deportation. As no multilateral mechanisms exist to require other governments to act, some persons scheduled for deportation can be held in immigration detention for lengthy periods for reasons outside Australia's control.[33]

8.71 DFAT sought Committee support for the concept of bilateral agreements to exchange or return prisoners. It is argued that these arrangements remain the best option to overcome government tensions and the administrative problems surrounding deportation.[34] Bilateral return agreements with individual countries also offer a means to expedite negotiations resulting in quicker removal of non-citizens convicted of serious offences.

8.72 While there are working arrangements with many countries, Australia has reached a bilateral agreement with Cuba and agreements with other countries are under preliminary investigation by DFAT.[35] DIMA reports that, despite the Cuban agreement, each case is subject to protracted negotiations.[36] Another witness advocated the development of regional conventions by Australia to assist in the process.[37]

8.73 The *International Transfer of Prisoners Act 1997* will permit (once participating nations have passed complementary legislation) Australian citizens imprisoned overseas and foreign nationals imprisoned in Australia to return home to complete their sentences. The transfer scheme, based on humanitarian, economic and social motives, differs from deportation in that the transfer requires the consent of all parties (prisoner and both governments).

Conclusion

8.74 Bilateral, regional and multilateral arrangements between Australia and other countries represent a means of improving deportation processing and potentially lowering costs by avoiding detention while overcoming deportation administrative problems.

Recommendation 20

The Committee recommends that the Commonwealth continue efforts towards achieving bilateral (or multilateral) arrangements with other nations where practical deportation difficulties regularly arise.

Deportations to places other than the country of nationality

32 DFAT, *Submissions*, p. S161.
33 ibid., pp. S161-162.
34 ibid., p. S162.
35 ibid., p. S163.
36 ibid., p. S291.
37 Johnson, *Submissions*, p. S36.

8.75 Some deportees will become stateless if they lose Australian residency and others may have reasons for not wanting to return to their country of nationality (though these reasons may not come within international law protections). Appendix Nine describes those international covenants and the obligations placed on Australia in returning deportees to their country of nationality.

8.76 The Ombudsman suggested that providing assistance to deportees to obtain visas to third countries may achieve Australia's goals while not forcing deportees to return to a country where they fear for their safety or welfare.[38]

Conclusion

8.77 Despite the irregular opportunities to arrange for deportation to third countries,[39] Australia should continue to explore such options at a diplomatic level where possible to meet international legal conventions and our own humanitarian concerns.

Recommendation 21

The Committee recommends that the Commonwealth continue its support for arranging deportations, in appropriate circumstances, to places other than the country of nationality of the deportee, subject to the deportee's request or concurrence.

Committee conclusion on the adequacy of existing deportation arrangements

8.78 The adequacy of existing deportation arrangements requires an assessment of both DIMA's administration of the existing scheme and the structure of that scheme. Separating these two aspects is important because the Committee formed different views on those aspects.

Existing administration of the scheme

8.79 With respect to DIMA's administration, the evidence seems to support DIMA's management of the current scheme. Statements in support of DIMA ranged from unqualified endorsement from some organisations to more qualified endorsement. The evidence gathered did not criticise DIMA's actual management of the existing scheme nor did it suggest an alternative to DIMA's continued management.

8.80 The Committee did not identify any major deficiencies in DIMA's administration of the existing arrangements. DIMA has instituted reasonably effective procedures to manage the scheme. Furthermore, in the context of the scheme's identified problems, DIMA appears

38 Ombudsman, *Submissions*, p. S197.

39 The UNHCR representative stated at *Transcript*, p. 24:

> It is very unlikely in practice. The individual may have family, ethnic or religious ties to a third country which might facilitate his or her acceptance by that country.

to manage them within the constraints of its legislation and cooperative arrangements with agencies in other jurisdictions.

8.81 The Committee concludes DIMA's administration of the existing scheme is adequate.

Existing scheme structure

8.82 The adequacy of the existing arrangements is questionable, however, when the focus shifts from DIMA's management of the existing arrangements to whether the deportation scheme itself continues to meet community needs.

8.83 The deportation scheme has operated in its present form for 15 years. In that time, major modifications have occurred to the *Migration Act 1958* which have impacted on the scheme. The change to AAT determinative decisions has divided the review function between the Executive (Minister and DIMA) and an administrative review agency (AAT). The codification of the power to cancel visas in s.501 of the Act has extended the removal power into areas shared with the deportation scheme. These developments, and their impact on the deportation scheme since 1993, led to the circumstances which resulted in the inquiry.

8.84 The inquiry has provided a forum for DIMA and other parties to raise various proposals to modify the existing scheme. The evidence reflects widespread desires to modify aspects of the structure of the present scheme. These modifications, however, do not amount to a rejection of the present scheme. The proposals for change still retain the fundamental elements while advocating incremental amendment to the scheme.

8.85 The Committee has recommended changes to some structures and processes of the scheme such as:

- the review arrangements, to reflect the central role of the Minister as policy maker;
- the statutory timelimit on non-citizen liability to deportation, to ensure very serious crimes can be considered under the deportation arrangements;
- information exchange arrangements with state and territory government agencies, to ensure universal coverage of the scheme;
- the ministerial policy statement, to include all relevant community views and to reflect the weight to be given to particular factors.

8.86 These and the other more specific recommendations will improve the existing scheme to better reflect community needs. The amendments, however, do not alter the fundamental goals of the scheme nor most existing practices and procedures.

8.87 The original scheme was developed to strike an appropriate balance between sometimes competing goals. The scheme still seeks to protect the community against the risk of further criminal acts by non-citizens while ensuring international law conventions and the individual rights of non-citizens are considered in the deportation process.

8.88 The deportation scheme continues to operate generally as intended by Parliament and the Executive. It is part of DIMA's efforts to protect the Australian community by removing persons from Australia who have committed serious crime and whose continued presence may pose an unacceptable risk to the Australian community.

8.89 The Committee concludes that, subject to the amendments recommended in this report, the criminal deportation scheme must continue to protect the Australian community.

CHRIS GALLUS, MP
CHAIR

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