The Parliament of the Commonwealth of Australia

Joint Standing Committee on Migration

Deportation of Non-Citizen Criminals

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FOREWORD

Australia's criminal deportation scheme was designed to protect the community from criminal non-citizens while ensuring that Australia fulfills its international and humanitarian obligations towards these non-citizens and their families.

When the Minister for Immigration and Multicultural Affairs asked the Joint Standing Committee on Migration to undertake the inquiry, he expressed concern at recent review decisions which allowed permanent residents with substantial convictions to stay in Australia.

With approximately 300 people in Australian prisons who come within the criminal deportation provisions, the Committee also was eager to ensure that the laws and administrative arrangements for dealing with the possible deportation of such criminal non-citizens operated fairly, efficiently and effectively. The Committee focused on the question of whether or not the criminal deportation arrangements adequately safeguard the interests of the Australian community.

Since 12 December 1996, the Committee has conducted a comprehensive review of criminal deportation arrangements administered by the Department of Immigration and Multicultural Affairs. The Committee presents its findings and recommendations using a report structure which follows the inquiry's terms of reference.

CHRIS GALLUS, MP
CHAIR

ACKNOWLEDGMENTS

The Committee expresses its sincere appreciation to all those people who contributed to the inquiry by making submissions, attending the public hearings and assisting with the inspections undertaken by the Committee.

The Committee is grateful to the those members of the secretariat who contributed during the inquiry including:

Secretaries: Mr Andres Lomp (to December 1997)
Ms Judy Middlebrook (from December 1997 to April 1998)

Inquiry staff: Ms Catherine Cornish (to November 1997)
Ms Gabrielle Jess (to June 1997)
Ms Denise Picker (to May 1998)

and to those who were responsible for the preparation of the Committee's report:

Secretary: Ms Margaret Swieringa (from April 1998)

Inquiry staff: Mr Shane Holt (from December 1997)
Mr Gim Del Villar (from January 1998)
Ms Penne Humphries (from May 1998)

The Committee appreciates the high quality procedural, research and administrative support which they provided throughout the inquiry.

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COMMITTEE MEMBERSHIP

Joint Standing Committee on Migration

Chair: Mrs Chris Gallus, MP

Deputy Chair: Senator Jim McKiernan

Members: Mr Eoin Cameron, MP (from 2.9.97)

Mr Martin Ferguson, MP (from 17.11.97)

Ms Teresa Gambaro, MP (to 2.9.97)

Mr Noel Hicks, MP (from 10.3.98)

Hon Clyde Holding, MP

Hon Duncan Kerr, MP (to 17.11.97)

Hon Stephen Martin, MP (to 2.9.97)

Rt Hon Ian Sinclair, MP (to 10.3.98)

Hon Dr Andrew Theophanous, MP (from 2.9.97)

Senator Andrew Bartlett (from 30.10.97)

Senator Alan Eggleston (from 10.11.97)

Senator Natasha Stott Despoja (to 30.10.97)

Senator John Tierney

Senator Judith Troeth (to 10.11.97)

TERMS OF REFERENCE

To inquire 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.

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ALR	Australian Law Reports
ARC	Administrative Review Council
Committee	Joint Standing Committee on Migration
CROC	United Nations Convention on the Rights of the Child
DFAT	Department of Foreign Affairs and Trade
DIMA	Department of Immigration and Multicultural Affairs
ECCQ	Ethnic Communities Council of Queensland
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
IRT	Immigration Review Tribunal
MSI	Migration Series Instruction
MRT	Merits Review Tribunal
Minister	Minister for Immigration and Multicultural Affairs
Ombudsman	Commonwealth Ombudsman
RSL	Returned & Services League of Australia
UNHCR	United Nations High Commissioner for Refugees
VIS	Victim Impact Statement

CONCLUSIONS AND RECOMMENDATIONS

Criminal deportation is one scheme through which the Government seeks to protect the safety and welfare of the Australian community by expelling those non-citizens who have been convicted of crimes in Australia. The scheme includes processes to ensure that non-citizens who are subjected to the deportation process are treated fairly, and that all relevant considerations are taken into account.

Overall, the Committee found that the existing deportation scheme was adequate although a number of specific weaknesses were identified. To overcome these weaknesses, there is a need to:

- improve co-operation with the state and territory governments, particularly to identify all potential deportees;
- improve the current merit review arrangements; and
- revise the existing legislative framework.

The Committee endorsed the consensus in evidence that DIMA administered the system effectively although some changes in policy and practices will better meet community needs and expectations.

The recommendations in this report are designed to strengthen what is otherwise an effective system. There are a number of conclusions and 21 recommendations on specific issues, summarised below.

Chapter 3 Review of deportation decisions

The Committee examined the appeal mechanisms which had been criticised by the Minister and other parties. It concluded that the present review arrangements did not give appropriate weight to the role of the Minister intended by Parliament.

The Committee found that a power, exercisable by the Minister alone, to set aside AAT decisions in the national interest would alleviate problems in the current review system. It would not have an adverse impact on the necessary merits review function of the AAT.

The Committee recommends that:

1. the *Migration Act 1958* be amended to:

(a) provide the Minister with a power to set aside an AAT decision on deportation matters if the Minister regards this outcome as being in the national interest;

(b) require the Minister, when exercising the power, to table an outline of the reasons before each House of Parliament within 15 sitting days.

(c) subject the exercise of this power by the Minister to a formal review by the appropriate committee of the Parliament three years after the tabling of this report.

Chapter 4 The ten year rule

The current legislation limits non-citizen liability to criminal deportation to a maximum of ten years. Should a non-citizen commit even the most heinous of crimes after that time, the law does not allow for deportation. The Committee found good reasons to recommend that the ten year limit be amended as it failed to give adequate weight to the interests of the wider community.

The Committee believes that the deportation legislation and policy should reflect the seriousness with which the community views repeat offenders. Non-citizens convicted of very serious crimes such as murder, rape, drug trafficking and serious assault pose an unacceptable risk to the community. Similarly, non-citizens who develop a serious criminal record after ten years residency should be considered for deportation. The abolition of the ten year limit for non-citizens in these categories would address that risk.

The Committee resolved to maintain the ten year limit on liability for deportation for juveniles (immigrants who arrive in Australia under the age of 18) as an appropriate balance between the need to protect the community and the obligation Australia accepts for very young immigrants. In relation to refugees, the existing discretions in the policy and legislation are sufficient to meet the requirements for decision-making and fulfil Australia's international obligations in this area.

The Committee recommends that:

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

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

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

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

Chapter 5 Arrangements with State and Territory governments

DIMA's effective management of the criminal deportation scheme depends on the cooperation of state and territory governments. While cooperation with state and territory

governments has generally been satisfactory, it is essential that more formal agreements be concluded between DIMA and state and territory governments to cover areas such as the identification of potential deportees and the timing of deportation hearings. Clarifying DIMA's information gathering powers will also improve its ability to negotiate with other agencies to obtain necessary information.

The Committee recommends that :

6. 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.

7. 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.

8. DIMA clarify the legal position regarding its powers to obtain information from the states and territories on potential deportees.

9. 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*.

Chapter 6 Weighing the parties' views on deportation

With respect to the issue of other parties' views in a deportation matter, the Committee considers that the protection of the community should continue to receive more weight in the process than the views of the criminal non-citizen.

The Committee made a number of recommendations to improve the operation of the deportation process. In particular, in accordance with Australia's international obligations and the common law, the interests of children should be treated as a primary consideration in making deportation decisions. The views of other members of the offender's family should also be considered.

Victims should also have an opportunity to present their views. DIMA should, therefore, amend its procedures to ensure that victims are invited to provide their views in the form of a Victim Impact Statement.

The Committee recommends that:

10. the current Ministerial Policy Statement acknowledge the interests of any children involved as one of the primary considerations in the deportation process.

11. the Ministerial Policy Statement be amended to ensure that the views of family members are considered in the deportation process, and that the weight to be given to those views follows the proposal contained in the draft Ministerial Policy Statement.

12. the Minister revise:

(a) the MSIs to require departmental officers to seek victims' views and record these views in the form of Victim Impact Statements; and

(b) the Ministerial Policy Statement to include the views of victims as a factor considered in the deportation process, as proposed in the draft Ministerial Policy Statement.

Chapter 7 Removal of criminals

The Migration Act provides that non-citizens in Australia who do not hold a valid visa must be removed. Criminal non-citizens whose visas have been cancelled or who never held a valid visa can be removed, as opposed to deported, from Australia.

The existing arrangements are adequate but the different possible exclusion periods between the deportation and removal processes should be standardised.

The Committee recommends that:

13. the Migration Regulations be amended to ensure that all non-citizens removed because of criminal convictions are subject to the same limitation that applies to criminal deportees.

Chapter 8 Adequacy of existing deportation arrangements

The other terms of reference directed the Committee's attention to particular contentious issues. The final chapter considers a number of issues, not previously considered, that impact on the various parts of the scheme: its legislative framework; the ministerial policy statement and departmental procedures.

The Committee believes that the legislation should be changed to strengthen existing powers by extending jurisdiction to:

- mentally ill non-citizens whose release into the community poses an unacceptable risk; and
- non-citizens whose criminal recidivism is demonstrated by sentences totalling more than 24 months in their first 10 years of residency.

The Committee also believes that the Minister should have the power to allow persons who have been deported to re-enter Australia on compassionate or public interest grounds. The deportation scheme should continue to apply to adults who committed crimes as juveniles within their first ten years of residency. The Act should be amended to omit references to the anachronism of a death penalty.

The Ministerial policy statement should set out the weight to be given to all considerations relevant to deportation decisions and the Migration Series Instructions should require DIMA to consult with persons in a position to provide information relevant to the deportation inquiry.

The Committee also concludes that additional bilateral or even multilateral arrangements with other countries can improve deportation processing by lowering costs and avoiding administrative problems. It also endorses efforts to explore the option of deportation to places other than the deportee's country of nationality so that Australia meets its international legal obligations and humanitarian concerns.

The Committee recommends that:

14. 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.

15. 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.

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

17. 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.

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

19. 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.

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

21. 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.

CHAPTER ONE

THE INQUIRY

The Minister for Immigration and Multicultural Affairs requested the Joint Standing Committee on Migration to report on the criminal deportation process. The reference arose from government and community concerns about the integrity of the deportation process. The Minister raised specific concerns about non-citizens convicted of serious crime using current review processes to remain in Australia. This chapter provides an overview of the inquiry process and the terminology used in the report.

Introduction to the inquiry

1.1 On 12 December 1996, the Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock, MP, asked the Joint Standing Committee on Migration to inquire into and report on the policies and practices relating to criminal deportation. The terms of reference of the inquiry are set out on p. xiii.

1.2 The criminal deportation scheme is part of the government's protection of the Australian community. The deportation scheme manages the lawful expulsion of non-citizens whose criminal offences while in Australia demonstrate their unsuitability for continued residence.

1.3 The purpose of the inquiry is to examine the adequacy, appropriateness and effectiveness of all aspects of the existing criminal deportation scheme.

Ministerial concerns

1.4 In February 1997, when announcing the criminal deportation inquiry, the Minister stated "the integrity of our immigration process could be undermined if non-citizens, convicted of serious offences are able to remain in the Australian community." The Minister expressed concern that some AAT review decisions have enabled "permanent residents with substantial convictions ... to successfully oppose or delay criminal deportation orders."[1]

1.5 The terms of reference reflect the Minister's concern. The second term of reference asks the Committee to examine the appropriateness of existing arrangements for the review of deportation decisions.

1.6 This ministerial concern also resulted in other announcements that impact on the existing deportation scheme. In March 1997, the Minister announced sweeping changes to refugee and immigration decision making and review systems "to improve efficiency, credibility and accountability." The Minister announced a:

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1 Minister for Immigration and Multicultural Affairs, *Minister requests inquiry into criminal deportation policies*, Media Release 17/97**,** 11 February 1997.

> two-tier merits assessment of applications .. [and] a number of other legislative measures .. to make my portfolio Tribunals more flexible and to improve their performance, while reducing the scope for abuse.[2]

1.7 In June 1997, the Minister cancelled the visas of two non-citizens convicted of criminal offences. Delegates within the Department of Immigration and Multicultural Affairs (DIMA) had decided not to allow the non-citizens to remain in Australia but the Administrative Appeals Tribunal (AAT) overturned these decisions.[3]

1.8 At the same time, the Minister foreshadowed that the government was considering a range of measures to strengthen powers relating to the removal of non-citizens who are not of good character. The Minister said:

> I have been concerned for some time that the Government's views in relation to criminality and other character issues were not being given due weight by the Tribunals and Courts.[4]

Conduct of the inquiry

1.9 On 16 February 1997, the Chair of the Committee announced the inquiry in a media release and invited submissions from the public and interested parties.

1.10 The Committee advertised the inquiry in major newspapers published nationally or in each capital city in February 1997. In addition, because of the subject of the inquiry, the Committee advertised in the specialist journal, *Australian Lawyer*.

1.11 The Committee wrote to a range of individuals and organisations including State and Commonwealth Government departments, immigration review agencies, immigration interest groups and members of the legal profession, seeking submissions.

1.12 The Committee received 58 submissions. Appendix One contains the list of submissions. The Committee received the written views of persons and organisations most affected by the scheme including:

- Commonwealth departments and agencies;
- state and territory governments;
- the Administrative Appeals Tribunal;
- the Administrative Review Council;
- a number of representative legal organisations;
- bodies representing migrants' interests; and
- a number of academics and other individuals.

1.13 The Committee held public hearings on six occasions in Canberra, Sydney and Melbourne. Appendix Two lists the dates of hearings and witnesses who attended. The

2 Minister for Immigration and Multicultural Affairs, *Sweeping changes to refugee and immigration decision making*, Media Release 28/97, 20 March 1997.

3 Minister for Immigration and Multicultural Affairs, *Minister cancels visas of convicted criminals*, Media Release 54/97, 13 June 1997.

4 Minister for Immigration and Multicultural Affairs, *Strengthening of immigration 'character' provisions*, Media Release 55/97, 13 June 1997.

Committee finished taking oral evidence in December 1997 and received the last submission in May 1998.

1.14 During the course of the inquiry, the Committee also received submissions and took evidence on matters beyond its terms of reference, specifically the deportation of Australian citizens. Appendix Eight addresses two issues concerning the deportation of Australian citizens who:

- committed crimes in Australia, thereby breaking their citizenship oath; or
- committed crimes against humanity in other countries.

Definitions

1.15 Throughout the report, the term "deportation" refers to the process established under the *Migration Act 1958*, whereby the Minister can order non-citizens to be expelled from Australia because they are a security threat or have committed crimes. The term "removal" refers to the process for the mandatory expulsion of the non-citizens who are unlawfully in Australia, either because they do not have visas or because their visas have been cancelled by the Minister.

1.16 The focus of the inquiry is the criminal deportation process (ie deportation of permanent residents who have committed crimes in Australia), although the last term of reference directs attention to that part of the removal process applied to criminal non-residents. Permanent resident non-citizens convicted of crimes may be liable under either process. Holders of other visa types convicted of crimes may be liable only under the removal process.

1.17 When used in the report, the terms refer to the specific processes defined in the Act and are not used interchangeably as may occur in general community usage.

CHAPTER TWO

THE EXISTING DEPORTATION ARRANGEMENTS

The existing deportation scheme operates using authority drawn from a combination of legislation, ministerial policies and DIMA practices. This chapter describes and summarises the existing deportation arrangements.

The deportation scheme aims to protect the community. The scheme targets criminal non-citizens who represent an unacceptable future risk to the community. It also takes account of the fact that serious crimes represent an abuse of the residency privilege. The chapter records the history of the scheme and concludes with the available statistics describing the current deportation scheme.

Introduction

2.1 The existing arrangements reflect the primary legislation, regulations, ministerial policy statements, DIMA policy instructions together with practices established with the other federal and state agencies. Before considering the various elements of the scheme, however, the chapter analyses the reasons for deportation and its function as an administrative sanction.

Rationale for deportation

2.2 Since 1983, the Government has issued Ministerial deportation policy statements which provide the rationale of the expulsion process.[1]

2.3 The Minister has a responsibility to expel non-citizens who abuse the privilege of residence by committing serious crime. The Minister also has a responsibility to Parliament to protect the community from the possibility of further criminal behaviour. The international community accepts the concept of deporting non-citizens who represent a threat to Australian society.[2]

2.4 DIMA submits that the absence of an expulsion system would strike at the heart of community acceptance of migration programs:

> The deportation of resident non-citizens who commit serious crimes against the Australian community is fundamental to the integrity of Australia's migration programs. It is essential for the Government to

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1 The first statement was released by the then Minister, the Hon. S J West, MP, on 4 May 1983 (see *Hansard* p. 166). The policy was revised on 24 December 1992 by the then Minister, the Hon. G Hand, MP, and is produced as Appendix Five.

2 For example, the regional representative of UNHCR states at *Submissions*, p. S42:

> In general, UNHCR recognises the need for deportation provisions in view of the importance of protecting the Australian community.

> have in place sound and effective deportation provisions to ensure the community is protected against crimes by non-citizens. It is also important that non-citizens who have abused their residence in Australia by committing serious crimes against the community are not permitted to remain in Australia.[3]

Deportation is not a second punishment

2.5 There has been some confusion between the penalty imposed by the Courts for the criminal offence and the consequential liability to deportation. Deportation has been regarded wrongly as a double jeopardy imposed only on non-citizens.

2.6 In Australia, deportation of non-citizen criminals is not an additional punishment. Deportation is a consequence of serious crime committed by a non-citizen, not an additional impost on non-citizens. In evidence before this inquiry, DIMA's representative explained:

> So it is not a second go at the person for committing the crime. It is the fact that the commission of the crime and its punishment draw you into another framework which is the migration framework, which is that the visa you have been granted to remain in Australia permanently, whether or not because of a consideration of all of the factors that are involved in the criminal deportation decision, should be taken away from you.[4]

2.7 The Courts and many others support the Government's view. For example, the Human Rights Commissioner explained the basis of a decision to deport in these terms:

> A decision to deport a person convicted of a crime is not a decision that involves the application of a penalty and so it should not be used as a penalty. Only courts can punish a criminal offender on behalf of the state, and, in terms of the particular individual, the court has imposed its punishment by imposing a period of imprisonment or such other penalty as the court sees fit.
>
> There is a fundamental principle that individuals should not be subject to double punishment for a particular offence. Criminal deportation then cannot be seen as a matter of penalty or indeed of double punishment but rather must be seen as an administrative decision taken by Australia pursuant to its sovereign right to decide who is permitted to enter and remain within this jurisdiction. It has to be based then on an objective assessment of the character and fitness of the individual in relation to the fundamental responsibility of the state to care for the safety and welfare of ordinary members of the community.[5]

3 DIMA, *Submissions*, p. S281.
4 DIMA, *Transcript*, p. 246.
5 HREOC, *Transcript*, pp. 54-55.

2.8 The criminal conviction of non-citizens acts as the trigger bringing them within the deportation process. The test for deportation, however, is not just that a crime has occurred. The test considers the length of the sentence and the seriousness of the crime weighed against a range of other factors designed to protect the community and the interest of the non-citizen.

International law obligations

2.9 Australia accepts international law obligations which impact directly on the criminal deportation scheme. The current domestic legislation encompasses some of those obligations but the majority are addressed in the ministerial and department policies.

2.10 Appendix Nine lists those treaties and covenants considered in Australia's criminal deportation scheme.

2.11 Some of the most important obligations that affect criminal deportation flow from the United Nations' Convention on the Rights of the Child (CROC), the UN Convention and Protocols relating to the Status of Refugees (The Refugees' Convention), and the International Convention on Civil and Political Rights (ICCPR). Specific considerations which affect the criminal deportation scheme include:

- the requirement that in all decisions affecting children the best interests of the child shall be a primary consideration (Article 3 of the CROC);
- the requirement that a refugee shall not be expelled unless there is a risk to national security or to the public order (Article 32 of the Refugees' Convention);
- the requirement that refugees (unless convicted of a particularly serious crime constituting a danger to the community), will not be returned to countries where their life or freedom may be threatened because of race, religion, nationality, or membership of a particular social group or political opinion (Article 33 of the Refugees' Convention); and
- the requirement that extradition not occur where, as a necessary and foreseeable consequence, the person's fundamental human rights will be violated in the other jurisdiction (Article 2.1 of the ICCPR).[6]

2.12 Legal advice from the Attorney-General's Department to DIMA on the draft criminal deportation policy canvasses Australia's international obligations in detail.[7] In addition, the submissions from the United Nations High Commissioner for Refugees[8] and the Department of Foreign Affairs and Trade (DFAT)[9] provide comments on specific aspects of Australia's obligations.

History of expulsion provisions

2.13 Before the *Migration Reform Act 1992* was enacted on 1 September 1994, enforced departure from Australia only occurred through deportation. Migration law drew no

6 This interpretation of Article 2.1 has resulted from a number of cases decided by the United Nations Human Rights Committee. For example, *Charles Chitat Ng v Canada Communication No 469/1991* UN Doc A/49/40 page 5.

7 DIMA, *Submissions*, pp. S306-342.

8 UNHCR, *Submissions*, pp. S44-46.

9 DFAT, *Submissions*, pp. S165-167.

distinction between non-citizens who were illegally in Australia and non-citizens who were legally in the country but had committed certain crimes. Deportation was the only means to exclude persons from Australia against their will.

2.14 Since the enactment of the Migration Reform Act, migration law has recognised two types of enforced departure from Australia: removal and deportation.

Removal provisions

2.15 Removal is a mandatory consequence for all unlawful non-citizens; that is, it must apply to any non-citizen who does not hold a valid visa. The circumstance of being without a valid visa can arise in two ways: either a visa was never issued or it was cancelled. Sections 189 and 198 require immediate detainment of unlawful non-citizens and removal "as soon as reasonably practicable". Non-citizens whose visas have been cancelled on character grounds (including grounds arising from criminal offences) must be detained and removed from Australia.

Deportation provisions

2.16 Deportation differs from removal. It is a power limited in its application to non-citizens whose conduct or convictions bring them within the scope of the deportation power. The deportation power is contained in Division 9 of Part 2 of the Migration Act (ss. 201 - 206). Section 200 enables the Minister to order deportation of a non-citizen who satisfies the conditions set out in sections 201 to 204. For more details, see Appendix Four.

2.17 In summary, sections 201 to 203 of the Act provide that the Minister may order:

- *criminal offence deportation* - where a non-citizen lawfully present in Australia for less than 10 years has been convicted of crimes resulting in a sentence of more than 12 months (s.201);
- *security threat deportation* - where a non-citizen lawfully present in Australia for less than 10 years is regarded as threat to Australia's security (s.202); or
- *security offence deportation* - where a non-citizen is convicted of specific security offences (s.203).

2.18 The sections also cover New Zealand citizens who are in Australia as exempt non-citizens or special category visa holders.

Existing deportation provisions

Deportation of convicted criminals

2.19 Section 201 renders a non-citizen liable to deportation if:

- he or she is convicted in Australia of a criminal offence;
- the conviction results in a sentence to death, to imprisonment for life or for a period of not less than one year; and
- he or she was in Australia as:
  - a permanent resident, for an aggregate of less than 10 years at the time when the offence was committed; or
  - a New Zealand citizen who was:
    (i) an exempt non-citizen; or
    (ii) a special category visa holder for an aggregate of less than 10 years at the time when the offence was committed.

2.20 Section 204 specifies that only time spent in Australia as a permanent resident, exempt non-citizen or special category visa holder counts toward the aggregate 10 year period. It also specifies that the aggregate 10 year period must exclude:

- periods in prison or other custodial institutions;
- periods spent as an escapee, or under periodic detention; and
- periods spent as an unlawful or prohibited non-citizen or as a prohibited immigrant.

2.21 If the Minister decides to deport a non-citizen who falls under s.201 of the Act, s.500 grants the person a right of appeal to the Administrative Appeals Tribunal (AAT) in all but one instance. The sole exception is where the Minister uses his or her powers under s.502 of the Act. Under that provision, the Minister can exclude review if the Minister personally decides (because of the seriousness of the circumstances giving rise to the decision) that it would be in the national interest for the non-citizen to be declared an "excluded" person, and issues a certificate to that effect. When invoking this section, the Minister must table before Parliament an outline of the reasons within 15 sitting days of the decision.

2.22 Liability to deportation under section 201 arises at the time the offence is committed. Liability does not cease when the person accumulates 10 years as a lawful permanent resident, an exempt non-citizen or a special category visa holder. In circumstances where a non-citizen receives a warning instead of being deported for a particular offence, that first offence may be taken into account if the non-citizen re-offends. The fact that the non-citizen may have been in Australia for more than 10 years at the time of the second offence does not give him or her protection.[10] Only when the person lawfully becomes an Australian citizen does liability to deportation cease. The loss of Australian citizenship or citizenship obtained through misrepresentations may reinstate liability for deportation.

2.23 Appendix Four contains the relevant sections of the legislation relating to criminal deportation.

Deportation on the grounds of a security threat

10 MSI 171 "*Deportation - General Policy*" (13/5/97), para 3.7.1.

2.24 Section 202 renders non-citizens who were in Australia as permanent residents, exempt non-citizens or special category visa holders for less than 10 years, liable to deportation where their conduct is regarded as a threat to Australia's security. The section provides that a non-citizen who has been in Australia as a permanent resident, a New Zealand exempt non-citizen or a special category visa holder for an aggregate of less than 10 years becomes liable to deportation if:

- the Minister considers that the conduct (at any time and in any country) of that person is or was a threat to the security of Australia or parts of Australia; and
- the Australian Security Intelligence Organisation makes an adverse security assessment about the person.

Section 204 applies to calculate the aggregate 10 year period for s.202 purposes.

2.25 If the Minister decides to deport a non-citizen under s.202, the non-citizen has a right to request the Security Appeals Division of the AAT to review the security assessment. Where the Tribunal finds that the adverse security assessment was inappropriate, the Minister cannot deport the person.

Deportation of security offenders

2.26 Section 203 provides for deportation of non-citizens convicted of certain specified crimes regardless of the residency period in Australia, or the length of the sentence. These crimes include:

- offences under the *Crimes Act 1914* such as treason, treachery, sabotage, sedition, incitement to mutiny and assisting prisoners of war to escape;
- being an accessory to or conspiring to commit such an offence; or
- a prescribed offence committed under State or territory laws.

2.27 There is no right to merits review if the Minister decides to deport a non-citizen on the basis of s.203. At the non-citizen's request, the Minister may appoint a special "Commissioner" to investigate the basis of the decision. The Commissioner is not bound by legal forms or the rules of evidence. The Commissioner must find the grounds established as a prerequisite for deportation.

2.28 Liability to deportation under s.203 arises at the time of conviction and does not cease unless or until the person becomes an Australian citizen.

Other deportation issues

Relevance of deportation under sections 202 and 203

2.29 The Committee notes no one has been deported under these sections since major reforms to the Act in 1992 and only 10 persons were deported under provisions similar to s.203 in earlier forms of the Act.[11] The outline of security threat and offence provisions was included to complete the background of the legislative powers.

Family members

2.30 Where the Minister has ordered deportation, s.205 of the Act allows the Minister, at the request of a spouse, to keep the family together and have the spouse accompany the deportee. A deportee without a spouse but with a dependent child may also request that the child accompany him or her.

2.31 Section 206 provides authority to enforce a deportation order (unless revoked by the Minister) and maintains its validity even if delayed in execution.

Deportation consequences

2.32 A consequence of a deportation is that any visa held by the non-citizen automatically ceases (s.82 of the Act).

2.33 The Migration Regulations provide that a deportation order under s.200 (including for criminal convictions) has the consequence of permanently excluding the person deported, from re-applying to enter Australia (special return criterion 5001).

Classes of non-citizens liable for deportation

2.34 For deportation purposes, non-citizens liable for deportation may include juveniles, former refugees, former Australian citizens and unlawful non-citizens. The deportation process, however, may apply differently to each class of non-citizen. The following table summarises liability to deportation:

11 DIMA, *Submissions*, p. S288.

Category	Description
Non-citizens (general)	Liability under s.200 occurs where the non-citizen falls within the criteria of sections 201, 202 or 203.
Non-citizen juveniles	A person under the age of 18 years who commits a serious crime is liable to deportation under s.200 if sections 201, 202 or 203 apply.
Former refugees	A person who arrived in Australia as part of the refugee settlement program or was granted refugee status following arrival is liable to deportation subject to the United Nations Convention for the Status of Refugees 1951. The convention allows for deportation if that person has: • ceased to be a refugee (Article 1C) and no longer requires protection; or • is considered a danger to the country's security following conviction of a particularly serious crime (Articles 32 and 33) and is no longer deserving of the country's protection.
Former Australian citizens	A person who no longer is an Australian citizenship or whose citizenship is void may be liable under s.200. Where a former Australian citizen has been: • convicted of an offence under s.50 of the *Australian Citizenship Act 1948* (providing false information or concealing a material circumstance in the application); or • convicted of an offence (after applying for citizenship) which was committed before the application was approved, and was sentenced to 12 months' imprisonment or more, then that person may be liable to deportation if they come within the provisions of sections 201-203.
Unlawful non-citizens	Section 198 requires removal of an unlawful non-citizen. Further, unlawful non-citizens may be liable for deportation if they come within the provisions of sections 201-203. Where dual liability exists, current policy dictates delaying removal until after the deportation assessment.

Deportation policies

Ministerial policy statement

2.35 The legislation dealing with criminal deportation is expanded by the policies governing its administration. The most important policy source is the Ministerial policy statement. The current statement has operated since 1992 and is similar to an earlier version. The policy continues to guide decisions on criminal deportation.

2.36 The statement provides that deportation may be appropriate when:

- the non-citizen constitutes a community threat because of the risk of further offences; or
- the non-citizen has committed a crime so offensive to Australian standards that the community rebels against his or her continued residency; or
- the non-citizen has not established sufficient ties with Australia and is unsuitable for permanent residence in Australia.[12]

2.37 The policy gives examples of "offensive crimes" that may render a person liable to deportation, including drug related offences, organised criminal activity, serious sexual assault and crimes against children.

2.38 Deportation decisions are based on broad criteria:

- the nature of the crime;
- the possibility of recidivism;
- the contribution the person has made to the community or may reasonably be expected to make in the future; and
- the family and/or social ties that already exist.

2.39 More specifically, the deportation inquiry process examines:

- other ties in Australia;
- the degree of hardship caused to lawful Australian residents by the deportation or the support for deportation from persons directly affected;
- any unreasonable hardship to the offender;
- ties with other countries;
- the relevant obligations of Australia under international treaties; and
- the likelihood that deportation would deter others from committing similar offences.[13]

2.40 The list is not exhaustive and other factors may be taken into account in individual cases. Generally, the policy statement does not state clearly the weight to be given to particular factors. The statement, however, provides some guidance:

- crimes against children take on a special significance (paragraph 12);
- social ties developed after liability for deportation has arisen can be discounted according to the circumstances (paragraph 13);

12 Australia's Criminal Deportation Policy, Appendix Five, paragraph 11.
13 Australia's Criminal Deportation Policy, Appendix Five, paragraph 19.

- the possibility of further criminal sanctions in the country in which a potential deportee expects to live is generally not relevant (paragraph 15); and
- a claim of likely persecution in the country of origin requires cogent and substantiated evidence (paragraph 18).

2.41 As part of their submission, DIMA has prepared a revised draft policy statement which is included in Appendix Six.

DIMA policy documents

2.42 In addition to the Ministerial policy statement, DIMA produces instructions to staff known as the Migration Series Instructions (MSIs). These documents provide further explanation of the Ministerial policy statement as well as staff instructions on particular functions associated with deportation. The MSIs which relate to the deportation process include:

- MSI 5 "*Enforced Departure from Australia - Overview*" (reissued 31 October 1996)
- MSI 34 "*Deportation Submissions*" (reissued 31 October 1996)
- MSI 168 "*Non-citizens held in prison liable to enforced departure*" (issued 2 May 1997)
- MSI 171 "*Deportation - General Policy*" (issued 13 May 1997)
- MSI 199 "*Compliance and Enforcement Overview*" (issued 20 April 1998).

Administrative practices

2.43 Administrative practices complete the scheme of existing deportation arrangements. Practices and procedures used by DIMA and the relevant state and territory prison authorities translate the legislation and policies into action.

Identifying potentially liable non-citizens

2.44 The first step in the criminal deportation process is to identify and locate potential deportees. DIMA obtains information about such persons from state and territory government agencies including corrective service departments.

2.45 State and territory government agencies notify regional offices of DIMA of non-citizens sentenced to imprisonment in Australia. These arrangements and the information supplied vary from place to place.[14] For instance, the NSW Department of Corrective Services provides, every quarter, an electronic spreadsheet of all the prisoners who enter the NSW gaol system. In Western Australia, the Ministry of Justice provides a monthly print-out of all foreign born prisoners.

2.46 No statutory obligation exists requiring state or territory agencies to furnish this information but cooperative arrangements with DIMA are long standing.

Establishing liability to the deportation process

14 DIMA, *Submissions*, pp. S349-350, provide a summary of information supplied by each state and territory.

2.47 On receipt of advice on potential deportees, DIMA assigns an officer to oversee each case. The case manager establishes liability for deportation by verifying that the person is a non-citizen and by calculating the length of lawful residence at the time of the offence. The process involves examining the following records:

- the citizenship database (to determine the person has not been through a citizenship ceremony);
- the movements database (for records of the person's arrival and departure dates, and immigration status);
- departmental records (to ascertain if the person has an immigration file); and
- the penal records of the relevant state or territory (to check for periods of imprisonment in Australia, since imprisonment does not count towards the period of lawful residence).

Deportation submissions

2.48 Following the verification process, the case manager prepares a deportation submission to be used by the decision-maker. The submission reports the relevant circumstances of the person's criminal conviction and includes a recommendation about the appropriateness of deportation. There are two kinds of submissions: summary reports and comprehensive reports.

2.49 The case manager prepares a summary report if deportation is not recommended. It presents the facts and does not require any supportive documentation. Such a report is provided where a person:

- has not been convicted of a serious crime;
- has strong family ties in Australia; or
- has no previous warning for deportation.

2.50 The case manager uses a comprehensive report when recommending deportation. This detailed report conforms with the 'statement of reasons' format of the *Administrative Decisions (Judicial Review) Act 1977* and the *Administrative Appeals Tribunal Act 1975*. All documents relevant to the deportation decision are attached, including:

- records of the non-citizen's movements in and out of Australia;
- police and sentencing judges' comments;
- any reports on the person's conduct from corrective services, parole or probation authorities; and
- information gained through interviews with the non-citizen and persons nominated by the non-citizen (eg the spouse).

2.51 Case managers exclude any statement or material adverse to the non-citizen that is not factual or not tested with the non-citizen.

Decision to deport

2.52 The Minister has delegated authority to make decisions to three DIMA officers: the Secretary; the Deputy Secretary; and the relevant First Assistant Secretary of the division responsible for the deportation scheme.

2.53 The departmental delegates can decide all cases except those reserved for the Minister for personal decision because:

- the case involves representations by federal and state parliamentarians and national organisations such as those representing ethnic communities; or
- the case is sensitive, controversial or especially complex.

2.54 The decision options are either to order deportation or to warn the criminal non-citizen that future criminal offences could result in deportation.

Warnings

2.55 Where the Minister or delegate declines to order deportation, DIMA staff warn the person of his or her continuing deportation liability and the possible consequences of further offences. Warnings are an administrative procedure which can trigger deportation in the future.

2.56 DIMA policy requires staff to deliver warnings at interview, where possible, with a written confirmation of the warning signed by the non-citizen. DIMA officers also advise non-citizens of the requirement to disclose all criminal convictions on future visa applications.

Deportation statistics

2.57 Deportation does not involve large numbers of non-citizens. Between 1 July 1990 and 30 June 1996, over 700 persons were considered under the deportation scheme. Of these persons, 538 persons, or 74% of cases, were given warnings.[15]

2.58 In the 1996/1997 financial year, 261 deportation submissions were concluded by DIMA, resulting in 162 warnings, 92 deportation orders and 37 deportations.[16] Of the 92 deportation orders, 12 persons had previously received warnings that if they re-offended, consideration would be given to their deportation. In two cases, the deportee had received two previous warnings.[17]

2.59 As at 30 June 1997, there were 296 persons in Australian prisons who were liable to deportation. The number scheduled for release by 1 July 1998 is 136, each of whom will require a decision.

2.60 As at 30 June 1997, there were more than 400 non-citizens in Australian prisons who were not liable to deportation. DIMA supplied information that:

15 ibid., p. S284.
16 ibid., p. S288.
17 ibid., p. S438.

- 90 to 100 non-citizen prisoners were not liable to deportation because of the 10 year rule; and
- over 300 non-citizen prisoners were not liable to deportation because of the 12 month threshold.[18]

18 ibid., p. S288.

CHAPTER THREE

REVIEW OF DEPORTATION DECISIONS

This chapter considers term of reference two; namely, the appropriateness of existing arrangements for the review of deportation decisions. Although the present system has proven satisfactory in the majority of cases, it has led to considerable disquiet when the Tribunal has reached outcomes different from those of the Minister or Department.

In this chapter, the Committee explores the arguments in favour of maintaining the current scheme and considers proposals for its reform, including making Tribunal decisions recommendatory. The Committee concludes that the existing review scheme should be maintained but that it should more closely reflect ministerial responsibility. Accordingly, the Committee endorses a proposal for the retention of AAT determinative powers while allowing the Minister a special power to set aside an AAT decision where he or she decides this is in the national interest.

Introduction

3.1 Before 24 December 1992, the AAT had only recommendatory powers in relation to deportation decisions. This meant that it could only affirm a decision or remit it to the Minister with recommendations. The Minister then had the responsibility for making the final decision to deport. The Minister could, and did, reject AAT recommendations in some cases.

3.2 Calls for change resulted from the Minister exercising his power not to follow AAT recommendations. There were perceptions that the recommendatory system encouraged litigation, and that political considerations were entering the decision-making process.

3.3 Since 24 December 1992, the AAT has been granted determinative powers for the review of deportation decisions. This means that the Tribunal acts as a primary decision-maker and makes a new decision on the facts before it. It can decide to affirm, vary or set aside the original decision according to the merits of the case. Under s.500(5) of the Act, such review must be conducted by a Presidential member of the AAT.

3.4 The move to determinative review has, however, created different problems. While there has always been friction between Ministers and the Tribunal when they have differed on the outcome of particular cases, the determinative system has caused that friction to become more public, for the Minister no longer has the power to intervene in cases where he or she perceives a threat to the community. As one commentator has observed:

> It is fair to say that criminal deportations are a vexed area of administration. Immigration Ministers have publicly voiced their disquiet when Tribunals exercising such administrative review... reach a different conclusion on the case to that of the Minister.[1]

1 Cronin, *Submissions*, p. S364.

3.5 It is clear that these disputes cause "resonating disquiet"[2] with the potential to detract from public confidence in the system. If the public loses confidence, the outcome would disadvantage both the Australian community and non-citizens who may seek to avoid deportation.

3.6 The Committee's terms of reference provide an opportunity to scrutinise the existing review arrangements and to consider proposals that will avoid the disquiet that has attended the determinative process.

3.7 In this chapter, the Committee first examines the current review framework and then canvasses various proposals for its reform.

Current review framework

Right of appeal to the AAT

3.8 As stated earlier, if the Minister decides to deport a non-citizen under s.200, s.500(1)(a) of the Migration Act grants a right of appeal to the AAT.

3.9 Under s.502 of the Act, however, no right of appeal is available where the Minister decides the matter personally and (because of the seriousness of circumstances giving rise to the decision) issues a certificate declaring the non-citizen to be an "excluded" person. In such cases the Minister must provide an outline of reasons and table it in Parliament within 15 sitting days of the decision.[3]

Review Statistics

3.10 The statistics provided by the AAT indicate that in the period 1 July 1993 to 30 June 1997 the Tribunal received 104 applications for review, and decided 84 of them. In 72 of these cases (86%), the AAT did not alter the Minister's decision, while in 12 cases, the matter was set aside (by consent or otherwise) or remitted to the Minister for reconsideration.[4]

3.11 DIMA provided broadly similar statistics to those of the AAT. It noted that the Tribunal had affirmed departmental decisions in 44 of the 53 cases (83%) that had gone to hearing since 1993. However, it added that in four out of the nine cases where the AAT had overturned the decision, the person had since re-offended.[5]

3.12 The AAT's figures indicate that in the period 1 July 1993 to 30 September 1997, the Tribunal took an average of 274 days to review applications on deportation. If one excludes certain "extreme cases" which took in excess of two years, the average is 216 days.[6]

3.13 DIMA provided a slightly different estimate of the current length of appeals. It claimed that, for the cases concluded between 1 July 1996 and 30 June 1997, the AAT spent

2 ibid., p. S365.
3 DIMA, *Submissions*, p. S477 indicates that s.502 has not been used in respect of criminal deportation.
4 AAT, *Submissions*, p. S156.
5 DIMA, *Submissions*, p. S287.
6 AAT, *Submissions*, p. S387.

an average of 232 days in finalising appeals.[7] The Tribunal put the average for this period at 196 days.[8]

3.14 These figures show that the AAT affirms the vast majority of deportation decisions and that it averages around seven to eight months to finalise cases.

Proposals for amending review arrangements

3.15 The Committee received considerable evidence on the current review framework. Most submissions supported retaining the current system of merits review and leaving it unchanged. The New South Wales Council for Civil Liberties, for instance, simply stated that they considered the existing arrangements to be appropriate.[9] DIMA, however, suggested a number of changes that might improve the system.

3.16 In this section, the Committee considers the arguments for:

- retaining the current system;
- making AAT review recommendatory; and
- providing the Minister with a special power of intervention.

Retaining the current system

3.17 A number of submissions supported retention of the independent merits review system because of the severe impact of deportation on non-citizen residents and their families. The Administrative Review Council (ARC), for example, explained the necessity for such review in these terms:

> Non-citizens who may be considered for deportation...may have been lawfully resident in Australia for a considerable period. The decisions made under those sections may significantly affect the interests of the deportees and their families in Australia. Not only is the person ejected from Australia, but deportation effectively imposes a life time ban on their return to Australia. In view of this, the Council considers that all deportation decisions under section 200 should be subject to external merits review.[10]

3.18 The ARC suggested that a generalist tribunal such as the AAT appropriately dealt with such matters, since deportation involved consideration of general issues such as the seriousness of the offence, rather than complex issues of migration or refugee law.[11]

3.19 The AAT argued that the existing system should be retained because deportation would affect the interests of the deportee and of his or her family and friends. It noted that the costs (financial and otherwise) to the deportee might be substantial, and that the effect of

7 DIMA, *Submissions*, p. S293.
8 AAT, *Submissions*, p. S387.
9 NSW Council for Civil Liberties, *Submissions*, p. S77.
10 ARC, *Submissions*, p. S87.
11 ibid., p. S448.

deportation was a permanent ban on re-entry to Australia. It added that, were merits review to be removed, more litigation might result:

> [I]f the right to seek merits review of these decisions were to be removed, it is likely that a greater number of deportation matters would result in applications to the Federal Court for orders of review pursuant to the *Administrative Decisions (Judicial Review) Act 1977*, at significantly greater cost to the taxpayer.[12]

3.20 The Jesuit Social Services and Jesuit Refugee Service supported the existing arrangements on slightly different grounds. They maintained that the principle reason for leaving deportation matters to the AAT was because it kept decisions free from political intervention. As they explained:

> In reviewing deportation decisions, it is...imperative that there be access to independent merits review. There is no reason why this should not continue to be through the Administrative Appeals Tribunal. Indeed...criminal deportation is such a highly emotive issue that care should be taken as far as possible to remove any form of or potential for interference in individual cases.[13]

3.21 The Law Society of New South Wales[14] and the AAT echoed these sentiments, the latter commenting that "[one] of the purposes of the introduction of a merits review scheme was to ensure that decisions in individual cases were removed from the political arena".[15]

Making AAT review recommendatory

3.22 In its first submission to the Committee, DIMA canvassed a number of options to improve the existing arrangements, including making the AAT's review powers recommendatory.[16] A shortcoming of the current arrangements is that the Minister cannot exercise his or her responsibility to the Parliament in determining who can enter or remain in Australia. DIMA described the situation as follows:

> The extent of the Minister's involvement under the present arrangements is limited to the establishment of the policy by which the deportation will be considered. The AAT, in the absence of statutory obligation to consider the policy, is not bound by the terms of the policy...The Migration Act recognises the Minister as responsible for decisions taken under the Act. However, the Minister is unable to

12 AAT, *Submissions*, p. S151.
13 Jesuit Social Services, *Submissions*, pp. S373-374.
14 Law Society of NSW, *Submissions*, p. S417.
15 AAT, *Submissions*, p. S454.
16 The remaining options proposed by DIMA included making the Immigration Review Tribunal responsible for review, eliminating merits review altogether, or appointing a special commissioner to deal with review applications. DIMA did not press or canvass these in detail nor were they raised by any other witnesses.

> decide a matter on its merits where the matter has been determined by the AAT.[17]

3.23 DIMA suggested that making the AAT's powers recommendatory would more closely reflect ministerial responsibility, because the Minister would make the final decision on matters of deportation. It noted that such a system existed until 1992, before the Tribunal was given determinative powers.[18]

3.24 In response to these suggestions, the AAT argued that reinstating recommendatory powers would politicise the review scheme and diminish the independence of the system. It stated:

> A key purpose of merits review is to have the review of administrative decisions carried out in an impartial forum, free from any political influences. If the review body has power only to make recommendations, this purpose is defeated as the ultimate decision must still be made in an environment where there is a perception of the possibility of political influence.[19]

3.25 The AAT further explained that recommendatory powers could increase delays and administrative burdens, since any ministerial decision to reject the recommendation of the Tribunal would be open to challenge, especially in the courts. It drew attention to two deportation cases[20] in which the Minister's decision not to accept the recommendations of the Tribunal had precipitated legal appeals, and remarked:

> [These] cases illustrate one of the underlying problems with any system in which the role of the Tribunal is limited to making non-binding recommendations to the Minister: any decision of the Minister to reject a recommendation of the Tribunal will be open to further avenues of challenge, for example through the courts. The interpolation of a decision of the Minister between the decision of the Tribunal and the courts could fragment and protract the process of review of deportation decisions, and may result in delays.[21]

3.26 The Law Society of New South Wales also expressed the view that recommendatory powers would politicise the review of decisions, and added that the proposed system had been tried and had failed:

> The suggestion that we move back to a system of recommendatory powers for the AAT will defeat the entire purpose of having a merits review system and will also lead to the system becoming increasingly

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17 DIMA, *Submissions*, pp. S293-294. That the Minister is powerless to overturn an AAT decision was confirmed in *Gunner v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court, 19 December 1997). In this case, Justice Sackville ruled that the Minister could not use the power to cancel visas on character grounds (s.501) to set aside an AAT deportation decision that had been made on the same facts.

18 ibid., p. S294.

19 AAT, *Submissions*, p. S384.

20 *Minister for immigration, Local Government and Ethnic Affairs v Batey* (1993) 112 ALR 198; *Haoucher v Minister for Immigration and Ethnic Affairs* (1989) 93 ALR 51.

21 AAT, *Submissions*, p. S455.

> political. This system has been tried and it failed. This was the primary reason for the shift to a determinative review system in 1992. There is now no good reason to return to it.[22]

Providing the Minister with a special power of intervention

3.27 In evidence before the Committee, the DIMA representative suggested that it might be preferable for the Tribunal to retain its determinative powers, but for the Minister to have the ability to overrule its decisions when he thought it in the national interest to do so:

> When I think of the number of decisions that [the AAT] makes and the fact that [there are] a number of those decisions where I think any minister may put his or her mind to changing the decision, there may be more efficiency in maintaining its determinative nature, but allowing a minister to come to a different conclusion if they wish.[23]

3.28 DIMA formalised this proposal in a supplementary submission as its preferred model for changing the review arrangements. It suggested that the Minister should be given a personal power to set aside deportation decisions of the AAT where the Minister was satisfied that it was in the national interest to do so. It drew attention to a similar provision in s.501A of the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997.

3.29 DIMA explained that the power was necessary because the Government used deportation to protect the Australian community from serious crime; however, it could not accomplish that task when the AAT overturned decisions to deport persons convicted of crimes such as drug trafficking and rape. In such cases, the Minister was powerless to act. DIMA described the situation in these terms:

> There is a natural concern when merits review bodies overturn deportation decisions. While this does not occur with great frequency, on occasions where there is an exceptionally serious crime involved, such as drug trafficking, fraud involving millions of dollars, rape etc, it is sometimes difficult to understand how such a decision might have been reached. As the courts cannot consider appeals against such merits review...there is no further avenue of appeal for the Department or the Minister in carrying out their roles of protecting the Australian community from persons who have already demonstrated the danger they represent.[24]

3.30 DIMA emphasised that the government should be able to re-examine AAT decisions which were at odds with the community needs, because the Government was ultimately responsible to the Australian community:

> [T]he community looks to the Government to provide appropriate levels of protection...Where the Government fails to provide the level of protection expected of it then it is open to the community and

22 Law Society of NSW, *Submissions*, p. S417.
23 DIMA, *Transcripts*, p. 272.
24 DIMA, *Submissions*, p. S465.

> through its representatives in Parliament to sanction the Government. It is not appropriate that an administrative review body should make merits decisions for which the Government is ultimately held responsible, without there being an avenue for the Government to re-examine those decisions which are out of step with community needs.[25]

3.31 DIMA concluded that its proposal was balanced, as it only allowed for overturning AAT decisions where they were out of step with community needs and where the Minister acted personally and in the national interest.[26]

3.32 The Senate Legal and Constitutional Legislation Committee has recently scrutinised national interest powers in the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997. Various provisions of that Bill would enable the Minister to exclude merits review of decisions if the Minister believes that such review would be contrary to the national interest.[27] The majority of the Committee found that these powers were not too broad, and that "national interest" naturally applied to serious issues that might affect the Australian community. The majority also accepted that the courts would determine the boundaries of the phrase as the need arose; and that the Minister's bona fides would still be subject to legal appeal.

3.33 The findings of the Senate Legal and Constitutional Legislation Committee furnish cogent reasons for thinking that the Minister's power to overturn AAT decisions in the national interest will not be overly broad. In addition, it should be noted that Immigration Ministers, for some years, have had the power to exclude deportation decisions from AAT review where this is in the national interest (s.502) but have chosen not to use that power in relation to criminal deportation cases.

25 ibid., pp. S465-466.

26 ibid., p. S467.

27 The provisions enable the Minister to issue conclusive certificates precluding review by the Refugee Review Tribunal and the proposed Merits Review Tribunal.

Conclusion on the review of deportation decisions

3.34 The Committee acknowledges the necessity for a review process for deportation decisions, since those decisions may have a severe impact on the interests of the deportee and his or her family in Australia.

3.35 The Committee, however, takes the view that there is scope to improve the current system. Although the AAT overturns less than 20% of the initial deportation decisions, when it has done so its determinations have aroused ministerial and public disquiet. As stated earlier, that disquiet poses a threat to public confidence in the system.

3.36 The main reason for that disquiet is the anomalous nature of the current scheme. The responsibility for allowing persons to enter or remain in Australia, and for protecting the Australian community, is vested in the Minister, who is answerable to Parliament. That responsibility is emphasised by the Minister's ability to exclude decisions from being reviewed by the AAT where this is in the national interest (s.502).

3.37 Under the present law, however, the Minister cannot act when the AAT makes decisions that, in his or her view, are out of step with the expectations and needs of the Australian community, or could pose a threat to the community's welfare. Nonetheless, the Minister is held accountable for those decisions. This situation is unsatisfactory and contributes to the disquiet that has attended the review process thus far.

3.38 While the initial DIMA proposal that giving the AAT recommendatory powers would better reflect the responsibility of the Minister, it poses too many practical difficulties. As DIMA noted, it would be inefficient for the Minister to make the final decision on every deportation matter given the small number of times that he or she would differ from the AAT. Furthermore, a move to recommendatory powers might well lead to an increase in judicial review applications from the Minister's decisions, thereby delaying proceedings and creating greater costs for taxpayers to bear.

3.39 The proposal of DIMA for a ministerial power to set aside AAT decisions would ensure an appropriate balance between ministerial responsibility and the benefits of merits review. It would underscore the responsibility of the Minister to Parliament and, through it, the people. At the same time, because the Tribunal seldom overturns departmental decisions, and because the power could only be exercised personally in the national interest, the impact of such a power on the merits review system would be minor.

3.40 The Committee appreciates that the reference to the "national interest" in this proposal may generate concern about the breadth of the Minister's discretion. Such concern, however, would be unwarranted based on past usage of the existing power in s.502 for removals.

Recommendation 1

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

(a) provide the Minister with a power to set aside an AAT decision on deportation if the Minister regards this outcome as being in the national interest;

(b) require the Minister, when exercising the power, to table an outline of the reasons before each House of Parliament within 15 sitting days; and

(c) subject the exercise of this power by the Minister to a formal review by the appropriate committee of the Parliament three years after the tabling of this report.

CHAPTER FOUR

THE TEN YEAR RULE

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

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

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

Introduction to the ten year rule

Description of the rule

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

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

Legislative basis of the rule

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

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

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

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

1 DIMA, *Submissions,* p. S288.

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

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

Origins of the rule

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

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

Counting the ten years

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

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

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

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

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

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

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

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

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

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

Concerns with the ten year rule

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

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

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

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

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

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

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

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

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

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

Juvenile Immigrants

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

Current position

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

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

> A sensitive issue concerns the liability for deportation of an adult who arrived in Australia as a minor. It is not the Government's intention that such people should never be deported. Where there is a pattern of criminal behaviour indicating a likelihood that the person will commit further serious crimes, deportation should be seriously considered.[15]

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

Deportation to a country where a person has no ties

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

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

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

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

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

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

Australia's responsibility to those who came as juveniles

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

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

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

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

4.29 The Ombudsman agreed with this view:

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

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

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

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

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

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

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

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

Arguments against a special rule for those who arrived as juveniles

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

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

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

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

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

Conclusions on applying the rule to juvenile immigrants

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

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

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

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

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

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

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

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

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

Recommendation 2

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

Former refugees

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

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

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

Implications of international obligations

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

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

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

Practical difficulties in effecting deportation of former refugees

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

27 Appendix Nine.

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

29 DIMA, *Transcript*, p. 259.

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

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

Conclusion regarding former refugees

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

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

Convictions for very serious offences

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

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

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

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

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

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

Arguments for ending the ten year limitation for very serious offences

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

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

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

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

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

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

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

4.58 DIMA also raised the option of mandatory deportation:

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

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

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

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

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

4.60 The Law Society of New South Wales argued:

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

Proposals for a sliding scale of liability

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

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

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

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

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

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

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

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

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

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

Conclusion on very serious offences

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

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

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

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

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

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

Recommendation 3

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

Repeat offenders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 4

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 5

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

Mandatory deportation

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

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

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

52 DIMA, *Submissions*, p. S290.

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

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

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

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

Conclusion to reject mandatory deportation

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

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

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

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

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

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

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

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:
>
> - 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.

CHAPTER SIX

WEIGHING PARTIES' VIEWS ON DEPORTATION

This chapter deals with term of reference five, which examines the weight to be given to the views of relevant parties. While deportation decisions must always balance a number of factors, the Committee endorses the existing deportation policy statement's emphasis on protecting the Australian community. However, the policy should take account of the views of the offender and his or her family and associates, as well as the victims of the crime.

The chapter contains recommendations endorsing the Government's proposals to obtain and weigh victims' views and the views of the potential deportee's associates. It also recommends taking the best interests of the potential deportee's children into account.

Views considered in deportation inquiries

6.1 Currently, the weight to be given to the views of interested parties is addressed in the Ministerial policy statement and the Migration Series Instructions. Paragraph 7 of the statement provides that:

> Consistent with Government policy, most weight should be given to the need to protect Australian society. Conversely, less weight should be given to the views of the offender and that person's family and associates, and to the possibility of adverse consequences for them of deportation.[1]

6.2 The threat to the community at large is the prime consideration in the deportation test. The views of those closely involved with the offender (other than interests of children) weigh less heavily in reaching a deportation decision. Nevertheless, if the views of those affected are to be taken into account at all, it is necessary to identify them.

6.3 For the purposes of this inquiry into deportation, the community can be divided into four groups:

- the criminal non-citizen;
- his/her family and associates;
- any victim(s) of the crime; and
- the remainder of the community (represented in the process by DIMA officers and the Minister).

6.4 No provision is made for the views of victims of the relevant crime in the current deportation decision process. However, DIMA proposes to change this and the draft revised policy specifies that the views of victims of the crimes should be a factor in making deportation decisions.[2]

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1 Paragraph 19 is also relevant in relation to factors affecting a deportation decision. See Appendix Five.
2 Appendix Six.

Weight to be given to the criminal non-citizen's views

6.5 Debate on the appropriate weight to be given to the non-citizen's views and interests in relation to those of the community has continued since the scheme commenced. The Committee notes that the essence of the test has remained substantially unchanged for 15 years. The proposed draft Ministerial statement maintains the present balance in favour of the interests of the Australian community.

6.6 The draft policy argues that:

> The greater the potential effect on the community or the greater the potential damage to the community the lower is the acceptable level of risk that the person concerned will commit further offences.[3]

6.7 Although many of the personal submissions received by the Committee identified the tension in striking an appropriate balance between the community and offender's interest,[4] evidence given to the inquiry did not suggest that more account should be taken of a non-citizen offender's views in relation to those of the community. The evidence supported maintaining the present balance or giving even greater weight to the community interest.

6.8 As noted in Chapter Four, some evidence supported mandatory deportation in particular circumstances. For example, the RSL suggested that persons committing certain types of crimes should be subject to mandatory deportation.[5] The Australian Capital Territory Government also advocated mandatory deportation for non-citizens convicted of crimes with lengthy sentences.[6] Mandatory deportation, in effect, makes the community interest absolutely paramount by withdrawing the non-citizen's right to present arguments for mitigation. Mandatory deportation negates the interests of the non-citizen offender.

6.9 Regardless of the weight to be given to the offender's views, there has been a problem in hearing those views. The AAT reported difficulty in securing the applicant's attendance for hearings when still serving time in NSW prisons.[7]

6.10 The Committee explored this problem at public hearings with the AAT and New South Wales Government representatives. In a supplementary submission, the NSW Department of Correctional Services reported agreement with the AAT about inmate procedures.[8]

6.11 As a result, the Committee did not consider recommendations to overcome the problem of the offender's access to a hearing.

Conclusion on criminal non-citizen's views

3 ibid., paragraph 10.
4 For example: Ronden, *Submissions*, pp. S9-10; Horsburgh, *Submissions*, p. S24; Emerton & Salt, *Submissions*, p. S27.
5 RSL, *Submissions*, p. S247.
6 ACT Government, *Submissions*, pp. S257-259.
7 AAT, *Submissions*, pp. S153-154.
8 NSW Department of Corrective Services, *Submissions*, p. S377.

6.12 The Committee considers that the balance should continue to be weighed in favour of protecting the Australian community. However, the Committee does not regard the protection of the community as a goal which should negate the interests of the offender, and for that reason, it does not support mandatory deportation. The potential non-citizen's views have a bearing on the case and should be heard.

Weight to be given to the interests of the potential deportee's children

6.13 The Committee received detailed submissions from DIMA and others on the weight to be given to the interests of the potential deportee's children. The overwhelming thrust of this evidence was for the Committee to ensure that Australia meets its international obligations to consider the interests of children affected by criminal deportation.[9] The RSL, however, put forward the view that only in the most exceptional circumstances should family considerations outweigh community benefits. The RSL argued that the rights of dependant children "should not necessarily be a weighed factor in considering the deportation of a parent."[10]

6.14 The current Ministerial policy statement does not specify the weight to be given to a deportee's children in reaching a deportation decision. The revised draft policy statement, however, addresses the issue in explicit terms, to reflect international law obligations under the CROC[11] and the decision of the High Court in Teoh's case. [12]

6.15 In 1990, Australia ratified the CROC, which provided that, in all actions concerning children, the best interests of the child were to be a primary consideration. In Teoh's case, a majority of the High Court held that Australia's ratification of a treaty created a legitimate expectation that decision-makers would act consistently with the treaty's provisions. Since the decision-maker had not regarded the interests of Mr Teoh's children as a primary consideration, the decision to deport him breached procedural fairness and was invalid.

6.16 Teoh's case raised the spectre of international obligations giving rise to legitimate expectations that arguably could invalidate many administrative decisions. To negate arguments about such legitimate expectations, successive Commonwealth Attorneys-General and Foreign Ministers issued Executive Statements stating clearly that entering into a treaty did not give rise to a legitimate expectation that decision-makers would act consistently with the provisions of the treaty.[13]

6.17 In 1995, the Government also introduced the *Administrative Decisions (Effect of International Instruments) Bill 1995* to reverse the legitimate expectation doctrine as expounded in Teoh's case. This Bill passed the House of Representatives but lapsed on prorogation of the Parliament prior to the March 1996 election. Following that election, the new Government introduced the *Administrative Decisions (Effect of International*

9 Examples of this type of evidence appear in Law Society of NSW, *Submissions*, p. S415 and the AAT, *Submissions*, p S385.

10 RSL, *Submissions*, p. S248.

11 DIMA, *Submissions*, pp. S298-299.

12 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353.

13 Executive Statement, 10 May 1995, by Hon Gareth Evans QC and Hon Michael Lavarch; Executive Statement, 25 February 1997, by Hon Alexander Downer and Hon Daryl Williams AM QC.

Instruments) Bill 1997. While it has passed the House of Representatives, it has not yet been debated in the Senate.

6.18 DIMA has received legal advice that the references to international legal obligations in the criminal deportation statement may mean that legitimate expectations will continue to be generated by the CROC.[14]

6.19 The revised draft policy treats the interests of deportee's children as a primary consideration in the deportation process.[15] In evidence, the Committee was also informed that later cases have taken account of the Teoh decision and have accorded due weight to the views of the deportee's children.[16] Two very recent Federal Court judgements overturning AAT judgements have turned on the issue of the appropriate weight to be given to the interests of the children.[17]

Conclusion on the weight to be given to the interests of children

6.20 The Committee believes that the ministerial policy should reflect the current state of the law. Within the framework of a scheme which has as its aim the protection of the community from further non-citizen crime, the international convention and Australian common law require the interests of the deportee's children to be considered.

6.21 However, the Committee does not believe that these require the Minister to consider the interests of children to be more important than the interests of the Australian community. The Committee notes that the draft Ministerial policy statement provides that due weight must be given to the interests of the deportee's children[18] and this statement would appear to reflect the actual legal position.

Recommendation 10

The Committee recommends that the Ministerial Policy Statement acknowledge the interests of any children involved as one of the primary considerations in the deportation process.

Weight to be given to the views of other family members

6.22 While the CROC does not extend to other family members, the Committee considers it appropriate to examine the weight to be given to the views of the spouse and other family of the deportee.

6.23 A number of parties wanted the weight to be given to particular factors in the statement clarified. The AAT drew attention to a lack of clarity in some parts of the guidelines and, in particular, suggested that they be revised to reflect the weighting to be

14 DIMA, *Submissions*, p. S311.
15 ibid., p. S344.
16 Cronin, *Transcript*, p. 119.
17 *Kwong Leung Lam v Minister for Immigration & Multicultural Affairs* [1998] 154 FCA (4 March 1998); *Davey Browne v Minister for Immigration & Multicultural Affairs* [1998] 566 FCA (29 May 1998).
18 Appendix Six.

accorded to various relevant factors for and against deportation.[19] Dr Cronin considered that the guidelines could be clarified "and the balancing exercise necessarily involved in such cases made explicit."[20] The Ethnic Communities Council of Queensland advocated that the interests of children and other dependents be considered in the decision making process.[21] The RSL suggested that "only in the most exceptional circumstances should the weight of family consideration outweigh greater community benefit."[22]

6.24 Paragraph seven of the current Ministerial policy statement suggests little weight should be given to the views of the offender and the offender's family and associates. DIMA proposes to clarify the weight to be given to the views of the family in its revised draft policy statement. That statement explicitly recognises the hardship caused to Australian residents and the offender as a lesser consideration in the deportation process.[23]

Conclusion on the weight to be given to family members

6.25 The views of the family can assist in determining the strength of the criminal non-citizen's ties to the Australian community. This factor needs to be appropriately weighed against the other factors relevant in the deportation process.

6.26 The revised draft of the Ministerial statement proposes to consider the views of the family in determining whether "the offender has established ties with the Australian community to become a full time member" and "the hardship caused to" the family as a result of deportation.[24] The Committee endorses the DIMA proposals which reflect the appropriate weight to be given to family views and which reflect the attitudes of the general community.

Recommendation 11

The Committee recommends that the Ministerial Policy Statement be amended to ensure that the views of family members are considered in the deportation process, and that the weight to be given to those views follows the proposal contained in the draft Ministerial Policy Statement.

Consideration of victims' views

6.27 The question of the extent to which the decision maker should actively seek the opinions of the victims of the non-citizen's crime drew a range of views from interested parties.

6.28 The current Ministerial statement does not refer to victims though the revised draft includes the views of victims as a factor to be given lesser weight. In Australia, the experience of victims seeking to have their views heard during decision making or appeals is limited. Nevertheless, the Committee was told of one instance where a victim had sought

19 AAT, *Submissions*, pp S390-391.
20 Cronin, *Submissions*, p S365.
21 ECCQ, *Submissions*, p. S26.
22 RSL, *Submissions*, p. S248.
23 Appendix Six.
24 Appendix Six.

standing before the AAT to challenge a decision not to deport and other cases where evidence of victims' views was led or foreshadowed.[25]

6.29 Some state and territory governments supported giving weight to the views of victims. The New South Wales Government cited its charter of victims' rights legislation as a model for examination by the Committee.[26] The Northern Territory Government considered that "victims [were] entitled to a say".[27] On the other hand, the Queensland Government considered that victims' rights were adequately addressed in the review process.[28] The AAT also pointed to the practical difficulties in using a victim's views in assessing the broader objective of protecting the entire community.[29]

6.30 In other comparable systems, the views of victims are sought or at least considered, where available. In the United Kingdom, "it is quite common to have cases where the victims of crimes, sought, as against the minister, to have particular persons deported".[30] The Law Society of New South Wales submitted that no legal impediment existed to stop victims providing their views and suggested that "victims and victim support groups should be advised and assisted in such matters".[31]

6.31 A Victorian lawyer reported his recent experience of a case where, to minimise discomfort and distress,[32] the victim and a relative provided evidence in the absence of the offender. The AAT and some other parties proposed that a Victim Impact Statement (VIS) or a similar document gathered from the victim or supporters would provide a better form of evidence:

> The advantage of such a Statement is that it presents, in a neutral and dispassionate fashion, a professional assessment of the impact of criminal code conduct on the victim and ... immediate family.[33]

6.32 The DIMA representative agreed with the observation that the department's submission was "equivocal" about the weight to be given to victim's views. He agreed that involving the victim in the decision-making process provided an opportunity to put a view which could be used in assessing the future threats to the community.[34]

6.33 In its revised draft statement, DIMA includes the views of victims as a factor to be considered when making deportation decisions, but it does not give those views the status of a primary consideration.[35]

Conclusion on obtaining victims' views

25 Law Society of NSW, *Transcript*, p. 32.
26 NSW Government, *Submissions*, p. S213.
27 NT Government, *Submissions*, p. S84.
28 Qld Government, *Submissions*, p. S239.
29 AAT, *Submissions*, p. S154.
30 Cronin, *Submissions*, p. S365.
31 Law Society of NSW, *Submissions*, p. S209.
32 Howlett, *Submissions*, p. S359.
33 AAT, *Submissions*, p. S154.
34 DIMA, *Transcript*, p. 278.
35 Appendix Six.

6.34 During a deportation inquiry, victims should have an opportunity to present their views. These views may be relevant to an assessment of the future danger to the community and the offender's level of assimilation into the community. The views have value in themselves and taking them into account meets community expectations. As the departmental representative noted, removal of offenders can act as a "healing process", allowing the community to express its views about the continued presence of a non-citizen convicted of serious crime.[36]

6.35 In its submission, DIMA raised two options for obtaining victims' views. The Committee favours the scheme whereby DIMA officers identify victims through court and prosecution records and correspond with them.[37]

6.36 The Committee agrees that a VIS is an appropriate form in which to present victims' views, since it has the advantage of avoiding the victim being cross-examined during any appeal hearing. The departmental officer who prepared the VIS would be the person subject to cross-examination.

6.37 The actual weight given to any VIS will depend on the circumstances of the deportation case. The value of a VIS is that it reflects the views of a person threatened by the non-citizen's continued residence and provides a measure of the crime's repugnance to the community. As the victim does not represent society at large, the weight given to the VIS must be tempered with other evidence collected during the process which demonstrates broader community attitudes.

6.38 The Committee agrees with DIMA that the weight to be given to victims' views should be less than a primary consideration in the deportation decision making process.

Recommendation 12

The Committee recommends that the Minister revise:

(a) the MSIs to require departmental officers to seek victims' views and to record these views in the form of Victim Impact Statements; and

(b) the Ministerial Policy Statement to include the views of victims as a factor considered in the deportation process, as proposed in the draft Ministerial Policy Statement.

36 DIMA, *Transcript*, p. 278.
37 DIMA, *Submissions*, p. S298.

CHAPTER SEVEN

REMOVAL OF CRIMINALS

This chapter deals with the sixth term of reference, which relates to the adequacy of existing arrangements for the removal of non-residents convicted of crimes. The Committee finds that the present arrangements for removing non-residents are adequate.

There is, however, an anomaly in the exclusion periods that apply to persons removed and those deported following criminal conviction in Australia. The Committee recommends that the same exclusion period apply to persons who are removed from Australia for criminal offences as applies to criminal deportees.

Introduction

7.1 Unlike the power to order deportation, which is discretionary, removal is an automatic consequence for every unlawful non-citizen. Non-citizens who do not hold a valid visa must be detained under s.189 of the Act and removed (ie expelled) under s.198. Mandatory removal was introduced to simplify the procedures for removing persons who had no legal authority to remain in Australia. It reinforces the principle that such persons have 'no right to stay in the country'.[1]

7.2 The fact that all unlawful non-citizens must be removed offers an alternative means of expelling criminal non-citizens from Australia. The Minister can render such persons unlawful, and hence subject to removal, simply by cancelling their visas. Under s.501 of the Act, the Minister has the power to cancel any visa on the grounds of bad character.

7.3 In this chapter, the Committee examines the current removal legislation and its application to non-residents - usually temporary visa holders, but sometimes unlawful non-citizens - who are convicted of crimes in Australia. This chapter also addresses the overlap between deportation and removal for permanent residents; government proposals to strengthen the removal provisions; and the anomaly in exclusion periods applied to non-citizens removed or deported following criminal conviction.

Overview of removal legislation

Cancellation of visas

7.4 Removal of non-resident criminals from Australia typically occurs after the cancellation of their temporary visas[2] under section 501 of the Act. That section enables the Minister to cancel a visa if the Minister is satisfied that:

- allowing the non-citizen to remain in Australia would be disruptive to the Australian community (s.501(1)(b)); or

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1 MSI 5 "*Enforced Departure from Australia - Overview*" (31/10/96), para. 2.3.

2 In this chapter, the focus is on the cancellation of temporary visas. The cancellation power under section 501 also extends to permanent visas.

- the person is not of good character (s.501(1)(a) and s.501(2)).

7.5 S.501(1)(b) enables the Minister to cancel a visa in a number of circumstances where disruption to the community might result from the non-citizen's presence. For the inquiry's purposes, the most relevant of these circumstances are when the Minister is satisfied that the person, if allowed to remain in Australia, would be likely to:

- engage in criminal activity in Australia; or
- represent a danger to the Australian community (or a segment of that community).

7.6 S.501(1)(a) and s.501(2) relate to bad character. They provide that the Minister may cancel a visa when satisfied that the non-citizen is not of good character having regard to:

- the person's past criminal conduct; or
- the person's general conduct.

7.7 The Minister may also cancel a visa when satisfied that a non-citizen is not of good character because of an association with another person, group or organisation believed to be involved in criminal conduct.

Consequences of visa cancellation

7.8 Under s.15 of the Act, a person whose visa has been cancelled becomes an unlawful non-citizen if he or she is in the migration zone[3] and does not hold another valid visa.

7.9 Section 189 requires a person who has become an unlawful non-citizen to be detained. Under s.196, the person must remain in detention until removed from Australia, deported or granted a visa. Furthermore, s.198 provides that DIMA officers must remove from Australia "as soon as reasonably practicable" a person who is a detainee and who:

- has not applied for another visa; or
- has applied but has been refused a visa.

7.10 DIMA practice is to provide a criminal justice or a bridging visa "E" to enable unlawful non-citizens convicted of crimes to remain in Australia to serve their custodial sentence. This temporary visa ceases to have effect upon the completion of the sentence, and the person is then removed.[4]

7.11 Where the Minister has cancelled a visa under s.501 because of a non-citizen's past criminal conduct, the Migration Regulations provide that the person is permanently excluded from re-entering Australia.[5]

3 The migration zone is defined in s.5(1) of the Act. In general, the term encompasses Australia and its ports, but not its external seas.

4 DIMA, *Submissions*, p. S300.

5 Schedule 5 to the Migration Regulations, special return criterion 5001.

7.12 Where the Minister cancels a visa under s.501 on grounds other than past criminal conduct, the non-citizen is excluded from applying for a migrant visa for 12 months after removal. The 12 month prohibition may be waived where the Minister is satisfied that compelling or compassionate circumstances exist that affect the interests of Australia or community members.[6]

7.13 Persons whose visas were cancelled under s.501, for reasons other than past criminal conduct, may also be excluded from applying for visitor visas to enter Australia for 3 years.[7]

Review rights

7.14 Under s.500 of the Act, a person whose visa has been cancelled has a right of appeal to the AAT. Under s.502 of the Act, however, the Minister may exclude that appeal right where he or she decides the matter personally and (because of the seriousness of the circumstances giving rise to the decision) issues a certificate declaring the non-citizen to be an "excluded" person. In such cases, the Minister must table an outline of reasons in Parliament within 15 sitting days after making the decision. The power to preclude review under s.502 has been rarely used.[8]

Permanent residents liable to deportation and removal

7.15 Although the focus of the previous section was on removal of temporary visa holders, it is apparent that the power of cancellation under s.501 also extends to permanent residents, and may be exercised even where a person becomes liable to deportation.[9] It is, therefore, possible to cancel the permanent visas of non-citizens convicted of crimes in Australia and to have such persons removed, rather than deported, from the country. Furthermore, as the cancellation power is not limited by the time a non-citizen has spent in Australia, criminals who can no longer be deported because of the ten year rule remain subject to visa cancellation and removal unless they obtain citizenship.[10]

7.16 The Committee notes the potential for overlap between the deportation and removal processes. However, the sixth term of reference directs attention to the removal of non-residents (ie temporary visa holders and unlawful non-citizens) convicted of crimes; it does not focus on permanent residents. DIMA has also informed the Committee that the removal provisions have been applied to permanent residents very infrequently. For example, between 1 July 1996 and 30 June 1997:

- four permanent residence visas were cancelled in Australia under the bad character provisions;[11]
- 92 permanent residents received deportation orders;[12] and
- 1 359 people were removed.[13]

6 Schedule 5 to the Migration Regulations, special return criterion 5002.
7 Schedule 4 to the Migration Regulations, public interest criterion 4014.
8 DIMA, *Submissions*, p. S477. The power has only been used in four cases involving visa cancellation.
9 *Gunner v Minister for Immigration and Multicultural Affairs* (unreported, Federal Court, 19 December 1997).
10 DIMA, *Submissions*, p. S286.
11 ibid., p. S438.
12 ibid.

The Committee notes the very limited application of the removal provisions to permanent residents to date.

Proposed changes to removal legislation

7.17 On 30 October 1997, the Government introduced the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1997 into the House of Representatives. Amongst other things, the Bill:

(a) strengthens the power to refuse to grant or to cancel a visa on character grounds by:

- introducing a character test in s.501;
- deeming certain persons not to pass the character test; and
- providing that visa applicants and visa holders being considered under s.501 bear the onus of proof in convincing the Minister that they pass the character test;

(b) prevents (with limited exceptions) persons who have had a visa refused or cancelled on character grounds from applying for further visas while they are in the migration zone; and

(c) strengthens the Minister's personal powers to refuse to grant, or to cancel, a visa on character grounds by:

- enabling the Minister to exercise personally a special power to intervene in any case and substitute his/her own decision to refuse to grant or cancel; and
- ensuring that the Minister's personal decisions (as opposed to decisions made by the Minister's delegates) are not reviewable by the Administrative Appeals Tribunal.

7.18 If passed, the Bill would change the legal standards applied to removals. For instance, the proposed s.501 deems a person not to pass the "character test" if the person has a "substantial criminal record".

7.19 The Committee has not subjected the proposed legislation to detailed scrutiny because the Senate Legal and Constitutional Legislation Committee has already reported upon it. In addition, at the time of writing, the Bill has not yet been debated in the Senate. The Committee, however, considers that, should these removal provisions become law, the criminal deportation scheme should take account of the amendments.

Adequacy of the removal power to deal with non-residents convicted of crimes

13 DIMA, *Annual Report 1996-97*, p. 95.

7.20 The Committee obtained little evidence on this term of reference. Available views support the existing arrangements and the absence of complaint suggests general endorsement.

7.21 The Queensland Government noted that the arrangements:

> [I]n the majority of cases [are] adequate, and [provide] a sufficient system of checks and balances that safeguard the rights of the criminal offender whilst protecting the interests of the Australian community.[14]

7.22 The Ombudsman reported that removals followed a similar course to deportations except there was no review of the removal action itself, since this was mandatory under the Act.[15]

7.23 DIMA supplied detail of the administrative functions applied to non-citizens who were temporarily resident under the Act.[16]

Exclusion periods for unlawful non-citizens removed after criminal conviction

7.24 Unlawful non-citizens are not limited to those whose visas have been cancelled on bad character grounds. Unlawful non-citizens also include those who entered Australia without lawful authority, and those who entered Australia lawfully but whose visas have since expired. Where these persons are convicted of crimes in Australia, they are treated in the same manner as persons whose visas have been cancelled: DIMA issues a criminal justice visa or a bridging visa "E" to enable the unlawful non-citizen to remain in Australia for the duration of his or her custodial sentence, then the person is removed.[17]

7.25 However, because such persons never held temporary visas that were cancelled for past criminal conduct, the consequences of removal are different. Instead of being permanently banned from re-entering Australia, such persons can apply for a migrant visa to enter Australia 12 months after removal; and that limitation can be waived if compelling or compassionate circumstances exist that affect the interests of Australia or community members.[18] In addition, such persons are only excluded from applying for visitor visas to enter Australia for a period of three years in most situations.[19]

The problem of having different exclusion periods

7.26 DIMA submitted that there was a need for non-residents (ie unlawful residents or people on temporary visas) to be regarded in the same light as criminal permanent residents, and suggested that the exclusion period should be standardised.[20] It stated that the permanent exclusion contained in Schedule 5 of the Migration Regulations did not apply to all prisoners removed for criminal offences; and it explained that unlawful non-citizens could apply for

14 Qld Government, *Submissions*, p. S239.
15 Ombudsman, *Submissions*, p. S201.
16 DIMA, *Submissions*, pp. S300-1.
17 ibid., p. S300.
18 Schedule 5 to the Migration Regulations, special return criterion 5002.
19 Schedule 4 to the Migration Regulations, public interest criterion 4014.
20 DIMA, *Submissions*, p. S300.

visitor visas to Australia after three years of removal, and could apply for migrant entry after only one year. This situation, DIMA submitted, was anomalous.[21]

7.27 DFAT was also concerned with the different exclusion provisions that applied to criminal deportees and to the removal of other criminals. It explained:

> The current provisions exclude a permanent resident deportee from returning to Australia. However, a non-resident removee possessing no significant ties with Australia has the option to apply to return to Australia.[22]

7.28 DFAT suggested that this anomaly could be addressed either by giving criminal deportees a greater capacity to re-enter Australia than non-residents or by placing the two groups on an equal footing.[23]

Conclusion on exclusion periods

7.29 The current legislation ensures that persons who are deported or whose visas have been cancelled because of criminal conduct are excluded for life. Such a ban reflects the aim of protecting the Australian community from persons who have engaged in serious criminal activity.

7.30 Once the aim of community protection is accepted, however, it becomes anomalous to have differing exclusion periods applied to criminal non-citizens. From the community's perspective, there is little difference between a criminal whose temporary visa is cancelled or who never held a temporary visa, and a criminal who holds a permanent residence visa. Where the threat to the community is the same, it ought to follow that the exclusion period should be the same.

7.31 It is, moreover, unsatisfactory that a permanent resident who may have significant ties with Australia can be deported and permanently excluded from re-entry, whereas a non-resident without any ties can apply to re-enter after a maximum of three years. In this respect, the current provisions appear to give greater rights to non-residents than to permanent residents. The Committee does not regard this as acceptable.

7.32 The Committee, therefore, concludes that non-citizens expelled because of criminal convictions should be subject to the same exclusion period, whether the deportation or removal process was used.

Recommendation 13

The Committee recommends that the Migration Regulations be amended to ensure that all non-citizens removed because of criminal convictions are subject to the same limitation that applies to criminal deportees.

21 ibid.
22 DFAT, *Submissions*, p. S168.
23 ibid.

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

June 1998

APPENDICES

APPENDIX ONE

LIST OF SUBMISSIONS

Submission Number	Organisation or Individual
1	Mr Michael Clothier
2	The Public Policy Assessment Society Inc.
3	Ms Magda Bardy OAM
4	Mr Colin den Ronden
5	Dr Robert Paterson
6	Mr Brian Gregory JP
7	Executive Council of Australian Jewry
8	Mr Richard Smith
9	Mr Reg Fisk
10	Mr Maurice Horsburgh
11	Ethnic Communities Council of Queensland
12	N R Emerton
13	The University of Melbourne
14	United Nations High Commissioner for Refugees
15	Privacy Commissioner Human Rights & Equal Opportunity Commission
16	Mr Bruce Haddon
17	New South Wales Council for Civil Liberties Inc.

Submission Number	Organisation/Individuals
18	Western Australia Government
19	Northern Territory Government
20	Administrative Review Council
21	Confidential
22	Dr Richard Crane
23	Administrative Appeals Tribunal
24	Confidential
25	Confidential
26	Confidential
27	Department of Foreign Affairs and Trade
28	Commonwealth Ombudsman
29	The Law Society of New South Wales
30	New South Wales Government
31	Queensland Government
32	Ethnic Council of Shepparton & District Inc.
33	The Returned & Services League of Australia
34	Mr Denis McCormack
35	Human Rights Commissioner Human Rights & Equal Opportunity Commission
36	Australian Capital Territory Government
37	Dr Richard Crane (supplementary submission)
38	Department of Immigration and Multicultural Affairs

Submission Number	Organisation/Individuals
39	Mr Max Howlett
40	Dr Kathryn Cronin
41	Jesuit Social Services & Jesuit Refugee Service
42	New South Wales Government (supplementary submission)
43	Administrative Appeals Tribunal (supplementary submission)
44	Department of Foreign Affairs and Trade (supplementary submission)
45	The Law Society of New South Wales (supplementary submission)
46	Executive Council of Australian Jewry (supplementary submission)
47	Department of Immigration and Multicultural Affairs (supplementary submission)
48	New South Wales Government (supplementary submission)
49	Queensland Government (supplementary submission)
50	Department of Immigration and Multicultural Affairs (supplementary submission)
51	Commonwealth Ombudsman (supplementary submission)
52	Confidential
53	Administrative Review Council (supplementary submission)
54	Administrative Appeals Tribunal (supplementary submission)

Submission Number	Organisation/Individuals
55	Australian Federal Police (supplementary submission)
56	Department of Immigration & Multicultural Affairs (supplementary submission)
57	Department of Immigration & Multicultural Affairs (supplementary submission)
58	Prisoners' Legal Service Inc.

APPENDIX TWO

LIST OF WITNESSES AT PUBLIC HEARINGS

Tuesday 12 August 1997 - Sydney

Administrative Appeals Tribunal

Dr Duncan Chappell, Deputy President
Mr Graham McDonald, Deputy President
Ms Kay Ransome, Acting Registrar

Human Rights & Equal Opportunity Commission

Mr Chris Sidoti, Human Rights Commissioner
Mr Kieren Fitzpatrick, Senior Adviser

Law Society of New South Wales

Mr Ronald Kessels, Member, Migration Task Force

New South Wales Department of Corrective Services

Ms Margaret Anderson, Executive Officer, Serious Offenders Review Council
Mr Neil Guy, Manager, Sentence Administration Unit
Mr Paul Nash, Director, Legal Services

Individuals

Dr Richard Crane
Mr Bruce Haddon

Wednesday, 13 August 1997 - Canberra

Commonwealth Ombudsman

Mr Andrew Herington, Senior Assistant Commonwealth Ombudsman
Ms Philippa Smith, Commonwealth Ombudsman

Monday, 15 September 1997 - Melbourne

Administrative Review Council

Professor Marcia Neave, President

Jesuit Social Services and Jesuit Refugee Service

Ms Eve Lester, Research & Policy Officer
Father Peter Norden, Director

Individuals

Mr Michael Clothier
Dr Kathryn Cronin
Mr Max Howlett
Mr Stanley Johnston

Monday, 29 September 1997 - Canberra

Australia Israel and Jewish Affairs Council

Dr Colin Rubenstein, National Policy Chairman

Department of Foreign Affairs & Trade

Mr Peter Heyward, Director, Refugees, Immigration and Asylum Section
Mr Denis O'Dea, Immigration Liaison Officer
Ms Jane Spry, Immigration Liaison Officer

Executive Council of Australian Jewry

Mr Jeremy Jones, Executive Vice President

Returned Services League of Australia

Mr Albert Owens, Member, National Youth Heritage and Citizenship
Mr John Sheldrick, Chairman, National Youth Heritage and Citizenship

FRIDAY, 17 OCTOBER 1997 - CANBERRA

Department of Immigration and Multicultural Affairs

Mr Peter Job, Director of Compliance
Mr John Parker, Acting Assistant Secretary, Legal Services and Litigation
Mr Mark Sullivan, Deputy Secretary
Mr Peter Vardos, Assistant Secretary, Compliance and Enforcement Branch

MONDAY, 1 DECEMBER 1997 - CANBERRA

Administrative Appeals Tribunal

Dr Duncan Chappell, Deputy President
Mr Graham McDonald, President Member
Ms Kay Ransome, Registrar

APPENDIX THREE

LIST OF EXHIBITS

1 Documents supplied by Dr Robert Paterson:

(a) 'Aspects of Internment in Australia during the First World War';

(b) Preface to 'Internee 1/5126';

(c) 'Internee 1/5126'.

2 Documents produced by the Department of Immigration and Multicultural Affairs:

(a) Letter from Mr C A McConnell to the Department of Immigration and Multicultural Affairs tabled by the Deputy Secretary at 17/10/97 public hearing;

(b) *Minister requests inquiry into criminal deportation policies*, Ministerial Media Release 17/97**,** 11 February 1997;

(c) *Sweeping changes to refugee and immigration decision making*, Ministerial Media Release 28/97, 20 March 1997;

(d) *Minister cancels visas of convicted criminals*, Ministerial Media Release 54/97, 13 June 1997;

(e) *Strengthening of immigration 'character' provisions*, Ministerial Media Release 55/97, 13 June 1997;

(f) Department of Immigration and Multicultural Affairs, *Annual Report 1996-97*, AGPS, Canberra;

(g) MSI 5 "*Enforced Departure from Australia - Overview*" (31/10/96);

(h) MSI 34 "*Deportation Submissions*" (31/10/96);

(i) MSI 168 "*Non-citizens held in prison liable for enforced departure*" (2/5/97);

(j) MSI 171 "*Deportation - General Policy*" (13/5/97);

(k) MSI 199 "*Compliance and enforcement overview*" (20/4/98).

3 Document supplied by Senator Andrew Bartlett:

(a) *Vilperit Betkhoshabeh v Minister for Immigration and Multicultural Affairs* (Administrative Appeals Tribunal, 26 September 1997, Deputy President Forrest).

APPENDIX FOUR

RELEVANT EXTRACTS OF LEGISLATIVE PROVISIONS

Migration Act 1958

Deportation of certain non-citizens

200. The Minister may order the deportation of a non-citizen to whom this Division applies.

Deportation of non-citizens in Australia for less than 10 years who are convicted of crimes

201. Where:

(a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;

(b) when the offence was committed the person was a non-citizen who:

(i) had been in Australia as a permanent resident:
(A) for a period of less than 10 years; or
(B) for periods that, when added together, total less than 10 years; or

(ii) was a citizen of New Zealand who had been in Australia as an exempt non-citizen or a special category visa holder:
(A) for a period of less than 10 years as an exempt non-citizen or a special category visa holder; or
(B) for periods that, when added together, total less than 10 years, as an exempt non-citizen or a special category visa holder or in any combination of those capacities; and

(c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year;

section 200 applies to the person.

Deportation of non-citizens upon security grounds

202. (1) Where:

(a) it appears to the Minister that the conduct (whether in Australia or elsewhere and either before or after the commencement of this subsection) of a non-citizen referred to in paragraph 201 (b) constitutes, or has constituted, a threat to the security of the Commonwealth, of a State or of an internal or external Territory; and

(b) the Minister has been furnished with an adverse security assessment in respect of the non-citizen by the Organization, being an assessment made for the purposes of this subsection;

then, subject to this section, section 200 applies to the non-citizen.

(2) Where:

(a) subsection (1) applies in relation to a non-citizen;

(b) the adverse security assessment made in respect of the non-citizen is not an assessment to which a certificate given in accordance with paragraph 38 (2) (a) of the *Australian Security Intelligence Organization Act 1979* applies; and

(c) the non-citizen applies to the Tribunal for a review of the security assessment before the end of 30 days after the receipt by the non-citizen of notice of the assessment and the Tribunal, after reviewing the assessment, finds that the security assessment should not have been an adverse security assessment;

section 200 does not apply to the non-citizen.

(3) Where:

(a) subsection (1) applies in relation to a non-citizen;

(b) the adverse security assessment made in respect of the non-citizen is an assessment to which a certificate given in accordance with paragraph 38 (2) (a) of the *Australian Security Intelligence Organization Act 1979* applies; and

(c) the Attorney-General has, in accordance with section 65 of that Act, required the Tribunal to review the assessment;
section 200 does not apply to the non-citizen unless, following the receipt by the Attorney-General of the findings of the Tribunal, the Attorney-General advises the Minister that the Tribunal has confirmed the assessment.

(4) A notice given by the Minister pursuant to subsection 38 (1) of the *Australian Security Intelligence Organization Act 1979* informing a person of the making of an adverse security assessment, being an assessment made for the purposes of subsection (1) of this section, shall contain a statement to the effect that the assessment was made for the purposes of subsection (1) of this section and that the person may be deported under section 200 because of section 202.

(5) Despite subsection 29(7) of the *Administrative Appeals Tribunal Act 1975*, the Tribunal must not extend beyond the period of 28 days referred to in subsection 29(2) of that Act the time within which a person may apply to the Tribunal for a review of an adverse security assessment made for the purposes of subsection (1) of this section.

(6) In this section:
"adverse security assessment", "security assessment" and "Tribunal" have the same meanings as they have in Part IV of the *Australian Security Intelligence Organization Act 1979*;
"Organization" means the Australian Security Intelligence Organization.

Deportation of non-citizens who are convicted of certain serious offences

203. (1) Where:

(a) a person who is a non-citizen has, either before or after the commencement of this subsection, been convicted in Australia of an offence;

(b) at the time of the commission of the offence the person was not an Australian citizen; and

(c) the offence is:
(i) an offence against section 24, 24AA, 24AB, 24C, 25 or 26 of the *Crimes Act l914;*
(ii) an offence against:
(A) section 6 or 7 of that Act; or
(B) subsection 86(1) of that Act by virtue of paragraph (a) of that subsection;
being an offence that relates to an offence referred to in sub-paragraph (1); or
(iii) an offence against a law of a State or of any internal or external Territory that is a prescribed offence for the purposes of this sub-paragraph;

then, subject to this section, section 200 applies to the non-citizen.

(2) Section 200 does not apply to a non-citizen because of this section unless the Minister has first served on the non-citizen a notice informing the non-citizen that he or she proposes to order the deportation of the non-citizen, on the ground specified in the notice, unless the non-citizen requests, by notice in writing to the Minister, within 30 days after receipt by him or her of the Minister's notice, that his or her case be considered by a Commissioner appointed for the purposes of this section.

(3) If a non-citizen on whom a notice is served by the Minister under subsection (2) duly requests, in accordance with the notice, that his or her case be considered by a Commissioner appointed for the purposes of this section, the Minister may, by notice in writing, summon the non-citizen to appear before a Commissioner specified in the notice at the time and place specified in the notice.

(4) A Commissioner for the purposes of this section shall be appointed by the Governor-General and shall be a person who is or has been a Judge of a Federal Court or of the Supreme Court of a State or Territory, or a barrister or solicitor of the High Court or of the Supreme Court of a State or Territory of not less than 5 year's standing.

(5) The Commissioner shall, after investigation in accordance with subsection (6), report to the Minister whether he or she considers that the ground specified in the notice under subsection (2) has been established.

(6) The commissioner shall make a thorough investigation of the matter with respect to which he or she is required to report, without regard to legal forms, and shall not be bound by any rules of evidence but may inform himself or herself on any relevant matter in such manner as he or she thinks fit.

(7) Where a notice has been served on a non-citizen under subsection (2), section 200 does not apply to the non-citizen because of this section unless:
(a) the non-citizen does not request, in accordance with the notice, that his or her case be considered by a Commissioner;
(b) the non-citizen, having been summoned under this section to appear before a Commissioner, fails so to appear at the time and place specified in the summons; or
(c) a Commissioner reports under this section in relation to the non-citizen that he or she considers that the ground specified in the notice has been established.

Determination of time for sections 201 and 202

204. (1) Where a person has been convicted of any offence (other than an offence the conviction in respect of which was subsequently quashed) the period (if any) for which the person was confined in a prison for that offence shall be disregarded in determining, for the purposes of section 201 and subsection 202 (1), the length of time that that person has been present in Australia as a permanent resident or as an exempt non-citizen or a special category visa holder.

(2) In section 201 and subsection 202 (1):

"permanent resident" means a person (including an Australian citizen) whose continued presence in Australia is not subject to any limitation as to time imposed by law, but does not include:

(a) in relation to any period before 2 April 1984 - a person who was, during that period, a prohibited immigrant within the meaning of this Act as in force at that time; or

(b) in relation to any period starting on or after 2 April 1984 and ending on before 19 December 1989 - the person who was, during that period, a prohibited non-citizen within the meaning of this Act as in force in that period; or

(c) in relation to any period starting on or after 20 December 1989 and ending before the commencement of section 7 of the *Migration Reform Act 1992* - the person who was, during that period, an illegal entrant within the meaning of this Act as in force in that period; or

(d) in relation to any later period - the person who is, during that later period, an unlawful non-citizen.

(3) For the purposes of this section:

(a) a reference to a prison includes a reference to any custodial institution at which a person convicted of an offence may be required to serve the whole or a part of any sentence imposed upon him or her by reason of that conviction; and

(b) a reference to a period during which a person was confined in a prison includes a reference to a period:
(i) during which the person was an escapee from a prison; or
(ii) during which the person was undergoing a sentence of periodic detention in a prison.

Dependants of deportee

205. (1) Where the Minister makes or has made an order for the deportation of a person who has a spouse, the Minister may, at the request of the spouse of that person, remove -
(a) the spouse; or
(b) the spouse and a dependent child or children;
of that person.

(2) Where the Minister makes or has made an order for the deportation of a person who does not have a spouse but who does have a dependent child or children, the Minister may, at the person's request, remove a dependent child or children of the person.

Deportation order to be executed

206. (1) Where the Minister has made an order for the deportation of a person, that person shall, unless the Minister, revokes the order, be deported accordingly.

(2) The validity of an order for the deportation of a person shall not be affected by any delay in the execution of that order.

Review of decisions

500. (1) Applications may be made to the Administrative Appeals Tribunal for review of:

(a) decisions of the Minister under section 200 because of circumstances specified in section 201; or
(b) decisions of the Minister under section 501; or
(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2);
other than decisions to which a certificate under section 502 applies.

(2) A person is not entitled to make an application under paragraph (1)(a) unless:

(a) the person is an Australian citizen; or

(b) the person is a lawful non-citizen whose continued presence in Australia is not subject to any limitation as to time imposed by law.

(3) A person is not entitled to make an application under subsection (1) for review of a decision referred to in paragraph (1)(b) or (c) unless the person would be entitled to seek review of the decision under Part 5 or 7 if the decision had been made on another ground.

(4) Decisions referred to in subsection (1) are not reviewable under Part 5 or 7.

(5) For the purpose of reviewing a decision referred to in subsection (1), the Tribunal shall be constituted by a presidential member alone.

(6) Where an application has been made to the Tribunal for the review of a decision under section 201 ordering the deportation of a person, the order for the deportation of the person shall not be taken for the purposes of section 253 to have ceased or to cease to be in force by reason only of any order that has been made by the Tribunal or a presidential member under section 41 of the *Administrative Appeals Tribunal Act 1975* or by the Federal Court of Australia or a Judge of that Court under section 44A of that Act.

(7) In this section, "decision" has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

Special power to refuse or to cancel a visa or entry permit

501. (1) The Minister may refuse to grant a visa to a person, or may cancel a visa that has been granted to a person, if:

(a) subsection (2) applies to the person; or

(b) the Minister is satisfied that, if the person were allowed to enter or to remain in Australia, the person would:

(i) be likely to engage in criminal conduct in Australia; or
(ii) vilify a segment of the Australian community; or
(iii) incite discord in the Australian community or in a segment of that community; or
(iv) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or violence threatening harm to, that community or segment, or in any other way.

(2) This subsection applies to a person if the Minister:

(a) having regard to:
(i) the person's past criminal conduct; or
(ii) the person's general conduct;
is satisfied that the person is not of good character; or

(b) is satisfied that the person is not of good character because of the person's association with another person, or with a group or organisation, who or that the Minister has reasonable grounds to believe has been or is involved in criminal conduct.

(3) The power under this section to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person, is in addition to any other power under this Act, as in force from time to time, to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person.

Minister may decide in the national interest that certain persons are to be excluded persons

502. (1) If:

(a) the Minister, acting personally, intends to make a decision:
(i) under section 200 because of circumstances specified in section 201; or
(ii) under section 501; or
(iii) to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2);
in relation to a person; and

(b) the Minister decides that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person;

the Minister may, as part of the decision, include a certificate declaring the person to be an excluded person.

(2) A decision under subsection (1) must be taken by the Minister personally.

(3) If the Minister makes a decision under subsection (1), the Minister must cause notice of the making of the decision to be laid before each House of the Parliament within 15 sitting days of that House after the day on which the decision was made.

Exclusion of certain persons from Australia

503. (1) A person in relation to whom a decision has been made:

(a) under section 200 because of circumstances specified in section 201; or
(b) under section 501; or
(c) to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Article of the Refugees Convention, namely, Article 1F, 32 or 33(2);
is not entitled to enter Australia or to be in Australia at any time during the period determined under the regulations.

(2) The period referred to in subsection (1) commences, in the case of a person who has been deported or removed from Australia, when the person is so deported or removed.

(3) Different periods may be prescribed under subsection (1) in relation to different situations.

(4) This section does not apply to a holder of a criminal justice visa.

Migration Regulations

SCHEDULE 4 - PUBLIC INTEREST CRITERIA

4014.

(1) If the applicant is affected by either of the risk factors specified in subclauses (2) and (4):

(a) the application is made more than 3 years after the departure of the person from Australia referred to in that subclause; or

(b) the Minister is satisfied that, in the particular case:

(i) compelling circumstances that affect the interests of Australia; or

(ii) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa within 3 years after the departure.

(2) Subject to subclause (3), a person is affected by a risk factor if the person left Australia after the expiry of a period of grace that applied to the person under section 13 of the Act as in force before 1 September 1994, being a period of grace that expired before 1 September 1994.

(3) Subclause (2) does not apply to a person who:

(a) applied for review by a review officer, the Immigration Review Tribunal or the Refugee Review Tribunal; and

(b) left Australia within 7 days of being notified of the decision on the application for review.

(4) Subject to subclause (5), a person is affected by a risk factor if the person left Australia as:

(a) an unlawful non-citizen; or

(b) the holder of a bridging visa class C, D or E.

(5) Subclause (4) does not to apply to a person if:

(a) the person left Australia within 28 days after a substantive visa held by the person ceased to be in effect or an entry permit held by the person expired, as the case requires; or

(b) a bridging visa held by the person at the time of departure was granted:

(i) within 28 days after a substantive visa held by the person ceased to be in effect or an entry permit held by the person expired, as the case requires; or

(ii) while the person held another bridging visa granted:

(A) while the person held a substantive visa; or

(B) within 28 days after a substantive visa held by the person ceased to be in effect or an entry permit held by the person expired, as the case may be.

SCHEDULE 5 - SPECIAL RETURN CRITERIA

5001.

The applicant is not:

(a) a person who left Australia while the subject of a deportation order under:

(i) section 200 of the Act; or

(ii) section 55, 56 or 57 of the Act as in force on and after 19 December 1989 but before 1 September 1994; or

(iii) section 12, 13 or 14 of the Act as in force before 19 December 1989; or

(b) a person whose visa has been cancelled under subsection 501(1) of the Act because the Minister, having regard to the persons's past criminal conduct, was satisfied that the person was not of good character.

5002.

If the applicant is a person who has been removed from Australia under section 198, 199 or 205 of the Act:

(a) the application is made more than 12 months after the removal; or

(b) the Minister is satisfied that, in the particular case:

(i) compelling circumstances that affect the interests of Australia; or

(ii) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa within 12 months after the removal.

APPENDIX FIVE

AUSTRALIA'S CRIMINAL DEPORTATION POLICY

The following is a statement on Australia's Criminal Deportation Policy made to Parliament in November 1992 by the Minister for Immigration, Local Government and Ethnic Affairs, The Hon. Gerry Hand. The Statement was effective from 24 December 1992.

Introduction

1. The Australian Government, on behalf of the Australian community, has the right to decide who will be accepted for permanent residence in Australia and, ultimately, for absorption into full membership of the community by way of Australian citizenship.

2. Parliament vests in the Minister for Immigration, Local Government and Ethnic Affairs the discretion to determine whether resident non-Australian citizens who have been convicted in Australia of certain serious criminal conduct are to be removed from Australia by deportation. In exercising that discretion the Minister is exercising the right of the Australian community to be protected and to choose who will be permitted to remain as a permanent resident.

3. A person liable for criminal deportation has a right to a decision on his/her case as soon as possible after sentencing and has a right to appeal to the Administrative Appeals Tribunal against a decision that he/she be deported, except where the circumstances set out in paragraph 4 below exist. Where the right of appeal exists, the Administrative Appeals Tribunal is invested with determinative powers of review and it is therefore able to overturn a decision by the Minister.

4. This right of appeal is not open to a person whom the Minister has declared should be an excluded person because of the seriousness of the circumstances giving rise to the deportation decision. Where the Minister makes such a declaration, he has an obligation to table notice of the decision before both Houses of Parliament within 15 sitting days of that house after the day on which the decision was made.

5. As there is no right of appeal against the Minister's decision to deport where he declare a person to be an excluded person, the decision of the Minister to make such a declaration is taken in only the most serious circumstances. Such declarations are only made where it is clear that it is in the national interest for the person to be excluded from Australia.

6. It should be recognised that the decision to deport stems from the Minister's responsibility to the Parliament and to the Australian community to protect the community from the possibility of further criminal behaviour or to expel from Australia those non-citizens who have seriously abused the privilege of residence accorded to them by the Australian community.

7. Consistent with Government policy, most weight should be given to the need to protect Australian society. Conversely, less weight should be given to the views of the offender and that person's family and associates, and to the possibility of adverse consequences for them of deportation.

8. The Government recognises Australia's obligations under international law, particularly to the International Covenant on Civil and Political Rights. However, the Government is mindful of the need to balance a number of very important factors, especially:

- the need for community protection against criminal behaviour;
- the requirement to take into consideration the legitimate human rights of an individual;
- the need to protect the rights of other person, including the family of the person concerned; and
- the need to avoid discrimination when making deportation decisions.

Guidelines for deportation

9. The purpose of deporting a person who has been convicted of a criminal offence in Australia is to protect the safety and welfare of the Australian community and to exercise a choice on behalf of the community that the benefit accruing to the community as a whole by his/her removal outweighs the hardship to the persons concerned and his/her family.

10. The greater the potential effect on the community or the greater the potential damage to the community the lower is the acceptable level of risk that the person concerned will commit further offences.

11. Deportation of a person convicted of crime may be appropriate when a person:

- constitutes a threat because there is a risk that he/she will commit further offences if allowed to remain; or
- has committed a crime so offensive to Australian community standards that the community rebels against having within it a person who has committed such an offence; or
- has not established sufficient ties with Australia to have become a full member of the community and, by reason of his/her conduct, is unsuitable for permanent residence in Australia.

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

- production, importation, distribution, trafficking or commercial dealing in heroin or other 'hard' addictive drugs or involvement in other illicit drugs on a significantly large scale (persons who embark upon drug-related crime for financial gain show a callous disregard for insidious effects on the health and welfare of Australia's young people); this does not necessarily apply to persons who use hard drugs for their own consumption who were not involved in the above illegal actions.

- It would be invidious if non-citizen residents who seek to profit from the import or supply of drugs, whether or not that profit is motivated by their own need for illicit drugs, were likely to be allowed to remain in Australia. It is important both as a deterrent and to protect Australian society that it is clearly understood that a person convicted of drug trafficking, which puts at risk the very lives of young Australians, has no place in our society.
- organised criminal activity (whether within Australia only or internationally);
- serious sexual assaults whether or not accompanied by other violence (especially where there has been more than one sexual offence);
- armed robbery;
- violence against the person;
- terrorist activity and assassination;
- kidnapping;
- blackmail;
- extortion.

Crimes against children, because of there vulnerability, take on a special significance, especially inducement to drugs, sexual assaults, violence, kidnapping and crimes taking unfair advantage of children.

13. Social ties developed after the liability for deportation arose, especially after the liability had been brought to the notice of the offender, can be discounted according to circumstances (eg marriage or the immigration to Australia of further family members).

14. Australia does not have an obligation to provide sanctuary for people who have broken the laws of another country. In any case it is neither feasible nor proper for the Australian Government to consider the propriety of the operation of criminal codes in other countries nor, even if it had the resources to obtain sufficient information, to attempt to anticipate likely outcome of any charges overseas.

15. Thus the possibility of further criminal sanctions in the country in which a potential deportee expects to live if deported are generally not relevant to the main issue of protecting the Australian community and may not be persuasive when making a decision on deportations.

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

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

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

19. The most important broad criteria on which judgements will be based are the nature of the crime; the possibility of recidivism; the contribution the person has made to the community or may reasonably be expected to make in the future and the family and/or

social ties that already exist. In particular the following factors will be taken into account when making a decision on whether a deportation order should be issued:

- the nature of the offence as outlined in paragraph 12 and the length of sentence imposed by the court;
- the person's previous general record of conduct. The total criminal history of a person should be given significant weight in making a decision to deport. A person who has been previously warned about the liability for deportation and, notwithstanding that warning, commits a further deportable offence, should expect that the warning will be given serious weight in consideration of his case. A person with several previous convictions against Australian society should usually be judged in the light of that past behaviour;
- the risk of further offences;
- the extent of rehabilitation already achieved, the prospect of further rehabilitation and positive contribution to the community the person may reasonably expected to make;
- the length of lawful residence in Australia, the strength of family, social, business and other ties in Australia.
- the degree of hardship which would be caused to lawful residents of Australia (especially Australian citizens) known to be affected adversely by deportation or conversely the extent of support for deportation from persons directly affected;
- any unreasonable hardship the offender would suffer;
- ties with other countries;
- the relevant obligations of the Commonwealth of Australia under international treaties ratified by the Australian Government;
- the likelihood that deportation of the offender would prevent or inhibit the commission of like offences by other persons.

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

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

21. A person's cultural background should not result in differing applications of the law. While our multicultural society encourages all person to practise their culture and pursue their ideals, this practise must fall within an adherence to the basic values and institutions which form the essence of Australia. Contrary cultural values do not provide an excuse to persons who offend against Australian society.

Claims for refugee status

22. In cases where issues of protection pursuant to the Convention and Protocol Relating to the Status of Refugees are raised, they are considered individually by the Minister. Advice on the application of the Convention and Protocol and whether a person is entitled to the protection of the Convention is provided to the Minister by his Department.

Deportation action

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

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

APPENDIX SIX

AUSTRALIA'S CRIMINAL DEPORTATION POLICY

DRAFT PROPOSED BY DIMA

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

Introduction

1. The Australian Government, on behalf of the Australian community, has the right to decide who will be accepted for permanent residence in Australia and, ultimately, for absorption into full membership of the community by way of Australian citizenship.

2. The Parliament vests in the Minister for Immigration and Multicultural Affairs the discretion to determine whether resident non-Australian citizens who have been convicted in Australia of serious criminal conduct are to be removed from Australia by deportation. In exercising that discretion, the Minister is exercising the right of the Australian community to be protected and to choose who will be permitted to remain as a permanent resident.

3. A person liable for criminal deportation has an expectation that a decision on his or her case as soon as possible after sentencing and has a right to appeal to the Administrative Appeals Tribunal against a decision that he or she be deported, except where the circumstances set out in paragraph 4 below exist. Where the right of appeal exists, the Administrative Appeals Tribunal is invested with determinative powers of review and it is therefore able to overturn a decision by the Minister.

4. The right of appeal to the Administrative Appeals Tribunal is not open to a person whom the Minister has declared should be an excluded person because of the seriousness of the circumstances giving rise to the deportation decision. Where the Minister makes such declaration, the Minister has the obligation to table notice of the decision before both Houses of Parliament within 15 sitting days of that house after the day on which the decision is made.

5. As there is no right of appeal to the Administrative Appeals Tribunal against the Minister's decision to deport where the Minister declares a person to be an excluded person, the decision of the Minister to make such a declaration is taken in only the most serious circumstances where it is clear that it is in the national interest for the person to be excluded from Australia.

6. It should be recognised that the decision to deport stems from the Minister's responsibility to the Parliament and the Australian community to protect the community from the possibility of further criminal behaviour or to expel from Australia those non-citizens who have seriously abused the privilege of residence accorded to them by the Australian community.

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

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

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

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

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

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

Guidelines for deportation

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

- production, importation, distribution, trafficking or commercial dealing in heroin for other 'hard' addictive drugs or involvement in other illicit drugs on a large scale (persons who embark upon drug-related crime for financial gain show a callous disregard for insidious effects on the health and welfare of Australia's young people); this does not necessarily apply to persons convicted of possession of hard drugs solely for their own consumption who were not involved in the above illegal actions.

    - It would be invidious if non-citizen residents who seek to profit from the import or supply of drugs, whether or not that profit is motivated by their own need for illicit drugs, were likely to be allowed to remain in Australia. It is important both as a deterrent and to protect Australian society that it is

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

- organised criminal activity (whether within Australia only or internationally);
- serious sexual assaults whether or not accompanied by other violence (especially where there has been more than one sexual offence);
- armed robbery;
- violence against the person;
- terrorist activity and assassination;
- kidnapping;
- blackmail;
- extortion;
- crimes against children

    - Because of their vulnerability, crimes against children take on a special significance, especially inducement to drugs, sexual assaults, violence, kidnapping and crimes taking unfair advantage of children.

- Crimes involving violence

    - Such crimes are of special concern to the welfare and safety of the Australian community and are to be given significant weight when deciding on deportation.

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

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

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

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

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

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

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

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

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

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

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

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

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

Claims for refugee status

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

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

Deportation action

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

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

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

APPENDIX SEVEN

GLOSSARY

Term	Meaning
Criminal deportation	The deportation of permanent residents and certain NZ citizens who have been convicted of an offence and sentenced to at least 12 months imprisonment, and who committed the offence during their first ten years of residency.
Deportation	The expulsion of a non-citizen from Australia. It occurs after the Minister has made a deportation order. (See chapter one.)
Deportee	A non-citizen in respect of whom a deportation order is in force.
Detention	A process whereby non-citizens are deprived of their liberty (and often held in prison like surroundings) under the authority of the Migration Act.
Exclusion period	In the Migration Regulations, the period during which a non-citizen who has been deported or removed is restricted from applying to re-enter Australia.
Juvenile	A non-citizen who migrated to Australia before 18 years of age.
Non-resident	A non-citizen who is not a permanent resident. The class of non-residents comprises temporary residents and unlawful non-citizens (see definitions below).
Permanent resident	A non-citizen who holds a visa allowing him or her to remain in Australia indefinitely.
Refoulement	The expulsion or return of a refugee to a country where the person's life or freedom is at risk on account of his or her nationality, race, religion, political opinions or membership of a particular social group. (See Appendix Nine.)
Refugee	A non-citizen who comes within the terms of the United Nations Convention Relating to the Status of Refugees. (See Appendix Nine.)

Removal	The mandatory expulsion from Australia of a person who is an unlawful non-citizen. (See chapters one and seven.)
Temporary resident	A non-citizen who holds a temporary visa.
Temporary visa	A visa that allows the non-citizen who holds it to remain in Australia during a specified period, until a specified event happens, or while the holder has a specified status.
Unlawful non-citizen	A non-citizen who never held or no longer holds a visa in effect.

APPENDIX EIGHT

DEPORTATION OF AUSTRALIAN CITIZENS

This appendix addresses two issues concerning the deportation of Australian citizens. These issues were outside the Committee's terms of reference but raised important matters of public interest requiring further investigation.

Context

8.1 As part of the process of gathering evidence for its criminal deportation inquiry, the Committee received evidence concerning the deportation or removal of certain Australian citizens who had committed crimes in this country or overseas. This evidence identified two issues:

- the possible deportation of Australian citizens who had been convicted of criminal offences while in Australia, thereby breaking their citizenship oaths; and
- the deprivation of citizenship of those persons who had become Australian citizens but had failed to advise of their involvement in crimes against humanity.

Possible deportation of Australian citizens convicted of criminal offences in Australia

8.2 The Hon. Mr Clyde Holding, MP, canvassed the possibility of deporting or removing certain Australian citizens for breach of their citizenship oath. He considered that persons who had violated the citizenship oath to uphold Australia's laws by repeatedly committing serious crimes should lose citizenship and be liable to deportation or removal:[1]

> It seems to me that, if we take citizenship as a serious responsibility, if somebody takes an oath to uphold our laws - I am not talking about traffic fines; I am talking about felonies - and continuously breaks the law in a way that can do damage to other Australian citizens, why shouldn't they be charged with breaking their oath? That would be serious. It would then be a matter of discretion, I suppose, for the minister as to whether a conviction would necessarily carry with it the cancellation of citizenship...But, if there is a continuum of criminal activity and a series of convictions, why isn't it open to the minister, if the Commonwealth gave him powers, to say, 'This person never intended to maintain his oath. He continually involves himself in serious breaches of the law. Out.'?

8.3 One witness suggested that the proposal might breach Australia's international human rights obligations in two ways:[2]

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1 Holding, *Transcript*, p. 27.
2 HREOC, *Transcript*, pp. 69-71.

- depriving some people of Australian citizenship might leave them stateless; and
- having one set of rules for natural born citizens and another for those who acquired citizenship might be discriminatory.

8.4 Other witnesses suggested that it might be very difficult to prove an initial intention to flout the citizenship oath.[3]

Possible deportation of Australian citizens who had been involved in crimes against humanity

8.5 The Executive Council of Australian Jewry, in their submission and oral evidence, argued that Australian citizens who had been involved in crimes against humanity should be capable of being stripped of their citizenship under the Australian Citizenship Act and deported or removed to face justice. The Council cited the efforts being made by the government of Canada to revoke citizenship after a civil hearing, and urged the Australian government to adopt similar measures:

> What Canada has done in the last two years is to say, 'Well, there are serious cases here with prima facie evidence. We cannot get a conviction on criminal grounds but we are going to do something about it,' and they turned to this very process that we are outlining today: that is, revoking citizenship for individuals involved in crimes against humanity. [4]

8.6 The Hon. Clyde Holding strongly supported aspects of their submission. He argued that more stringent measures should be directed against those involved in crimes against humanity, as in the case of Konrad Kaleijis, where there was prima facie evidence that he failed to disclose his involvement in war crimes to the immigration authorities at the time of his admission to Australia.

8.7 In Mr Holding's opinion, an applicant who had been involved in crimes against humanity and who had failed to disclose this fact when seeking admission to Australia should face prosecution. To conceal such a fact should be regarded as a serious offence in its own right, and the effluxion of time should not operate to mitigate the seriousness of the offence. The offender should be subject to criminal charges to be dealt with by the courts, and if the person were found guilty, the grant of citizenship should be regarded as void and the Minister should have a discretion to institute deportation proceedings.

8.8 Other members raised a number of concerns about other aspects of the Executive Council's proposal. Senator Judith Troeth highlighted problems that could arise from the issue of statelessness. [5] The Right Hon. Mr Ian Sinclair, MP, identified problems for those who had already taken out citizenship if the system were to be changed:

> [T]here is a problem for a country like Australia if we, as a country of migrant destination, create uncertainty about the nature and status of

3 Law Society of NSW, *Transcript*, p. 27.
4 Executive Council of Jewry, *Transcript*, p. 234.
5 Troth, *Transcript*, pp. 224-225.

> our citizenship beyond that which was there when they were first admitted as citizens. [6]

He also expressed concern that a person might be deprived of citizenship without being convicted of a criminal offence.

Outcome

8.9 The Committee resolved that these citizenship matters lie outside its terms of reference into criminal deportation of non-citizens. Because of the public interest in these matters, however, the Committee resolved to outline how these important matters were raised and to report the contents of the submissions and exchanges.

8.10 The Committee advised the Minister for Immigration and Multicultural Affairs of the issues. The Minister indicated that he had noted the comments relating to Australian citizenship, particularly those made by the Hon. Clyde Holding, MP. He advised that he had asked that these issues be brought to the attention of the Australian Citizenship Council for more detailed consideration.[7]

6 Sinclair, *Transcript*, p. 226.

7 Letter by the Honourable Mr Philip Ruddock, MP, to the Chair of the Joint Standing Committee on Migration, dated 21 January 1998.

APPENDIX NINE

DEPORTATION AND AUSTRALIA'S INTERNATIONAL LAW OBLIGATIONS

Australia has accepted international legal obligations by being party to a number of United Nations conventions and treaties. Such obligations must be taken into account when reviewing the laws, policies and practices relating to criminal deportation.

The following treaties create obligations that affect Australia's criminal deportation scheme.

1. The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is a treaty which was adopted in 1966. As at 30 June 1996 the treaty had 132 States Parties (including Australia).

The rights contained in the ICCPR apply to all individuals within Australian territory and must be applied without distinction of any kind, including national origin. Article 2 (1) of the ICCPR provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ICCPR Covenant, therefore, extends rights (such as the right to life enshrined in Article 6(1)) to permanent residents and non-citizens who are present lawfully within Australian territory and subject to its jurisdiction, including individuals subject to criminal deportation proceedings.

Article 13 of the ICCPR provides:

> An alien lawfully in the territory of a State party to the present Convention may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

This Article is applicable to all procedures aimed at the obligatory departure of non-citizens, including deportation and removal.

2. The Second Optional Protocol to the ICCPR

The Second Protocol to the ICCPR was adopted in 1989 with the primary objective of eliminating the death penalty. Following the abolition of capital punishment (by law) in all its States and Territories, Australia became a party to this Protocol in 1990. As at 30 June 1996, there were 30 States Parties to the Protocol.

The *Migration Act 1958* still refers to the death penalty as one of the grounds that render a non-citizen liable to deportation.

3. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 (CAT)

Article 3 of the Convention refers to extradition and the obligations which prohibit and prevent torture and provides:

(1) No State Party shall expel, return *("refouler")* or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The obligations of this Article clearly apply to deportation and removal under the *Migration Act 1958*.

4. The Convention on the Rights of the Child (CROC)

The CROC was adopted in 1990. This Convention was not qualified by Australia at the time of signing (unlike the United Kingdom, which included a reservation to the Convention in relation to immigration law and decisions on deportation).

One of the most relevant international obligations applying to criminal deportation arises under Article 3 of the Convention, which provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 9(4) of the Convention provides that where a child is separated from his/her parents as a result of any action initiated by a State Party, such as the detention, imprisonment, exile, deportation, or death of one or both parents or the child, the State Party has an obligation, on request, to provide information concerning the whereabouts of the absent family member unless the provision of the information would be detrimental to the well-being of the child.

Article 37 provides that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and that neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

The High Court has resolved that Australia's ratification of the CROC obliges decision-makers to advise the deportees' children of a decision to deport and to provide them with a further opportunity to present information relevant to their best interests.

5. The United Nations Convention Relating to the Status of Refugees

This Convention imposes restrictions on the deportation of persons who are determined by the Contracting State to the Convention to be a refugee under their established procedures.

The relevant provisions of the 1951 Convention are Articles 31, 32 and 33, which read as follows:

Article 31: Refugees Unlawfully in the Country of Refuge

(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movement of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32: Expulsion

(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

(2) The expulsion of such a refugee shall only in pursuance of a decision reach in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

(3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period that internal measures as they may deem necessary.

Article 33: Prohibition of Expulsion or Return *("Refoulement")*

(1) No Contracting State shall expel or return *("refouler"*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable ground for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime constitutes a danger to the community of that country.

6. The United Nations Convention on the Reduction of Statelessness, 1961

The UN Convention on the Reduction of Statelessness, to which Australia is a State Party, came into effect in December 1975. The Convention outlines the rights and obligations of Contracting States in relation to the issues of nationality and statelessness.

Under Article 8 of the Convention:

(1) A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.

Article 8(3) of the Convention, however, sets out exceptions to this provision:

> Notwithstanding the provisions of paragraph 1 of this article, a Contacting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:
>
> (a) That, inconsistently with his duty of loyalty to the Contracting State, the person
>
> (i) has, in disregard of any express prohibition by the contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
>
> (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;
>
> (b) That the person has taken an oath, or made a formal declaration of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

Under Article 8 (4) of the Convention, contracting States have an obligation not exercise the powers of deprivation under the Convention, except in accordance with law. It also provides that the person concerned maintains the right to a fair hearing by a court or other independent body.