

## 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.*

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#### 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.<sup>1</sup>

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.<sup>2</sup>

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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.<sup>3</sup>

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,<sup>4</sup> 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.<sup>5</sup> The Australian Capital Territory Government also advocated mandatory deportation for non-citizens convicted of crimes with lengthy sentences.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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

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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.<sup>9</sup> 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."<sup>10</sup>

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<sup>11</sup> and the decision of the High Court in Teoh's case.<sup>12</sup>

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.<sup>13</sup>

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*

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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.<sup>14</sup>

6.19 The revised draft policy treats the interests of deportee's children as a primary consideration in the deportation process.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

### **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<sup>18</sup> 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

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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).

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

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.<sup>23</sup>

### **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.<sup>24</sup> 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

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19 AAT, *Submissions*, pp S390-391.

20 Cronin, *Submissions*, p S365.

21 ECCQ, *Submissions*, p. S26.

22 RSL, *Submissions*, p. S248.

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

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.<sup>26</sup> The Northern Territory Government considered that "victims [were] entitled to a say".<sup>27</sup> On the other hand, the Queensland Government considered that victims' rights were adequately addressed in the review process.<sup>28</sup> The AAT also pointed to the practical difficulties in using a victim's views in assessing the broader objective of protecting the entire community.<sup>29</sup>

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".<sup>30</sup> 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".<sup>31</sup>

6.31 A Victorian lawyer reported his recent experience of a case where, to minimise discomfort and distress,<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup>

## Conclusion on obtaining victims' views

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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.

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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.<sup>36</sup>

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.<sup>37</sup>

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.

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36 DIMA, *Transcript*, p. 278.

37 DIMA, *Submissions*, p. S298.