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

---

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.