Joint Standing Committee on Migration—Report on Deportation of Non-Citizen Criminals

The Joint Standing Committee on Migration's Report on Deportation of Non-Citizen Criminals was tabled in the Parliament on 29 June 1998. Overall, the Committee found (at page xvii) 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 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.

Review of deportation decisions

The Committee noted that most submissions, including the Administrative Review Council's, supported retention of the independent merits review system. The Department of Immigration and Multicultural Affairs (DIMA) suggested making AAT powers recommendatory whereas the AAT and the NSW Law Society argued that reinstating recommendatory powers (which existed until 1992) would politicise the review scheme and diminish the independence of the system (the Society also argued that that system had been tried and had failed).

In a supplementary submission DIMA 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. The Committee noted that the majority of the Senate Legal and Constitutional Legislation Committee had found that national interest powers in the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997, which enabled the Minister to exclude merits review (by the Refugee Review Tribunal and Immigration Review Tribunal) if the Minister believed such review would be contrary to the national interest, 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.
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> 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 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.

The Committee concluded that, although the AAT overturned less than 20% of the initial deportation decisions, when it did its determinations aroused ministerial and public disquiet which posed a threat to public confidence in

the system. The initial DIMA proposal for recommendatory powers would better reflect the responsibility of the Minister but had too many practical difficulties. DIMA's supplementary proposal (for a ministerial power to set aside decisions) would "ensure an appropriate balance between ministerial responsibility and the benefits of merits review"(para 3.39) and the Committee so recommended (recommendation 1).

The Committee found that a power, exercisable by the Minister alone, to set aside Administrative Appeals Tribunal (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 recommended that 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 the power by the Minister to a formal review by the appropriate committee of the Parliament three years after the tabling of this report (Recommendation 1).

The ten year rule

Non-citizens who are lawfully resident in Australia for 10 or more years before committing a relevant offence are exempt from criminal deportation. The Committee considered a number of arguments in favour of different treatment for those who arrived as children or young persons but did not favour amendment of the rule, noting that the rule was applied in accordance with guidelines and these should be amended to take account of any particular hardship or potential injustice (Recommendation 2).

The Committee did not favour the proposal (from DIMA and the ACT Attorney-General) to replace the 10 year rule with a sliding scale of liability where the seriousness of the offence was weighed against the length of time spent in Australia. The Committee considered that the scale would itself be arbitrary and recommended instead that the 10 year rule be abolished for very serious offences which would be specified in regulations (Recommendation 3). The Committee did not support mandatory deportation but recommended strengthening provisions for repeat offenders (Recommendations 4 & 5).

Arrangements with State and Territory governments

Recommendations 6, 8 & 9 are concerned with obtaining information from State authorities, recommendation 20 with arrangements with other countries and recommendation 7 with the appropriate time to hold a deportation inquiry. Recommendations 10 - 12 are concerned with obtaining the views of the non-citizen criminal, his/her family and the views of any victims of the crime and Recommendation 19 is to expand the list of sources who may be contacted to provide information about the non-citizen.

Removal of criminals

The Committee discusses the overlap between provisions which enable

persons to be removed from Australia (those without a valid visa or whose visa is cancelled) and the criminal deportation provisions. The Committee noted that it is possible to circumvent the 10 year rule by cancelling the permanent visas of non-citizens and having them removed from Australia rather than deported. However, a non-citizen who is removed may apply for a visitor's visa after 3 years or migrant entry after only one year. Non-citizens who have been deported or whose visa are cancelled for criminal conduct are excluded for life.

The Committee considered that this gave greater rights to non-residents than to permanent residents and recommended that all non-citizens removed because of criminal convictions should be subject to the same limitation as applies to criminal deportees (Recommendation 13). In response to evidence against the lifetime ban on re-entry, the Committee recommended that the Minister be given power to grant a visa to a previously deported person, in the public interest or on compassionate or humanitarian grounds, that such a power should not be subject to either merits review or judicial review but that Parliament should be advised of the reasons within 15 sitting days (Recommendation 17).

Adequacy of existing deportation arrangements

The Committee recommended that criminal deportation should be expanded to encompass mentally ill non-citizens who have committed actions normally expected to attract a sentence of at least 12 months, and whose actions demonstrate their continuing threat to society (Recommendation 14). Other recommendations deal with multiple offences which each result in a sentence of less than 12 months (Recommendation 15), removal of references to death sentences (Recommendation 16) and deportation to places other than the deportee's country of nationality at the deportee's request or with their concurrence (Recommendation 21).

The Committee also recommended that the Ministerial policy statement should be revised 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 (Recommendation 18).

Australian Law Reform Commission Issues Paper 24

In April 1998, the Australian Law Reform Commission released an issues paper concerning federal review tribunals and the adversary system, *Issues Paper 24: Review of the adversarial system of litigation—Federal tribunal proceedings.* Comments and submissions were sought by 17 July 1998.

The issues paper dealt with a wide range of issues concerning federal review tribunals. A number of the issues and questions raised by the Commission are mentioned below.

Representation and Participation

- restricting non-legal representation:

  – the paper notes that federal merits review tribunals do not place any particular restrictions on non-legal representation. However, in some other jurisdictions non-legal representatives are restricted. For example, in the Victorian Administrative Appeals Tribunal representation by a person other than a legal practitioner at a hearing in its general division is only permitted with the consent of the