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.