

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 Contracting 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.