

HUMAN RIGHTS COMMISSION

REPORT NO. 4

**Human Rights and the
Deportation of Convicted Aliens
and Immigrants**

JUNE 1983

Australian Government Publishing Service
Canberra 1983

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ISBN 0 644 02636 7

Report No. 1 *The Australian Citizenship Act 1948* (August 1982)

Report No. 2 *Proposed A.C.T. Mental Health Ordinance 1981* (October 1982)

Report No. 3 *Testamentary Guardianship in the Australian Capital Territory* (April 1983)

Printed by C. J. **THOMPSON**, Commonwealth Government Printer, Canberra

Human Rights Commission

G.P.O. Box 629
Canberra, A.C.T. 2601

10 May 1983

Senator The Hon. Gareth Evans
Attorney-General
Parliament House
Canberra, A.C.T. 2600

Dear Attorney-General,

Pursuant to paragraphs 9 (1) (a) and (c) of the *Human Rights Commission Act 1981* this report is presented to you following the Human Rights Commission's examination of the human rights which should be taken into account when consideration is being given to making deportation decisions under sections 12 and 13 of the *Migration Act 1958*.

Yours sincerely,

A handwritten signature in black ink on a light-colored rectangular background. The signature is written in a cursive style and reads "Roma Mitchell".

Chairman
for and on behalf of the
Human Rights Commission

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THE FUNCTIONS OF THE COMMISSION

Section 9 of the *Human Rights Commission Act 1981* reads:

9. (1) The functions of the Commission are—

- (a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;
- (b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and-
 - (i) where the Commission considers it appropriate to do so—endeavour to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters—to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;
- (c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;
- (d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;
- (e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;
- (f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;
- (g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;
- (h) to perform-
 - (i) any functions conferred on the Commission by any other enactment;
 - (ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and
 - (iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the *Gazette*, to be complementary to other functions of the Commission; and

- (j) to do anything incidental or conducive to the performance of any of the preceding functions.
- (2) The Commission shall not—
 - (a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or
 - (b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).
- (3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organisations.

I. INTRODUCTION

1. The Commission has prepared this report on the human rights aspects of decisions to deport aliens and immigrants convicted of serious crimes following the receipt of a number of complaints by persons who have received deportation orders, most of which have been made under section 12 of the *Migration Act 1958*. While the complaints are the subject of separate action, it is the Commission's opinion that the importance of the issues warrants a general report which sets out, to assist in the making of deportation decisions under sections 12 and 13 of that Act, what it sees as the main relevant human rights considerations.

2. In making this report, the Commission does not address itself to the administration of the Migration Act in respect of deportation: that would need to be the subject of a separate inquiry.

3. Nor does the report canvass the whole area of deportation: it focuses on human rights aspects of decisions to deport taken pursuant to sections 12 and 13 of the Migration Act. In particular, it is not concerned with the weight which should be attached to particular sorts of offences in making deportation decisions. These matters lie outside the jurisdiction of the Commission.

4. Section 12 of the Migration Act gives the Minister for Immigration and Ethnic Affairs a discretion to order the deportation of aliens convicted in Australia:

- (a) of crimes of violence against the person (including attempts);
- (b) of extortion by force or threat (including attempts);
- (c) of any other offence involving a sentence of a minimum of one year's imprisonment.

The section provides that the Minister 'may, upon the expiration of, or during' the period of imprisonment, order the deportation of the alien.' The Commission understands that section 12 orders are almost invariably made before the expiry of each term of imprisonment and supports this procedure as giving notice to the person ahead of his release.

5. Section 13 of the Migration Act gives the Minister a discretion to order the deportation of immigrants who have committed certain offences within five years of their entry into Australia, including offences punishable by imprisonment for one year or longer. Sections 12 and 13 tend to overlap in their application to alien immigrants during the first five years of their residence in Australia, but section 13 applies not only to aliens, but also to British subjects, Irish citizens and protected persons while they retain the status of immigrant.

¹ Section 12, and other relevant sections of the Migration Act, are set out in Appendix 1.

II. WHY SHOULD HUMAN RIGHTS FACTORS BE TAKEN INTO ACCOUNT IN DEPORTATION DECISIONS?

6. Human rights must be observed when deportation decisions are being taken. There are a number of reasons for this.

7. First, Australia is bound in international law by the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Convention) which contain rules affecting these decisions. Like the parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, described in the *East African Asians* case, Australia has:

. . . agreed to restrict the free exercise of [its] . . . powers under general international law, including the power to control the entry . . . of aliens, to the extent and within the limits of the obligations . . . assumed under this treaty.'

For the purposes of this report, the most relevant international instruments are the ICCPR, the Declaration of the Rights of the Child (the Declaration) and the Racial Discrimination Convention.

8. Second, the Executive Government should exercise its powers in accordance with Australia's international obligations: see *Phansopkar's* case.¹ This point is particularly relevant where the legislation does not define the basis on which decisions are to be taken, as in the case of sections 12 and 13 of the Migration Act.

9. Third, the Commonwealth Parliament having enacted the *Human Rights Commission Act 1981* and the *Racial Discrimination Act 1975*, ways are laid down in Australia's domestic law for implementation of a range of international human rights instruments ratified or supported by Australia. The Human Rights Commission Act binds the Commonwealth, and the Racial Discrimination Act binds both the Commonwealth and the States. The Human Rights Commission Act envisages that the administration of Commonwealth law, as well as the law itself, will be adjusted in conformity with Australia's international obligations as identified by the Commission: preamble and section 9. Just as the traditional right of the States Parties to the ICCPR—including Australia—to exclude aliens has been modified by international treaty law, so too is it envisaged that Australia's domestic laws relating to deportation will be modified in accordance with its international obligations. The unfettered right of the Executive Government to deport aliens is in the process of modification. One of the objects of this report is to advise how this modification should take place.

10. Additionally, there is a growing body of opinion, reflected in decisions in several Australian courts and Tribunals, that humanitarian considerations should be taken into account in deportation decisions. This body of opinion is consistent with the proposition that human rights considerations should also be taken into account because of the close links between humanitarian and human rights concepts.²

11. Though it is probably accurate to say that the trend of judicial opinion has moved away from the view that the Minister has an absolutely unfettered discretion in making

1. (1973) 3 EHRR 76 at page 79.

2. [1976] 1QB 606 at page 626.

3. A note of the main European cases appears in Appendix 2 and of the main High Court, Federal Court and Administrative Appeals Tribunal cases in Appendix 3.

decisions under sections 12 and 13 of the Migration Act, it certainly cannot be said that as the law now stands, he is required to do more than take humanitarian considerations into account when considering all relevant circumstances for and against a proposed deportation. Putting it at its highest, taking sections 12 and 13 of the Migration Act as they now stand, and ignoring for the moment the Human Rights Commission Act, the Minister is not required to give any special weighting to humanitarian considerations. Where the evidence requires it, he may not be able to ignore them, but he need not prefer humanitarian considerations or human rights factors as against other criteria and policy considerations. The result could be that in a particular case a lawful decision to deport made under section 12 or section 13 of the Migration Act and which survived the various appellate processes available to deportees nevertheless could be inconsistent with or contrary to human rights following an inquiry into a complaint made under the Human Rights Commission Act. The purpose of this report is to make recommendations directed at changing the law so that all deportation decisions lawfully made are consistent with human rights.

III. WHAT HUMAN RIGHTS CONSIDERATIONS ARE TO BE TAKEN INTO ACCOUNT IN DEPORTATION DECISIONS?

(a) Legislative Provisions

12. The Commission, in identifying the human rights considerations relevant to deportation decisions, has taken the approach that the Human Rights Commission Act and the Racial Discrimination Act together comprise a legislative scheme and are complementary one to the other. Both pieces of legislation are administered by the Commission and the Commission's role is to implement both statutes and accordingly to promote the international obligations to which they are related. This approach is consistent with the statement by the Attorney-General in his Second Reading Speech on the Human Rights Commission Bill 1979 that—

One of the Government's primary objectives in establishing the Human Rights Commission is to achieve some rationalisation of activities in a field where there is a present tendency towards rapid proliferation.

13. The Commission takes the view that the instruments in the schedules of the Human Rights Commission Act can also be involved in a complaint under the Racial Discrimination Act. Sub-section 9 (1) of that Act is not limited in its operation to the Racial Discrimination Convention set out as a schedule to that Act: it talks of 'any human right in the political, economic, social, cultural or any other field of human life') In the Commission's view, this reference must at least extend the operation of section 9 of the Racial Discrimination Act to render unlawful acts of racial discrimination which infringe the rights set out in the instruments which the Parliament in the Human Rights Commission Act has declared as defining human rights for the purposes of the Commission.

(b) The International Covenant on Civil and Political Rights (ICCPR) and the Declaration of the Rights of the Child (the Declaration)

14. The following paragraphs discuss the Articles of the ICCPR and the Principles of the Declaration which the Commission considers relevant to the exercise of the power to deport. They also refer to relevant decisions by the European Commission of Human Rights (the European Commission) in interpreting comparable provisions of human rights treaties operating in parts of Europe.

15. (i) '*Cruel, inhuman or degrading treatment*'—ICCPR Article 7.² Most complaints about decisions to deport that have come to the attention of the Commission have involved alien immigrants who have been in Australia for many years and have in many cases become an integral part of the Australian community, although the order to deport has arisen from conviction of a criminal charge. It has been put to the Commission that in these cases deportation could amount to cruel, inhuman or degrading treatment. On occasions, the inhumanity of the order has been emphasised because the person to be deported is a member of a family. Family aspects of deportation are dealt with later, but they can exacerbate the cruel or inhuman nature of the decision to deport. However, the inhumanity can apply whether or not the person is a single or a family man and whether or not he' has retained close links with members of his ethnic group.

2. The text of relevant sections of the Racial Discrimination Act and Convention appears at Appendix 4.

3. Article 7, and other relevant Articles in the ICCPR, are set out in Appendix 5.

4. In this report, a reference to the male gender, unless the context requires otherwise, includes the female gender.

16. For the purposes of constitutional law, an alien remains an alien until he takes out Australian citizenship, however long he has been in Australia and irrespective of how far he has become a member of the Australian community.⁴ The anomaly and hence the cruel and inhuman aspects are inevitably emphasised as the period of stay extends and the Commission will be considering, in its review of the Migration Act, whether a time limit should be imposed in section 12 as it is in section 13. An alternative would be to include in section 12 a rebuttable presumption that it would not apply to an alien who had resided in Australia for a lengthy and stated period, say 10 years.⁵ In the computation of this period, any time in prison should, however, be excluded because it does not show effective absorption into the Australian community.

17. The Commission has reached the view that deportation may, in certain circumstances, amount to an act that is inconsistent with Article 7 of the ICCPR. The Commission notes that in this respect its opinion is consistent with the approach taken by the European Commission which tends to apply the same sorts of human rights principles to both immigration and deportation complaints, which are described as exclusion cases.⁶ That Commission is prepared, in an appropriate case, to hold that exclusion amounts to inhuman treatment or an affront to human dignity capable of constituting degrading treatment contrary to Article 3 of the European Convention mentioned above, which is cast in similar terms to Article 7 of the ICCPR.

18. (ii) *The rights of aliens to reasons, representation, and a review* _ICCPR Article 13.⁷ Article 13 requires that before deportation an alien lawfully in Australia is entitled, except where compelling reasons of national security require, to:

- submit reasons against his expulsion;
- have his case reviewed;
- be represented at the review.

Thus Article 13 requires the introduction into deportation decisions taken under section 12 (except those involving compelling reasons of national security) of concepts akin to those found in the rules of natural justice.

19. The Migration Act provides for the Minister to reach a decision to deport (sections 12, 13 and 48), but under section 66E aliens and immigrants are allowed to appeal against the decision to the Administrative Appeals Tribunal. The Commission supports making the Administrative Appeals Tribunal a reviewing agency for deportation decisions. However, the question arises whether the appeal provisions comply with the natural justice element in Article 13 because in section 12 and 13 cases the Tribunal, where it differs from the Minister, has a power only to recommend—the Tribunal's decision is not substituted for that of the Minister.⁸

4. *Pochi v. Macphree* (1982) 56 ALJR 878 at pp. 882 and 883.

5. The Commission notes the policy of the Australian Government to eliminate the distinction between aliens and immigrants so that all immigrants, regardless of origin, can be free from the threat of deportation after a certain time: Policy Statement—Immigration and Community Relations, the Hon. Mick Young, M.P., pages 6 and 7; Ministerial statement by the Minister for Immigration and Ethnic Affairs, the Hon. Stewart West, M.P., on 4 May 1983.

6. e.g. *East African Asians v. United Kingdom* (1973) 3 EHRR 76, where the refusal of the U.K. Government to permit the immigration of the husbands of Commonwealth citizens already lawfully resident in the United Kingdom infringed Article 3.

7. The full text is reproduced in Appendix 5.

8. The jurisdiction of the Administrative Appeals Tribunal in relation to the Migration Act is confined to sections 12, 13 and 48 and, in relation to these sections, its powers are recommendatory where it differs from the Minister. Where it agrees with him, it affirms the deportation order in question.

20. It is probable that where the Tribunal affirms the decision of the Minister, the requirements of Article 13 are met. Where the Minister is minded to reject a recommendation from the Administrative Appeals Tribunal to revoke a deportation order, the requirements of Article 13 would, in the Commission's view, oblige the Minister to apply concepts akin to those found in the rules of natural justice.⁹ To satisfy these rules, the deportee would need to be given a fresh opportunity to submit reasons against his expulsion and to be represented. Although the wording of the Article allows for this review to be undertaken by the Minister himself, it also envisages review by a person or persons designated for the purpose. In the view of the Commission, the requirements of Article 13 would be met best if the case was remitted to the Tribunal for further consideration if the reason for rejection of its earlier recommendations is that there is fresh evidence, or there are new considerations, to be taken into account.

21. A more general question also arises, which is whether the *review* required by Article 13 is satisfied by a recommendation from the Administrative Appeals Tribunal, which does not take effect as a decision, but serves only as a recommendation to the Minister if the Tribunal is of the opinion that a deportation order should be revoked.¹⁰ Some members of the Commission are of the opinion that the requirement in Article 13 for a review of deportation decisions can only be met by entrusting a power of decision in all cases in the Administrative Appeals Tribunal." There is no doubt that if the power of ultimate decision was entrusted to the Tribunal in deportation cases, the requirements of Article 13 would be met and, at the same time, consistency achieved throughout the range of the Tribunal's jurisdiction. Nevertheless, in the view of some members of the Commission the requirements of Article 13 are already being met under present arrangements, by which the powers of the Tribunal are those of recommendation where it differs from the Minister. In support of this view it can be argued that the Minister rarely disagrees with the Tribunal, and that where he does so, his own decisions can be the subject of Parliamentary discussion and, ultimately, review by the electors of Australia. Furthermore, it can be said that deportation decisions frequently involve issues of political policy which have been entrusted traditionally to the Executive, in whose hands they should ultimately reside. This is the present position.

22. The Commission is of the opinion that it does not, at this stage, need to reach a concluded view on this question, since the main thrust of its report is directed towards ensuring that human rights are not infringed in the initial decisions on deportation. This report is less concerned with appellate procedures in deportation than with the initial decisions that are made in this area. At the same time, questions of appeal procedures do arise in a consideration of Article 13 and the Commission is unanimous that at the very least, the present jurisdiction of the Administrative Appeals Tribunal in deportation cases should be maintained. It will return to the issue in the course of its proposed review of the Migration Act.

23. (iii) *Double punishment—ICCPR Article 14.7.*¹² It has been suggested to the Commission that deporting a person after he has served a prison sentence for an offence.

9. It is possible that the Minister may, in any event, be bound by the rules of natural justice if he differs from the Tribunal in any respect adverse to the alien: *Taylor v. Public Service Board (N.S.W.)* (1976), 50 ALJR 705, at page 713, *per* Murphy J.

¹⁰ It is recognised that there is authority that, for deportation decisions, where no Administrative Appeals Tribunal hearing is provided for, the Minister is not bound by the rules of natural justice: *Salemi v. Minister for Immigration* (1977), 51 ALJR 538. In the end, the applicability of the rules of natural justice to deportation decisions is a matter for the courts, but as indicated in the text the Commission considers Article 13 effectively introduces natural justice requirements.

11. Where the Administrative Appeals Tribunal does have jurisdiction it normally has the power of ultimate decision in an appeal. As far as can be ascertained, it is only in deportation cases that the Tribunal is confined to a power of recommendation.

12. The full text is reproduced in Appendix 5.

in Australia is inconsistent with paragraph 7 of Article 14 of the ICCPR, which provides that no-one is to be liable 'to be tried or punished again for an offence for which he has already been finally convicted'. For an alien who has received a sentence appropriate to a crime to be under threat of deportation separates him from the general run of citizens and places him under threat of a second form of punishment. Although it is true that imprisonment for a crime which brings section 12 of the Migration Act into operation is imposed by the courts, and deportation is pursuant to a decision taken by the Government, in the eyes of most people imprisonment and deportation are both sanctions imposed by the State. In the view of the Commission that is the substance of the matter, although in technical terms it may be that the deportation process and the act of deportation may not amount to trial and further punishment.¹³

24. The Department of Immigration and Ethnic Affairs has put it to the Commission that the decision to deport is neither a second punishment nor an additional punishment: it is an executive decision taken by the Minister, taking into account both the public interest of the Australian community and the individual circumstances of the deportee. Notwithstanding this view, the Commission is of the opinion that whatever the intention of the Minister, there could in fact be double punishment in certain circumstances. Thus, double punishment is prima facie involved if the Minister, in making his decision to deport, relies exclusively, or almost so, on the fact of the conviction and the evidence which supported it. In such circumstances, he would be punishing the alien again on the same facts that had led to his being imprisoned by the court. The two punishments would differ in form and effect, but the substance of the matter is that there would be two punishments nevertheless, and, in the Commission's view, there will be cases where the Minister's punishment would be the more drastic, e.g. where the alien had resided in Australia for a lengthy period and had established effective ties in Australia, particularly family ties.

25. If, however, in making his decision to deport, the Minister relies on fresh evidence which has been admitted and found to have probative value by the Administrative Appeals Tribunal, then double punishment would not always be involved, particularly if the fresh evidence showed that the alien was quite clearly involved in serious criminal activity for which, for various reasons, it was impracticable to prosecute him. In these cases, the Commission is nevertheless of the view that Article 13 and the proper processes of natural justice should be complied with.¹⁴ It notes that if existing Australian law does not provide a sufficient penalty to administer an adequate sentence for a particular offence, then that law should be changed and the deportation decisions under the Migration Act should not be used to supplement that law for a particular class of persons.

26. Sometimes it is argued that aliens and immigrants coming to Australia are here on probation and are subject to deportation if they offend, or that there is an implied contract between them and the Australian people. It would then follow, so the argument goes, that the alien and the immigrant implicitly consent to deportation if they fail to observe their probation or contract by committing the criminal offences caught by sections 12 and 13 of the Migration Act. To state these propositions is to expose their

¹³ Some of the issues associated with this question have been considered by the Administrative Appeals Tribunal and the Federal Court. The general thrust of the observations of the Tribunal has been towards the view that where the motive of deterrence of other potential offenders is involved in the issue of a deportation order, deportation constitutes a further punishment. In the Federal Court, consideration has been given to the question whether deportation, because it seems like the kind of penalty that only judges can administer, represents an exercise of judicial rather than executive power. For further details see Appendix 3.

¹⁴ See also the discussion at paragraph 20 above.

slender logical foundations. The concepts of probation and implied contracts are false analogies, for the status of aliens and immigrants is dealt with by legislation in which these concepts are not to be found. Of greater significance in this context is that while the general criminal law applies equally to all persons within Australia, sections 12 and 13 of the Migration Act do not. The sections are seen by many to be, in effect, a supplement to the sanctions imposed by the criminal law, with the inevitable feeling that discrimination against aliens and immigrants is involved", even though on a narrow interpretation there may be no technical inconsistency with Article 26 of the ICCPR, which requires that the law be administered without discrimination. There is a further problem in that with the many decisions being taken by the Minister and courts and tribunals in relation to deportation under sections 12 and 13, it is difficult to assert that there is equal administration of the law. As equality in administration of the law is the key element in Article 26, it seems to the Commission that there may indeed be breaches, or a risk of breaches, of that Article as matters stand at present. The argument about the welfare of the Australian community as a whole is discussed in paragraph 43 below.

27. It has also come to the notice of the Commission that in certain cases aliens deported to their countries of origin for offences committed in Australia are liable to be punished again in their countries of origin for the same offences or on the same set of facts for which they have already been punished in Australia. In such cases, it is impossible to make a fine distinction between the source of the punishment in each case. Both sorts of punishment are imposed by the courts, the distinction being that the courts in question are in different countries.

28. Nevertheless, although the 'double punishment' argument weighs heavily with the Commission, the Commission recognises that, in certain extreme cases (for example, compelling reasons of national security), the power of deportation must remain available to a national government as an option that may be used. This 'extreme case' view of deportation is consistent with Article 13 of the ICCPR under which the natural justice type of procedures envisaged by that Article may be modified when compelling reasons of national security are involved.

29. (iv) *The entitlement of the family to protection*—ICCPR Article 23.1 and Declaration Principle 6.¹⁵ Both the ICCPR and the Declaration enjoin States who are parties to them to protect and promote the interests of children. Particularly where a person has been in Australia for many years, he is likely to have married and children may be involved. The very fact that a family is in existence, and that its interests must be protected and promoted, places on those making deportation decisions an obligation to deport only when there is a greater interest at stake than that of protecting the family and, in particular, the children, irrespective of whether they were born in Australia. This obligation is additional to, though it is clearly associated with, the requirement of Article 7 that persons be not subject to cruel, inhuman or degrading treatment or punishment." The Commission considers that where a family is involved, the threshold for the operation of Article 7 is lowered, i.e. it may well be more inhuman to deport a member of a family than it would be to deport an isolated individual.

¹⁵ The Commission is in agreement with the announced policy of the Australian Government to eliminate the distinction between immigrants and aliens (see Ministerial statement by the Minister for Immigration and Ethnic Affairs, the Hon. Stewart West, M.P., on 4 May 1983).

¹⁶ The text of Articles 17, 23, 24 and 26 of the ICCPR is reproduced in Appendix 5 and the text of Principles 1, 2 and 6 of the Declaration is set out in Appendix 6.

¹⁷ See paragraphs 13-15 above.

30. Though Article 23.1 is the most relevant provision of the ICCPR in this context, in certain exceptional cases issues could also arise under Article 17 which, amongst other things, deals with arbitrary interference with the family and the home. Discrimination issues under Article 26 may also occasionally arise, particularly if discrimination in the application, rather than the content, of the law is involved. Article 24, together with Principle 6 of the Declaration of the Rights of the Child, is relevant to the position of innocent children affected by decisions to deport a parent. Principle 6 requires that the child is, wherever possible, to grow up in the care and under the responsibility of his parents. Additionally, in relation to children, Principle 1 provides that every child is to be entitled to the rights in the Declaration without distinction or discrimination, and Principle 2 that the child is to enjoy special protection and be given by law and other means opportunities and facilities to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. No insult or slight is intended to any foreign country by saying that a breach of human rights could be involved in children being placed in a position of having to go to that country in order to accompany their parents. The point is that the parents have chosen Australia as the place where they prefer to live, and the country in which they prefer their children to grow up. What is being criticised in deportation decisions involving the breaking-up of families is not the sort of conditions they can expect to meet in the country to which the family is forced to go but the dislocation involved in having to leave the country of their choice.

31. The Commission notes that the European Commission has considered the nature of the obligation towards the family in exclusion cases pursuant to complaints under Article 8 of the European Convention.¹⁸ The language of Article 8 is somewhat different from that of Article 23.1 of the ICCPR, because it provides that the family is entitled to 'respect' rather than to 'protection' as under the ICCPR, but if anything it might be considered that the ICCPR language imposes stronger protections. The European Commission has concentrated on the rights of family groups and on such matters as the prohibition of certain forms of extreme conduct such as discrimination and the use of degrading treatment. The result has been a balancing of rights between the powers of the State and the family group. The trend of European Commission case law is neatly encapsulated in *X v. Sweden* (1981), 4 EHRR 408 at page 409, where the Commission recalled:

. . . that it has repeatedly held that no right of an alien to enter or to take up residence in a particular country, nor a right not to be expelled from a particular country is as such guaranteed by the [European] Convention.

The Commission has, however, constantly held that the exclusion of a person from a country where close members of his family are living may amount to an infringement of Article 8.

32. The Commission considers that, in certain circumstances, e.g. where an alien of long-standing residence in Australia has established a family in Australia and, in particular, where children of the family have grown up in Australia, deportation could amount to an infringement of Articles 17, 23.1 and 24 of the ICCPR or Principles 1,2 and 6 of the Declaration.

(c) The Racial Discrimination Act 1975

33. In its report on the Citizenship Act¹⁹, the Commission drew attention to the fact that the concept and use of the term 'alien' as defined for the purposes of the Citizenship Act and the Migration Act have potential for giving rise to acts that are unlawful

¹⁸ A note on the exclusion cases is contained in Appendix 2.

¹⁹ Report No. 1: *The Australian Citizenship Act 1948*. AGPS, Canberra, 1982.

under section 9 of the Racial Discrimination Act and for bringing section 10 of that Act into operation.²⁰ Some of the complaints it has received have involved aliens who consider they are discriminated against by comparison with persons from other countries who have resided in Australia but who also are not citizens of Australia (they may, for example, as British subjects be from the United Kingdom, Bangladesh, Malaysia, Sri Lanka or New Zealand). For the purposes of decisions on deportation, the discrimination applies particularly to the definition of alien and its use in section 12 of the Migration Act.

34. In the context of decisions on deportation the Commission draws attention particularly to section 9 of the Racial Discrimination Act which makes it unlawful for a person to do any act which involves a distinction, exclusion or restriction based on race. In its view the Minister, in exercising powers under section 12 of the Migration Act, is required to exercise them in such a way as to avoid any distinction that is based on racial grounds in the broad sense in which this term is used in the Racial Discrimination Act and the Racial Discrimination Convention (race includes colour, descent and national or ethnic origin).²¹

35. For the reasons mentioned in paragraph 12 above, the Commission takes the view that the Human Rights Commission Act and the Racial Discrimination Act form part of a single legislative scheme. Accordingly, complaints under section 9 of the Racial Discrimination Act are not necessarily confined to infringements of the human rights specified in the Racial Discrimination Convention. All the human rights mentioned in the ICCPR—and particularly those in Articles 13, 17, 23 and 24—would be caught up by section 9 of the Racial Discrimination Act, where an act of racial discrimination was involved. In addition, the Racial Discrimination Convention itself, in Article 5, contains human rights provisions. The most important of these for purposes of deportation decisions are:

- 'equality before the law'—introductory words;
- 'equal treatment'—paragraph (a);
- 'civil rights'—paragraph (d);
- economic rights, notably the right to work and the right to a free choice of employment—paragraph (e) (i).²²

36. Aside from the possibility of a complaint about the lawfulness of a deportation order, sub-section 10 (1) of the Racial Discrimination Act may affect section 12 of the Migration Act. Sub-section 10 (1) provides in effect that inequalities in the law on racial or ethnic grounds are nullified. The Commission expresses no concluded view on this question, which is essentially a legal one for decision by the courts, but observes that section 12, being confined to aliens in its operation, may discriminate in favour of persons of certain national origins, notably British and Irish, who have not attained Australian citizenship, enjoying instead their original nationality. The concepts of nationality and a national origin overlap, as pointed out in *Ealing London Borough Council v. Race Relations Board*.²³ In the Commission's Report on the *Australian Citizenship Act 1948*, at paragraphs 9 and 10 on page 4, a similar point is made, and the Commission repeats the recommendation made in paragraph 38 (1) of that report. The

²⁰ Sections 9 and 10 of the *Racial Discrimination Act 1975* are reproduced in Appendix 4.

²¹ cf. *re Dimic*, Unreported, 23 June 1982, per Davies J (A.A.T.) where the rather different issue of whether s.12 was inconsistent with the Racial Discrimination Convention was considered.

²² The text of Article 5 is contained in Appendix 4.

²³ [1972] AC 342.

recommendation is that the definition of 'alien' in subsection 5 (1) of the Migration Act should be repealed or reworded to remove discrimination between non-citizens on grounds of national origin.

37. The Commission notes with pleasure that it is the Government's intention to eliminate the distinction between aliens and immigrants so that all immigrants, regardless of origin, can be free from the threat of deportation after a certain time.²⁴ This would entail amendment of the definition clause and presumably of sections 12 and 13 of the Migration Act.

²⁴ Policy statement 'Immigration and Community Relations', the Hon. Mick Young, M.P., pages 6-7; and Ministerial statement by the Minister for Immigration and Ethnic Affairs, the Hon. Stewart West, M.P., on 4 May 1983.

IV. HUMAN RIGHTS IN DEPORTATION DECISIONS

38. An important general issue arising out of the foregoing analysis is the weight that should be given to human rights in the making of deportation decisions. As the position now stands, a wide range of policy and factual considerations are taken into account in the making of deportation decisions, with the overriding concern being the safety and welfare of the Australian community as a whole.¹ There is a balancing of community as against individual interests. The question is how human rights criteria should rank in this hierarchy of considerations.

39. In answering this question, it is important to recall that the Parliament of the Commonwealth has already, in the Human Rights Commission Act itself, given a clear indication of the legislative policy it embodies. The preamble recites that:

. it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and freedoms.

It follows from the preamble, and from the specific provisions of section 9, that human rights must be observed in the law and practice of the Commonwealth. Where human rights are not observed, it is the duty of the commission to furnish a report to the Minister, recording its opinion that the act or practice in question is inconsistent with or contrary to any human right (paragraph 9 (1) (b) and section 14). It is a consequential obligation on each Minister, Department and agency that acts and practices under Commonwealth law should comply with human rights, and that any offending law should be changed so that it is brought into conformity with the relevant human rights.

40. It is accordingly the view of the Commission that the Human Rights Commission Act envisages that decisions such as those relating to deportation should and must conform with human rights. Although the Parliament, at this stage, has not made the human rights embodied in the instruments administered by the Commission directly enforceable in domestic law, it clearly requires the Commission to report how domestic laws and practices should be modified in order that human rights violations do not occur. The Parliament has been uncompromising in requiring conformity with human rights as defined in the relevant international instruments. It has not said that human rights considerations must give way to policy considerations or other matters. Indeed, the Commission has been set in place precisely to receive complaints that a policy or practice is not in conformity with human rights. And ultimately, if the Commission is of the opinion that any decision is inconsistent with or contrary to human rights, even if it is made in pursuance of a policy adopted by the Executive Government, it must report accordingly.

41. The result, in the view of the Commission, is that human rights must invariably be observed in the making of decisions on deportation. Human rights cannot be surrendered in favour of other criteria. In the final analysis, it is policies that must conform with human rights, and not human rights that must conform with policies.

42. It follows from the fact that human rights should be observed in all deportation decisions that this requirement could usefully be incorporated in the Migration Act, and

¹ Ministerial statement by the Minister for Immigration and Ethnic Affairs, the Hon. Stewart West, M.P., on 4 May 1983; and c.f. public statement by the Minister for Immigration and Ethnic Affairs, 31 January 1980.

the Commission so recommends. It is not enough simply to eliminate the distinction between aliens and immigrants in respect of deportation.² Nor would it be sufficient to amend the sections of the Migration Act dealing with deportation so as to introduce, in conformity with recent developments in administrative law, specific statutory criteria to which equal weight was given, even if these specific criteria included human rights considerations. What is required is an uncompromising and inescapable statutory obligation to ensure that all deportation decisions are consistent with human rights. This of course does not mean that deportation can never take place. Deportation is recognised in international law as a necessary power to be exercised by nation states, including the States Parties to the human rights instruments administered by the Commission. What it means is that in the exercise of this power of deportation, human rights considerations must always be observed.

43. It has also been suggested to the Commission that the interests of the individual need to be balanced against the interests of the community—the public interest—and that the real question is what weighting human rights considerations should have. In the view of the Commission, a distinction between human rights and the public interest is in most cases a false dichotomy. Where there is no liberty the people perish, and where the human rights of the individual are overridden in the interests of the community there is danger. It is the Commission's mandate to uphold the human rights of individuals as defined in its charter, and it must say firmly that it cannot agree to their being overridden. Many of the human rights are defined as being subject to limitations, and the Commission accepts these. But whether the right contains an express limitation or does not, once the right has been defined it must be observed.

² Ministerial statement by the Hon. Stewart West, M.P., Minister for Immigration and Ethnic Affairs, on 4 May 1983.

V. CONCLUSION

44. In Chapter III the Commission identified a number of human rights which in its view need to be taken into account when decisions are being made under sections 12 and 13 of the Migration Act about the deportation of aliens and immigrants. The most relevant provisions in the ICCPR are contained in Articles 7, 17, 23, 24 and 26. The most important provisions in the Declaration are Principles 1, 2 and 6. In addition, sections 9 and 10 of the Racial Discrimination Act have a significant bearing on the way human rights are to be taken into account where racial and ethnic factors are involved.

45. The findings of the Commission are summarised in the form of recommendations in Chapter VI. Their effect is to indicate that the power to deport provided by sections 12 and 13 is, pursuant to the Human Rights Commission Act and the Racial Discrimination Act, subject to some important restrictions related to the human rights of the individuals involved. The Commission considers it would be desirable to amend the Migration Act to include a requirement that in the exercise of the power to deport conferred by sections 12 and 13 the Minister should at all times respect the human rights of the individuals concerned.

46. The purpose of this report has been to provide a basis for the discussion and application to deportation decisions under sections 12 and 13 of the Migration Act of the human rights endorsed by the Government and the Parliament in the Human Rights Commission Act. The Commission recommends that following its report guidelines be prepared to assist in ensuring that human rights are given full weight when deportation decisions are taken.

47. The Commission is not charged with overall responsibility for deportation decisions under the Migration Act. That is vested in the Minister, subject to review and recommendation by the Administrative Appeal Tribunal. It cannot accordingly comment on any policy which may be adopted by the Minister, e.g. to isolate drug offenders as prime targets for deportation. What it is required by its charter to do is, however, to emphasise that whatever fresh considerations are introduced into administration of deportation policy, they must, in nature and application, be in conformity with human rights. However serious the offence, the offender and his family still have human rights and these may only be moderated in accordance with the provisions of the relevant international instruments, e.g. the processes provided in Article 13 may only be waived where compelling reasons of national security so require. There is, for example, to be no modification of the right to freedom from arbitrary or unlawful interference with privacy, to the right of the family to protection or to the right of the person not to be subjected to cruel, inhuman or degrading treatment. The Commission believes and expects that the Government, in making decisions on deportation, should always promote and observe these fundamental human rights and freedoms.

VI. RECOMMENDATIONS

48. Pursuant to sub-section 16 (1) and paragraph 9 (1) (a) and (c) of the *Human Rights Commission Act 1981*, the Commission makes the following recommendations as a result of its examination of the human rights which should be taken into account when consideration is being given to ordering the deportation of residents of Australia under sections 12 and 13 of the *Migration Act 1958*:

- (1) The *Migration Act 1958* should be amended to incorporate a requirement that it is the duty of the Minister, when making deportation decisions, to ensure that they are invariably consistent with human rights as defined in the ICCPR, the Racial Discrimination Convention, and the three Declarations found in Schedules 2 to 4 of the *Human Rights Commission Act 1981* (paragraphs 11 and 42).
- (2) Deportation may in certain circumstances amount to an act that is inconsistent with Article 7 of the ICCPR, which proscribes cruel, inhuman or degrading treatment or punishment, and the human right not to be subjected to this treatment should be observed when deportation decisions are being taken (paragraphs 15-17).
- (3) When the Minister is considering making a decision on deportation in conflict with the recommendation of the Administrative Appeals Tribunal *without receiving fresh evidence*, procedures of the kind envisaged in Article 13 of the ICCPR ought to be applied, that is to say, the alien should be allowed a further opportunity to submit reasons against his expulsion, the Minister should review the case again, and the alien should be permitted to be represented before him or his delegate (paragraph 20).
- (4) When the Minister is considering making a decision on deportation in conflict with the recommendations of the Administrative Appeals Tribunal *wholly or partly on the basis of fresh evidence* or fresh factors not considered by the Administrative Appeals Tribunal, he should remit the matter for rehearing by the Tribunal which should consider, amongst other things, the admissibility and weight of the fresh evidence (paragraph 20).
- (5) The provisions of Article 13 of the ICCPR for review of deportation decisions are such that the Administrative Appeals Tribunal should at least retain the power to make recommendations relating to individual deportation cases before it, and perhaps that it should have the ultimate power of decision on appeal (paragraphs 21 and 22).
- (6) In some cases deportation following a prison sentence could involve double punishment, and deportation should ordinarily be ordered only when there is fresh evidence available which makes it desirable to effect expulsion of the person, and then only after natural justice processes have been pursued, except where compelling reasons of national security otherwise require (paragraphs 23-28).
- (7) Where the penalties in Australian law are considered inadequate, that law should be amended rather than resorting to deportation, which is a form of treatment inevitably discriminatory in its application (paragraphs 25 and 26).
- (8) In view of the importance placed on the protection of the family, family units should not be broken up except in extreme circumstances, e.g. where considerations of national security prevail (paragraphs 29-32).

- (9) Attention must continue to be paid to the requirement of section 9 of the Racial Discrimination Act, when deportation decisions are made, in order to ensure that there is no infringement of the Racial Discrimination Act and the human rights defined in the Racial Discrimination Convention, the ICCPR and the Declaration of the Rights of the Child (paragraphs 33-37).
- (10) The definition of 'alien' in sub-section 5 (1) of the *Migration Act 1958* should be repealed or reworded to remove discrimination between non-citizens on grounds of national origin (see Human Rights Commission Report: The *Australian Citizenship Act 1948*, paragraph 38 [1]) (paragraph 33) .
- (11) Guidelines should be developed to ensure that those involved invariably observe human rights in making decisions about deportation in respect of persons resident in Australia (paragraphs 40-41 and 46).

APPENDIX 1

Migration Act 1958

(Relevant Sections)

5. (1) In this Act, unless the contrary intention appears—"alien" means a person who is not—

- (a) a British subject;
- (b) an Irish citizen; or
- (c) a protected person;

12. Where (whether before or after the commencement of this Part) an alien has been convicted in Australia of a crime of violence against the person or of extorting any money or thing by force or threat, or of an attempt to commit such a crime, or has been sentenced to imprisonment for one year or longer, the Minister may, upon the expiration of, or during, any term of imprisonment served or being served by that alien in respect of the crime, order the deportation of that alien.

13. Subject to section fifteen of this Act, where (whether before or after the commencement of this Part) an immigrant—

- (a) has been convicted in Australia of an offence punishable by death or by imprisonment for one year or longer, being an offence committed within five years after any entry by him into Australia;
- (b) has been convicted in Australia of an offence by reason of being a prostitute or of having lived on, or received any part of, the earnings of prostitution or of having procured persons for the purposes of prostitution being an offence committed within five years after any entry by the immigrant into Australia; or
- (c) is, within five years after any entry by him into Australia, an inmate of a mental hospital or public charitable institution,

the Minister may order the deportation of the immigrant from Australia.

18. The Minister may order the deportation of a person who is a prohibited immigrant under any provision of this Act.

48. (1) Where the Minister is satisfied that a person is not a fit and proper person to act as an immigration agent, the Minister may, by notice in writing, direct that person not to act as an immigration agent.

(2) Where a direction under the last preceding sub-section is in force in relation to a person, that person shall not—

- (a) act as an immigration agent;
- (b) describe himself as an immigration agent or by words which suggest that he is a person who acts, or is prepared to act, as an immigration agent; or
- (c) advertise that he renders or is prepared to render services of a kind referred to in section forty-six of this Act.

Penalty: \$1000 or imprisonment for 6 months.

66E. (1) Applications may be made to the Administrative Appeals Tribunal for review of decisions of the Minister under sections 12, 13 or 48 other than a decision

made on a matter remitted by the Tribunal for reconsideration in accordance with sub-section (3).

(2) A person is not entitled to make an application under sub-section (1) in relation to a decision under section 12 or 13 unless—

- (a) the person is an Australian citizen; or
- (b) the continued presence of the person in Australia is not subject to any limitation as to time imposed by law.

(3) After reviewing a decision referred to in sub-section (1), the Tribunal shall either affirm the decision or remit the matter for reconsideration in accordance with any recommendations of the Tribunal.

(4) For the purpose of reviewing a decision referred to in sub-section (1), the Tribunal shall be constituted by a presidential member alone.

(5) Where an application has been made to the Tribunal for the review of a decision under sections 12 or 13 ordering the deportation of a person, the order for the deportation of the person shall not be taken for the purposes of section 39 to have ceased or to cease to be in force by reason only of any order that has been made by the Tribunal or a presidential member under section 41 of the *Administrative Appeals Tribunal Act 1975* or by the Federal Court of Australia or a Judge of that Court under section 44A of that Act.

(6) In this section "decision" has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

APPENDIX 2

Some Notes on the European Exclusion Cases

Inhuman and Degrading Treatment

In *X v. Sweden*, 4 EHRR 398, at page 410, in rejecting a complaint that exclusion in that case constituted inhuman treatment, the European Commission of Human Rights held that:

. . . before treatment can be considered to be inhuman, it has to reach a certain stage of gravity, causing considerable mental or physical suffering.

In that case, it considered that though the applicant's separation from her family was likely to cause her mental pain and anxiety, this was not so severe as to constitute inhuman treatment within Article 3 of the European Convention. In coming to this conclusion, the Commission reiterated that the separation, in its view, was voluntary, being brought about by the family itself.

However, in the earlier *East African Asians* case, 3 EHRR 76, the Commission decided that the singling out of a group of persons for differential treatment on the basis of race could constitute a special form of affront to human dignity and might therefore be capable of constituting degrading treatment contrary to Article 3. The Commission concentrated on this aspect of Article 3 rather than on the concept of inhuman treatment considered in the later Swedish case. It was of the opinion, at 3 EHRR page 80, that:

The term 'degrading treatment' in this context indicates that the general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action which lowers a person in rank, position, reputation or character, can only be regarded as 'degrading treatment' in the sense of Article 3 where it reaches a certain level of severity.

The Commission did not limit the concept of degrading treatment to physical acts. Moreover, in this case, it was inextricably linked with the racial discrimination issue, for it was this discrimination against the East African Asians which constituted the degrading treatment. The discrimination was held to be on the basis of the colour and race of the East African Asians.

They were, of course, not aliens, but citizens of the United Kingdom and colonies, so that the discrimination was not on the basis of their nationality so much as of their national origins. The Commission concluded, at 3 EHRR page 83, that:

. . . the *Commonwealth Immigrants Act 1968*, by subjecting to immigration controls citizens of the United Kingdom and colonies in East Africa who were of Asian origin, discriminated against this group of people on grounds of their colour or race.

It also considered that the discriminatory provisions of the 1968 Act had to be seen in the context of two other laws on the subject of citizenship and immigration which gave preference to white people.

The Review of Deportation Decisions

Article 13 of the ICCPR has no direct equivalent in the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in *X v. United Kingdom* (1981) 4 EHRR 188, the European Court of Human Rights, at page 210, held that Mental Health Review Tribunals in the United Kingdom, having advisory functions only, lacked competence to decide the lawfulness of the detention of the applicant in Broadmoor Hospital, resulting in inconsistency with Article 5 (4) of the European Convention, which provides that:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The equivalent provision in the ICCPR is Article 9.4, which is expressed in very similar language. Article 9.4 would, of course, apply to aliens detained prior to deportation. While not expressing a final view, the Commission notes that it may be open to argue that, in their case, the most applicable provision of the ICCPR is Article 9.4 and, further, on the analogy of *X v. United Kingdom*, the present system of review and recommendation by the Administrative Appeals Tribunal does not meet the requirements of Article 9.4 because a power of decision is not entrusted to the Tribunal.

It is of interest that the European Court of Human Rights said of the Mental Health Review Tribunals in the United Kingdom, at 4 EHRR page 210, that:

There is nothing to preclude a specialised body of this kind being considered as a "court" within the meaning of Article 5 (4), providing it enjoys the necessary independence and offers sufficient procedural safeguards appropriate to the category of deprivation of liberty being dealt with.

It went on to conclude that the presence of merely advisory functions and the lack of competence to decide the lawfulness of the detention infringed Article 5 (4) of the European Convention.

The European Exclusion Cases and the Protection of the Family under Article 8 of the European Convention

The European Commission of Human Rights tends to treat immigration and deportation cases as members of the same class, if Article 8 issues involving a potential or actual breaking up of a family are before it. Thus, in *East African Asians v. United Kingdom* (1973); 3 EHRR 76 the European Commission was of the opinion that the refusal of the United Kingdom Government to permit the immigration of the husbands of Commonwealth citizens already lawfully resident in the United Kingdom constituted *inter alia*, interference with family life contrary to Article 8. The opinion of the majority, at 3 EHRR 76 page 91, was that:

. . . this refusal of admission constituted . . . an interference with the applicants' "family life" in the sense of Article 8 of the Convention in that it prevented, against their will, the reunion in the United Kingdom of the members of the applicants' families, who were all citizens of the United Kingdom and colonies.

Similar principles were applied by the European Commission of Human Rights in *Uppal v. United Kingdom* (No. 1) (1979), 3 EHRR 391, a deportation case. Whereas in the *East African Asians* case families were seeking to be reunited, in *Uppal's* case the unity of an extended family resident in the United Kingdom was threatened by the proposed deportation of a husband and wife. Their children, and the husband's parents were lawfully residing in England, but it was common ground that under the domestic laws of the United Kingdom relating to immigration and deportation, the husband and wife had no rights to remain. Nor did the birth of their children in the United Kingdom confer rights of residence on the parents, who had evaded the authorities, overstayed their leave of entry, and were deemed to be illegal immigrants. The European Commission agreed that, considered by themselves, the husband and wife, being unlawful immigrants, not only lacked rights to remain under United Kingdom law, but also under the Convention. However, the European Commission did not confine itself to a narrow analysis of the lack of rights of the husband and wife as individuals or spouses. They looked also at the rights of the children and the grandparents under the Convention and of the extended family as a whole. The Commission was obviously impressed

by the fact that together they formed a large and close family unit based in the United Kingdom for many years. In an opinion that was followed by a negotiated settlement which resulted in the husband and wife being allowed to remain in the United Kingdom, the Commission, at 3 **EHRR** page 396, said that:

. . . in certain exceptional cases . . . such exclusion of a close family member may raise an issue under Article 8 of the Convention.

The trend of European Commission case law is neatly encapsulated in *X v. Sweden* (1981), 4 **EHRR**408 at page 409, where the European Commission recalled:

. . . that it has repeatedly held that no right of an alien to enter or to take up residence in a particular country, nor a right not to be expelled from a particular country is as such guaranteed by the Convention.

The Commission has, however, constantly held that the exclusion of a person from a country where close members of his family are living may amount to an infringement of Article 8.

The applicant was a Turkish citizen with a permit to stay in Sweden. When her application for a permit for her parents and seven brothers and sisters to immigrate to Sweden was rejected, she complained to the European Commission of Human Rights. The Commission rejected her application because it took the view that the separation of the family was brought about by the family itself in sending the applicant to Sweden. It felt that this could not impose a duty on the Swedish state to accept all the rest of the family. It would seem that the reasonableness of the Turkish family in seeking to leave Turkey, in order to avoid the persecution of the Christian minority group to which they belonged, did not affect the position. The Commission was of the opinion, at 4 **EHRR** page 409, that:

- . . Article 8 (1) of the Convention cannot be interpreted in such a way as to impose an obligation on the State in question to receive all the other members of the immigrant's immediate family.

The Commission concluded that the application was inadmissible.

This case was not on all fours with the *East African Asians* case, since though resident in East Africa, they were not citizens of an East African state, but of the United Kingdom and colonies, while their continued residence in East Africa became illegal (3 **EHRR** 76 at pages 84 and 85).

The Modification of the Power to Exclude Aliens?

The question arises whether the European Commission of Human Rights, within its area of jurisdiction, has modified or limited the principle of international law that nation states have an unfettered discretion to exclude aliens from their territory. Indeed, if this power to exclude has been modified or affected, then it is not only in respect of aliens, but also in respect of nationals who, under domestic laws, lack rights of entry into a country whose nationality they possess. The way the European Commission of Human Rights expressed this in the *East African Asians* case, at 3 **EHRR** page 79, was that the parties to the European Convention had:

. . . agreed to restrict the free exercise of their powers under general international law, including the power to control the entry and exit of aliens, to the extent and within the limits of the obligations which they assumed under this treaty.

The Commission then went on to say that the above considerations were not confined to aliens but extended to that particular case, where the applications were brought by citizens of the respondent state.

APPENDIX 3

Notes on Some Australian Cases

Double Punishment

The Administrative Appeals Tribunal has dealt with this issue in several cases involving the review of deportation decisions under section 12 of the *Migration Act 1958* in cases involving drugs. In *Gungor's* case (1980) 3 ALD 225 at page 227, Smithers J said that:

In these circumstances deportation of the applicant would constitute further punishment administered, either for its own sake, or as a deterrent to other persons. But punishment according to law is intended to be the factor appropriate for punishment and for deterrence of the offender from repetition of his offence. It is intended also to deter other persons from like offences. Such are the functions of the criminal law. That is the law applicable equally to aliens, immigrants and to Australians. The criminal law is the expression of Parliament as to what, in its view, is requisite for those purposes with respect to all citizens. These functions are not, primarily at any rate, the functions of s.12 of the *Migration Act 1958*. That section is designed primarily to protect the Australian community from the presence of particular offending aliens and not for imposing extra punishment on an offender or by so doing deterring other unnaturalised aliens from particular offences. To use the powers conferred by the *Migration Act 1958* for the purposes of punishment and deterrence is in substance to discriminate against immigrants and aliens by subjecting them to an additional sanction not applicable to other persons for breaches of the criminal law.

In *Jeropoulos'* case (1980) 2 ALD 891 at page 902, Fisher J agreed with Smithers J that deportation:

. . . is capable of inflicting an additional punishment .

At page 902 he went on to say that:

. . . If deterrence is again to be such a significant factor in considering deportation, the alien will be liable to be punished once more for the same offence, in the sense of being in the position of double jeopardy in respect of his crime.

Davies J in *Piscioneri's* case (1980) 3 ALN No. 6 was quite emphatic that:

No purpose at all is served by characterising the detriment [of deportation] as other than punishment. Notwithstanding that the deportation order is not a sentence imposed by a court of law, the detriment which results from it will be seen by the criminal as a further punishment for his crime and the detriment will serve to deter others from committing crimes of a like nature because it will be seen by other persons to be an additional punishment.'

The general thrust of these Administrative Appeal Tribunal decisions is that, for the purposes of a review of the deportation order on the merits, if deportation is intended as a deterrent to other potential offenders then it can constitute a punishment in addition to the imprisonment already served by the deportee.

The issue of whether deportation is a punishment arose in a somewhat different context in an appeal from the Administrative Appeals Tribunal to the Federal Court in *Minister for Immigration v. Pochi* (1980) 31 ALR 666. In reasoning with which Evatt J concurred, Deane J considered the constitutional question of whether deportation was the sort of penalty that could only be administered by judges appointed in accordance with the provisions of Chapter 3 of the Commonwealth Constitution. As deportation is ordered by Ministers, if it really is an exercise of judicial power then a Ministerial order for deportation must be invalid. However, Deane J was able to conclude that, as a matter of constitutional law, this issue had been set at rest by earlier authority

¹ And c.f. *Re Sergi (1979)* 2 ALD 224 at page 231, per Davies J (A.A.T).

and that it was too late to raise the question of the constitutional validity of legislation entrusting the power of deportation to executive officers of the Commonwealth. However, it is of interest that Deane J said, at page 685, that:

If the slate were clean, I should have thought that there was a great deal to be said for the view that the banishment, consequent upon his conviction of a criminal offence, of one who has become an accepted member of the Australian community was an interference with personal liberty by way of punishment.

On the same page, having assured himself of the constitutionality of deportation, His Honour went on to point out that:

The affinity between an order of deportation of an established resident consequent upon his conviction of a crime and the imposition of punishment for a criminal offence is not however, as will be seen, irrelevant when one comes to examine the principles by which a statutory tribunal empowered with reviewing an order for such deportation must ordinarily be guided in the discharge of its functions.

Later, at page 687, Deane J cited the majority opinion of the United States Supreme Court in *Bridges v. Wixon* (1945) 326 U.S. 135 where it was said that:

. . . Though deportation is not technically a criminal proceeding, it visits a great hardship upon the individual and deprives him of his right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

The Judicial Use of Humanitarian Criteria in Deportation Cases

In *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at page 430, Smithers J, in an appeal from a decision of the Administrative Appeals Tribunal to the Federal Court said it was the duty of Tribunal '. . . to have regard to considerations such as the human aspects of deportation'.

In *Re Nevistic*, an unreported decision of the Administrative Appeals Tribunal dated 19 December 1980, Davies J said that:

The giving of due weight to the humanitarian issues involved in a decision [on deportation] is, therefore, not to be overborne by a statement of government policy.

The same judge in *Re Saverio Barbaro* (1980), 3 ALD 1 at page 10, in considering ministerial policy statements on deportation criteria, was of the opinion that policy goals such as 'the best interests of the Commonwealth of Australia' and 'the public interest' comprehended:

. . . humanitarian factors affecting the criminal and interested persons. It is in the public interest and in the best interests of Australia that due weight be given to the circumstances and interests of individual persons in Australia.

Subsequently, in *Pochi v. Macphee* (1982), 56 ALJR 878 at page 883, Murphy J, speaking of the power to deport, said that it:

. . . must be exercised not cruelly, but humanely according to the standards of civilised society . . . Australian laws including those for deportation of aliens are intended to express the standards of a civilised humane society.

In the earlier case of *Re Mackellar; Ex parte Ratu* (1977) 137 CLR 461 at page 482, Murphy J said that:

The Migration Act was an attempt to abolish the procedures under which deportation laws could be administered arbitrarily and inhumanely. It was primarily aimed at removing the mischief of the existing laws, in particular the much abused dictation test . . . and at ensuring that deportation powers would be exercised not only in the national interest, but in an humanitarian way . . .

Family Issues in Deportation Cases Before the Administrative Appeals Tribunal

In its review on the merits of deportation decisions made under sections 12 and 13 of the *Migration Act 1958*, the Administrative Appeals Tribunal regularly considers the effect of deportation on the family of the deportee, where the facts warrant this. Issues relating to the position of the family are considered as part of the general body of evidence before the Tribunal with predictably variable results. The mere introduction of evidence relating to the hardship likely to be caused to the family of the deportee does not automatically result in a recommendation for the revocation of the deportation order. This evidence is weighed together with all the other relevant material before the Tribunal. A function of the Tribunal in a review on the merits is to consider all the relevant factual material. It is not the function of the Administrative Appeals Tribunal to test the evidence against human rights criteria so much as to indulge in a wide-ranging examination of the evidence before it. Accordingly, in a number of cases the Administrative Appeals Tribunal has affirmed deportation orders, notwithstanding the introduction of evidence relating to hardship likely to be caused to the families by deportation. Thus, McGregor J in *Re Tabag* (1982) 4 ALN No. 58 affirmed a deportation order where at least two and possibly all of the deportee's four children would remain in Australia after his deportation. The same judge, in *Re Ghosn* (1982) 4 ALN No. 21 affirmed a deportation order where the evidence showed it was probable that the wife and children of the deportee would not accompany him when he was deported. In *Re Baglar* (1980) 3 ALN No. 3 and *Re Tombuloglu* (1981) 3 ALN No. 11 deportation orders were confirmed where it was held that the families concerned would probably be able to adapt to living with the deportee in question in Turkey. In *Re Nevistic* (1980) 3 ALN No. 7 Davies J confirmed a deportation order where there was uncertainty whether the family of the deportee would accompany him to Yugoslavia and where the evidence indicated that the wife and the four children of the deportee were regarded highly by their fellow townspeople in Australia. The same Judge, in *Re Saverio Barbaro* (1980) 3 ALD 1, confirmed a deportation order even though it was unlikely that the wife and children of the deportee would accompany him and where the evidence indicated the wife's health would be adversely affected by the proposed deportation.

Nevertheless, in a number of cases recommendations have been made to revoke deportation orders when evidence relating to family hardship was introduced. Thus, in *Re Georges* (1978) 1 ALD 331 Fisher J emphasised the desirability of maintaining the unity of a hard-working migrant Lebanese family and said this was an influential factor in his recommendation to revoke the deportation order in question. The same judge, in *Re Vincenzo Barbaro* (1981) 3 ALN No. 21 recommended revocation of a deportation order when the evidence indicated the likelihood of hardship to the innocent family was such that it outweighed the deterrent factor to other potential offenders likely to result from the proposed deportation. Ministerial action has resulted in the subsequent revocation of the deportation orders in respect of the two Barbaros, who are not related. McGregor J in *Re Cole* (1981) 3 ALN No. 28 adopted a similar approach to Fisher J in *Re Vincenzo Barbaro* when he held that the deterrent factor in the deportation of a New Zealander was outweighed by the hardship likely to result from his separation from his two young children. In that case the applicant's marriage had been dissolved.

Whilst likely hardship to the family is a relevant factor in the consideration of deportation cases by the Administrative Appeals Tribunal, the mere raising of this issue by no means results automatically in a recommendation for revocation. The position of the family is treated as part of the whole body of factual material before the Administrative Appeals Tribunal, which is not directly concerned with testing that evidence against human rights norms. In other words, the Administrative Appeals

Tribunal and the Human Rights Commission are doing very different things. Administrative Appeals Tribunal decisions are therefore of limited assistance to the Commission in the preparation of this report and, indeed, in the consideration of complaints reaching it to the effect that particular deportation orders are inconsistent with or contrary to human rights.

APPENDIX 4

Racial Discrimination Act 1975

(Relevant Sections)

9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(2) The reference in sub-section (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention.

(3) Sub-section (1) does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of sub-section (1).

10. (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that—

- (a) authorises property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
- (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander,

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which sub-section (1) applies and a reference in that sub-section to a right includes a reference to a right of a person to manage property owned by him.

SCHEDULE

International Convention on the Elimination of All Forms of Racial Discrimination

(Relevant Articles)

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) the right to equal treatment before the tribunals and all other organs administering justice;
- (b) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by an individual, group or institution;
- (c) political rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) other civil rights, in particular:
 - (i) the right to freedom of movement and residence within the border of the State;
 - (ii) the right to leave any country, including one's own, and to return to one's country;
 - (iii) the right to nationality;
 - (iv) the right to marriage and choice of spouse;
 - (v) the right to own property alone as well as in association with others;
 - (vi) the right to inherit;
 - (vii) the right to freedom of thought, conscience and religion;
 - (viii) the right to freedom of opinion and expression;
 - (ix) the right to freedom of peaceful assembly and association;
- (e) economic, social and cultural rights, in particular:
 - (i) the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) the right to form and join trade unions;
 - (iii) the right to housing;
 - (iv) the right to public health, medical care, social security and social services;
 - (v) the right to education and training;
 - (vi) the right to equal participation in cultural activities;
- (f) the right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafés, theatres and parks.

APPENDIX 5

International Covenant on Civil and Political Rights

(Relevant Articles)

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant 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.

Article 14

7 No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedures of each country.

Article 17

1 No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2 Everyone has the right to the protection of the law against such interference or attacks.

Article 23

1 **The** family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 24

1 Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2 Every child shall be registered immediately after birth and shall have a name.

3 Every child has the right to acquire a nationality.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

APPENDIX 6

Declaration of the Rights of the Child

(Relevant Principles)

Principle 1

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Principle 6

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

