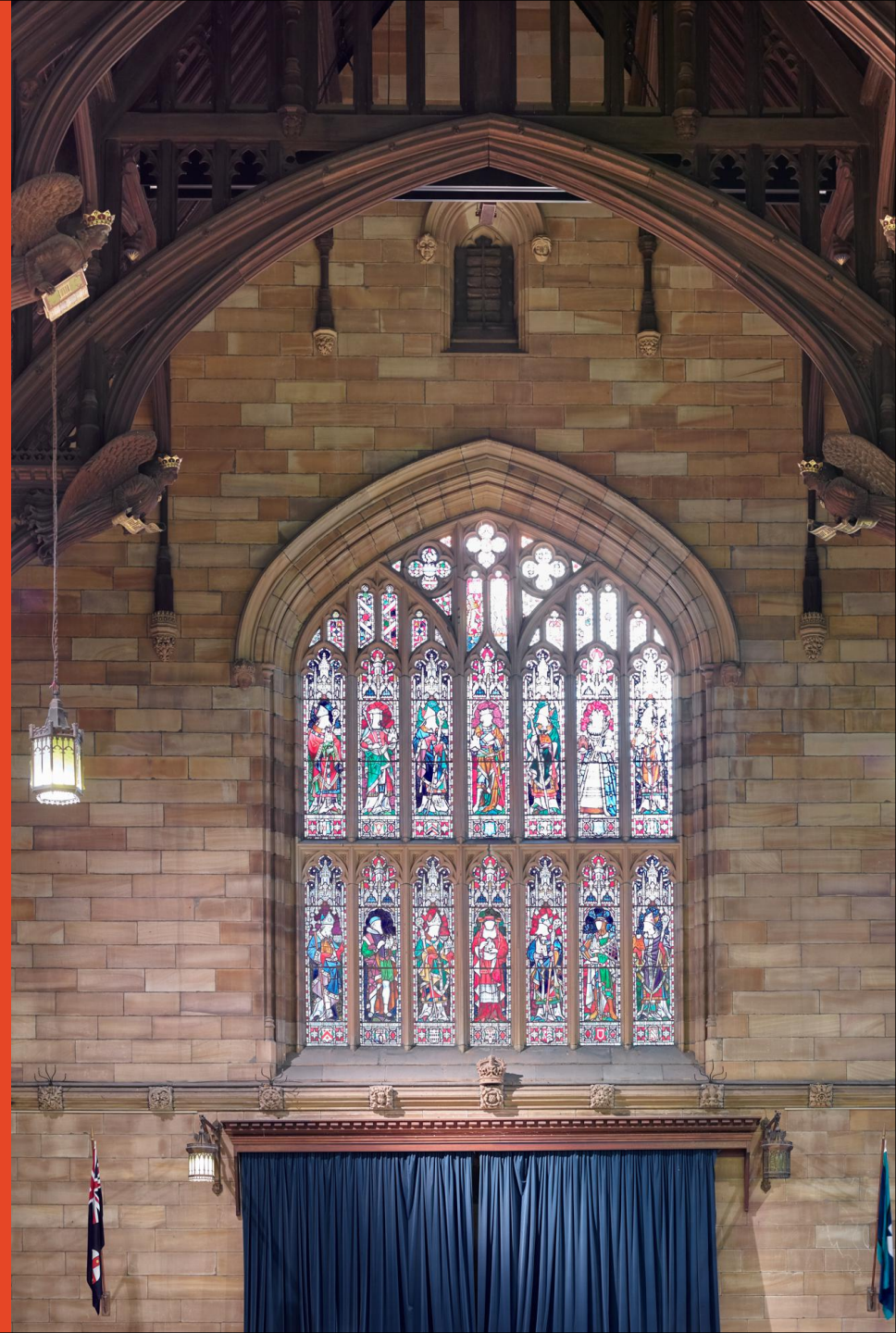


Immigration Considerations in Sentencing

*Professor Mary Crock & Dr Louise
Boon-Kuo
Sydney Law School
15 March 2020*



THE UNIVERSITY OF
SYDNEY



The evolution of crimmigration law in Australia

- Immigration laws in Australia provided for the exclusion and expulsion of both criminals and generally undesirable persons from the time of Federation in 1901: s 3 'prohibited immigrant'
- In practice, most migrants were British subjects and there was an assumption that settled or 'absorbed' migrants became non-deportable. Ministerial decisions were virtually never challenged
- Consideration of using Australian citizenship as the discrimen for liability for deportation began in 1980s (*Pochi*, *Nolan* and *Drake* cases). Still very small numbers deported
- Deportation on criminal grounds attracted rights to merits review before AAT but always considered highly political

Evolution of s 501 Migration Act

- The Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998 (Cth) (the Character and Conduct Act) transformed s 501 into a mechanism for expulsion as well as exclusion.
- Reliance placed on s 51(19) (naturalization and aliens) of the Constitution rather than s 51(27) (immigration and emigration)
- From this time s 200ff Migration Act (criminal deportation processes) falls into obscurity. All decisions now made under s 501

The importance of status

- The shift of constitutional emphasis has led to an increasing presumption that the only persons truly immune from removal are Australian citizens
- All non-citizens convicted of serious crimes should be subject to deportation
- Australia's complex colonial history and the decision not to enshrine an Australian citizenship in the Constitution has left interesting areas of uncertainty:
 - For long term British nationals (*Patterson; Ex p Taylor* but see *Shaw v MIMA*)
 - For persons of Aboriginal descent recognised as Indigenous (*Love and Thoms*)
- For the most part, the High Court has confirmed that permanent residents who have resided in Australia for virtually all their lives (ie *Nystrom* – came as 2 day old baby) CAN be deported
- These people often engage with the criminal justice process **without knowing that they are not Australian citizens**

Main features of s 501

- Extreme complexity – the system is confusing. The Ministers responsible often misunderstand what they can or must do
- Reverse onus and double negatives: Non-citizens are required to 'reasonably satisfy' the Minister that they are not of bad character.
- Since 1999 the Minister has been empowered to elect to cancel visas with or without observing the 'rules of natural justice'
- Minister has a discretion to cancel in some instances
- In others cancellation is mandatory: ie 'substantial criminal record'/ sexual offences involving children
- In cases of mandatory cancellation, the Minister may revoke the cancellation upon application/ appeal to AAT
- Revocation decisions by delegates or AAT can be overridden by the Minister in the exercise of a non-reviewable non-compellable power

The Character test: Migration Act s 501(6)

- Section 501(6) draws together all of the historical exclusionary elements in immigration and refugee law.
- In addition to the standard reference to a person's criminal record, the subsection bundles together offences relating to escape or rioting in immigration detention; and sweeping evaluative assessments that a person is of bad character based on the reasonable suspicion of the Minister and the past and present 'criminal conduct' and 'general conduct'.
- A person will fail the character test if the Minister 'reasonably suspects' that the person is or has been a member of, or has had an association with a group, organization or person involved in criminal conduct.
- A similar formulation is used to capture reasonable suspicions that a person has been involved in conduct involving people smuggling, human trafficking and international crimes ranging from genocide to slavery and other international crimes – whether or not the person has been convicted of any of the listed crimes (501(6)(aa))

Substantial criminal record: s 501(7)

- For the purposes of the character test, a person has a substantial criminal record if:
 - the person has been sentenced to death; or
 - the person has been sentenced to imprisonment for life; or
 - the person has been sentenced to a term of imprisonment of 12 months or more; or
 - the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months

Visa cancellation under section 501 on criminal grounds

Mandatory cancellation if:

A person does not pass the character test if they have a

- 'substantial criminal record', which for mandatory cancellation means a sentence of 12 months imprisonment or more. This could be the current or impending sentence, or a past sentence in Australia or overseas; or
- conviction for sexually based offences regarding a child,

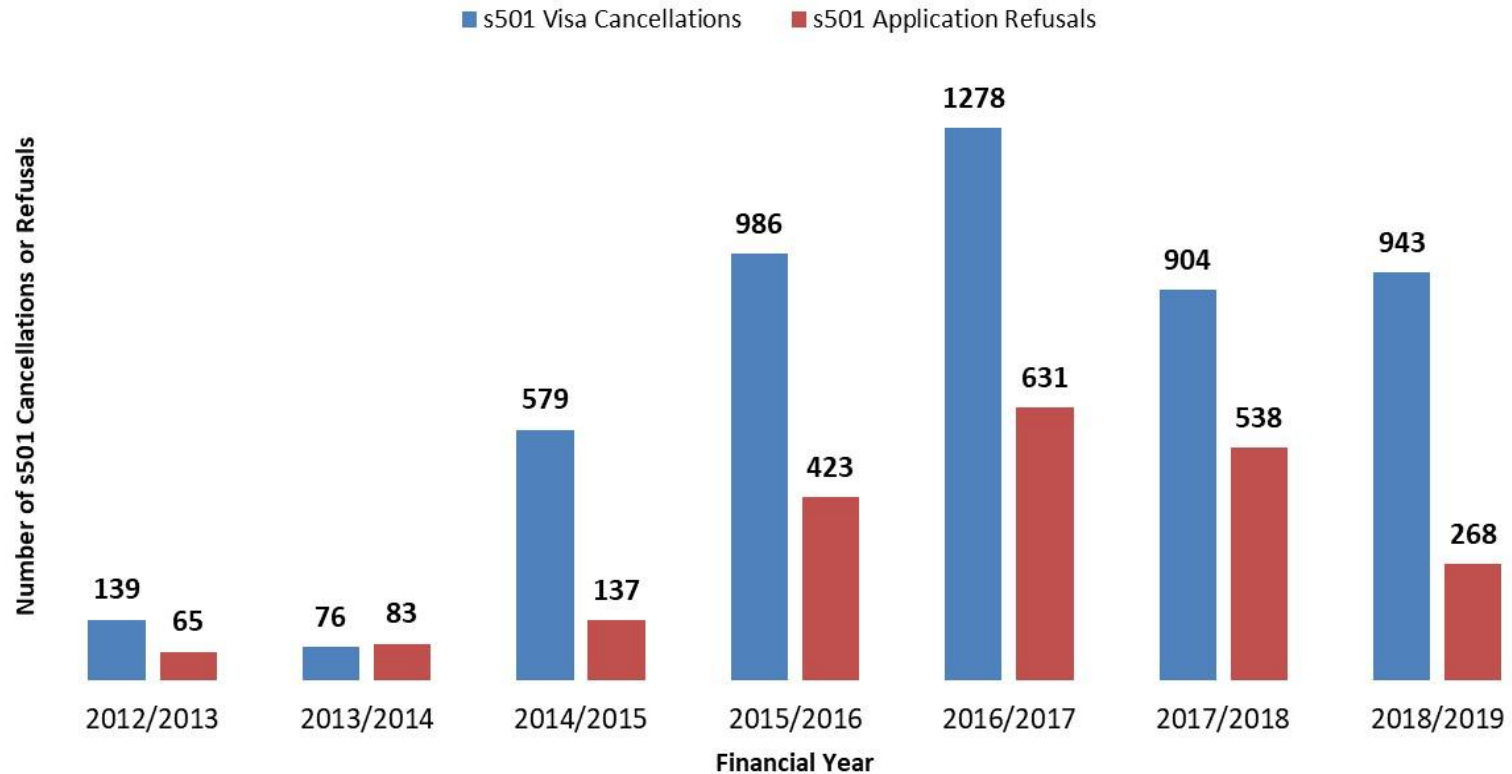
and is currently serving a full-time sentence of

Discretionary cancellation

A person does not pass the character test if

- they have a 'substantial criminal record' which for discretionary cancellation means a cumulative sentence of 12 months or more;
- having regard to the person's past and present criminal conduct (this can include any findings of criminal guilt, convictions, sentences of any length) or general conduct (including criminal charge) the

Migration Act s 501 Visa Cancellations and Refusals



Source: Department of Home Affairs (2019) 'Key Visa Cancellation Statistics'.

Table 1: Australian jurisdictions and whether they take an offender's deportation into account in sentencing

Jurisdiction	Is the risk of deportation a permissible sentencing factor?
VIC	✓
QLD	✓
ACT	✓
TAS	✓
NSW	✗
WA	✗
NT	✗
SA	Unsettled

Source: State of Victoria, Sentencing Advisory Council (2019) *Deportation and Sentencing: An Emerging Area of Jurisprudence*. Available: <https://www.sentencingcouncil.vic.gov.au/publications/deportation-and-sentencing-an-emerging-area-of-jurisprudence>

Victoria, Queensland and the Australian Capital Territory

Guden v R (2010) 28 VR 288, 294 [25]

- “In our view, authority does not require, and there is no sentencing principle which would justify, a conclusion that the prospect of an offender’s deportation is an irrelevant consideration in the sentencing process. As a matter of principle, the converse must be true. Like so many other factors personal to an offender which conventionally fall for consideration, the prospect of deportation is a factor which may bear on the impact which a sentence of imprisonment will have on the offender, both during the currency of the incarceration and upon his/her release.”

Guden v R (2010) 28 VR 288, 295 [27]

- “[T]he fact that an offender will serve his/her term of imprisonment in expectation of being deported following release may well mean that the burden of imprisonment will be greater for that person than for someone who faces no such risk ... in an appropriate case, it will be proper to take into account the fact that a sentence of imprisonment will result in the offender losing the opportunity of settling permanently in Australia... this may well be viewed as a serious ‘punishing consequence’ of the offending.”

NSW, Western Australia and the Northern Territory

R v Chi Sun Tsui (1985) 1 NSWLR 308, 311

- “the prospect of deportation is not a relevant matter for consideration by a sentencing judge, in that it is the product of an entirely separate legislative and policy area of the regulation of our society”

Hickling v The State of Western Australia [2016] WASCA 124, [60]:

- “it is not apparent why, as a matter of principle, special mitigatory weight should be given to the effect which the ‘prospect of deportation’ may have on the impact which a sentence of imprisonment will have on the offender. Many offenders, if not every offender, sentenced to a term of imprisonment suffer uncertainty — even great uncertainty — in prison about matters such as whether their relationships will remain intact; their prospects of employment; whether they will have somewhere to live upon release and where that might be. For some, whether they will return home or back into the community or town in which they lived will be uncertain. These are regarded as matters which are unavoidable consequences of imprisonment and do not constitute mitigating circumstances. We are unable to see the qualitative difference between these factors and the prospect of deportation even under the new regime.”

Sentencing submissions for clients facing mandatory visa cancellation

Victoria Legal Aid (2019) 'Mandatory visa cancellations – information for lawyers' suggest (extract follows):

- make your submissions in mitigation in line with Guden v The Queen (2010) 28 VR 288 [25], [27]
- provide as much subjective evidence as possible of the impact of likely deportation on your client (ie increased burden of imprisonment, effect on mental health etc)
- if your client is a refugee (ie was on a protection visa) obtain evidence about the circumstances of their departure from their country of origin and be aware that under the principles of non-refoulement they cannot be returned to their home country which means that following any sentence imposed they will be held in immigration detention for an indeterminate period
- seek to rely upon loss of opportunity to settle in Australia as an additional punishment, and point to any facts which support the argument that your client will be deported, with some degree of certainty

Sentencing submissions continued

- highlight any factors which would go against your client in their attempt to make an application for revocation of cancellation of visa, referring to the Ministerial Direction No. 79 (ie no familial ties to Australia, short duration of residence in Australia, type of visa held etc)
- consider submitting a Freedom of Information request to the Department to find out the recent number of matters where the Minister, or their delegate, has revoked a cancellation of a visa.
- When giving advice to a client seeking to appeal a sentence imposed prior to the 2014 amendments, it is important to be clear that the change in law has not affected sentencing practices.

Questions for your client – immigration and citizenship status

- Ascertain your client's immigration status at first contact. If your client arrived in Australia as a child, they may assume that they hold citizenship or be unsure. Ask:
 - Were you born in Australia?
 - Was one of your parents an Australian citizen?
 - Have you had a citizenship ceremony?
 - Do you hold an Australian passport?
- See Australian Passport office guidance on confirmation of Australian citizenship
- Visa holders and registered organisations can check visa status online using the Department of Home Affairs Visa Entitlement Verification Online system

Discussion with your client

- If your client is a visa holder, immediately seek advice from a registered migration agent/lawyer.
- It is important to advise your client of the possible consequences of a guilty plea (or a court's finding of guilt) e.g. mandatory visa cancellation (detention, deportation, and permanent exile). This may affect how they should plead.
- Ensure your client knows of the risk that their visa will be mandatorily cancelled, that this can occur at any time during the sentence, and may occur close to your client's release date.
- Ensure your client is aware of the process of cancellation: notification that you have a 'substantial criminal record', decision to cancel, notice of visa cancellation.
- Ensure that your client is aware of the strict time limits associated with applying for revocation of mandatory visa cancellation, or discretionary visa cancellation as relevant.

Resources

Visa cancellation under Migration Act s 501: Information for clients

- Immigration Advice & Rights Centre (NSW) and Refugee & Immigration Legal Service (Qld)(2015) 'Visa Cancellation Section 501 Migration Act Legal Information Kit'
- Legal Aid NSW (2015) 'In prison and had your visa cancelled? Act Now!'

Visa cancellation under Migration Act s 501: Information for lawyers

- Victoria Legal Aid (2019) 'Mandatory visa cancellations – information for lawyers'
- Law Institute of Victoria (2018) 'Refusals or Cancellation under s 501: Information for Criminal Lawyers'

Immigration considerations in sentencing

- National Judicial College of Australia, Commonwealth Sentencing Database, Deportation
- National State of Victoria, Sentencing Advisory Council (2019) Deportation and Sentencing: An Emerging Area of Jurisprudence. Available:

- NSW Judicial Commission, Sentencing Benchbook (2019),