27 April 2017

Submitted via email to migration@aph.gov.au

Submission to the Joint Standing Committee on Migration Review Processes Associated with Visa Cancellations Made on Criminal Grounds.

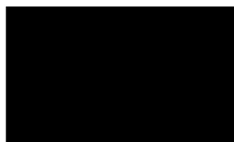
We welcome the opportunity to contribute to the Joint Standing Committee on Migration Review Processes Associated with Visa Cancellations Made on Criminal Grounds.

This submission brings together the evidence-based views of Ms Rebecca Powell and Associate Professor Leanne Weber from Monash University. Rebecca Powell is the Border Crossing Observatory's Managing-Director and Associate Professor Weber is the co-Director of the Observatory and Australian Research Council Future Fellow in the Policing of Internal Borders. Short biographies of the authors are available at the end of this submission.

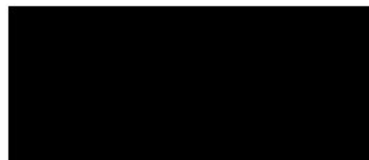
We would welcome the opportunity to discuss further with the Committee this submission or our wider research on visa cancellation and deportation of convicted non-citizens under s501 of the Migration Act.

Kind regards,

Ms Rebecca Powell



Assoc. Prof. Leanne Weber



MONASH University
Arts

Recommendations

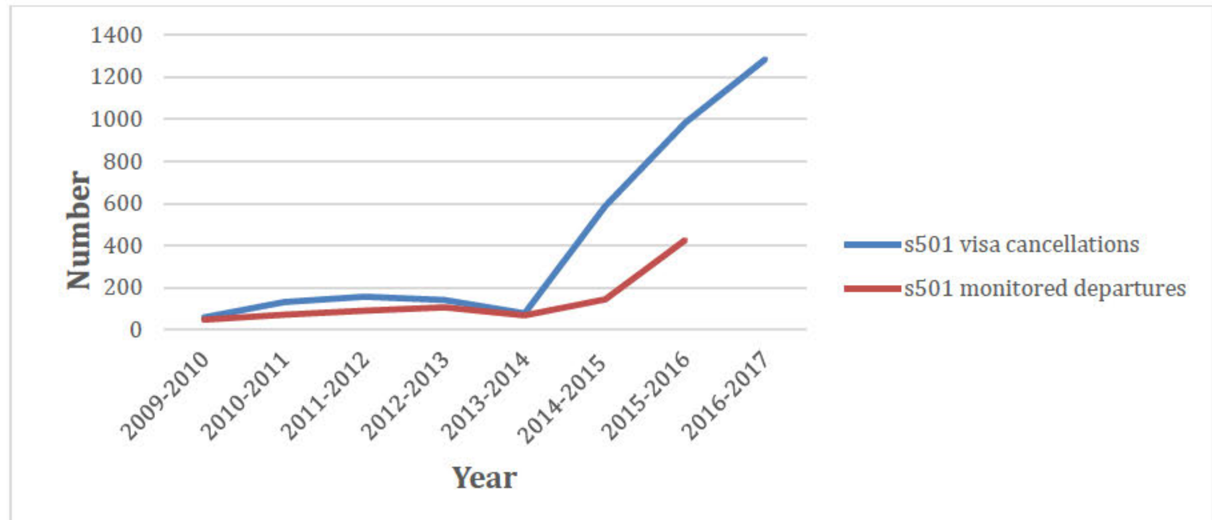
1. **Individual fairness and overall effectiveness in promoting community safety must be considered alongside efficiency in framing a system of criminal deportation that is credible, just and serves the interests of all Australians**. Key considerations include:
   - Develop and implement a risk assessment tool for s501 decision making processes that gives due weight to prospects for rehabilitation and sets the bar for 'unacceptable risk' at a suitably high level.
   - Decision making regarding s501 visa cancellations at both Ministerial and AAT review should be re- weighted towards human rights of affected individuals with due consideration for Australia's international human rights obligations and the negative impact of deportation on families and communities.
   - Executive power in s501 visa cancellation decision making be reduced, particularly the personal exercise of visa cancellation power by the Minister for Home Affairs, which then restricts access to merit review.
   - From an international ethical standpoint, Australia must take responsibility for offending committed by long term residents.
2. **Continued, or increased access to full merits review is essential to ensure fairness and to bring the criminal deportation system in line with the due process protections provided within the criminal justice system and comply with Australia's international human rights obligations**.

Background

Our research shows that there has been a steep rise in visa cancellations and the deportation of convicted non-citizens from Australia, particularly following amendments made to s501 of the Migration Act in December 2014. These amendments resulted in an expansion of executive power with the introduction of mandatory visa cancellation for those sentenced to a term of imprisonment for 12 months or more. Graph 1 below illustrates that from 2013/14 to 2016/17 the number of s501 cancellations increased sixteen-fold and the number of removals increased five-fold from 2013/14 to 2015/16. Reflective of this trend, there has been a concurrent significant increase of the s501 population in the Australian

immigration detention system up to 30% of the overall detention population in 2016, from 15% in 2015 (Commonwealth Ombudsman 2016: 18).

Graph 1: Number of s501 visa cancellations 2009-2017 and number of s501 monitored departures (deportations) 2009-2016 for all nationalities



Source: DIBP annual reports and removal statistics provided to the Border Crossing Observatory

In this submission we question whether this turn towards more efficient deportation of criminal offenders, including minor offenders and, in some cases, those merely considered to be at risk of committing crime serves the interest of individual fairness and overall effectiveness in promoting the safety of Australian communities.

The steep rise in s501 visa cancellations and removals in recent years has impacted on a disproportionately large number of New Zealanders given their long term residence with temporary migration status as Special Category Visa (SCV) holders, evidenced across a range of government statistics. Whilst it is not known how many of these increasing numbers of removals are New Zealanders, DIBP statistics reveal that from December 2014 to February 2016, of the 561 New Zealand nationals who had their visas cancelled, 533 were cancelled under s501 of the Migration Act mandatory cancellation provisions (Karlsen, 2016). Further, the Senate Legal and Constitutional Affairs Legislation Committee reported in February 2016 that 174 out of the 183 New Zealanders (or 95%) in onshore immigration detention centres at that time were there as a result of visa cancellation on character grounds

(Commonwealth of Australia, 2016). New Zealand citizens have made up the largest nationality group of persons held in immigration detention (at around 13% of the total detention population) since June 2016 (DIBP & ABF Immigration Detention Statistics).

In this submission we focus primarily on the first term of reference for the Inquiry and make some observations about the second. As social scientists we do not have much to say about the details of legal procedure that are the main focus of the Inquiry. Instead, we concentrate on the negative impact on individuals and communities of the criminal deportation system as it operates at present and question the narrow emphasis on efficiency that is apparent within the Inquiry's terms of reference. Analysis of the implications of current policies and case material on the particular impact on New Zealand citizens are taken from current PhD research into the s501 deportation system being undertaken by Rebecca Powell[1], supplemented by observations from the ongoing research being conducted by Associate Professor Weber as part of her Future Fellowship study which includes non-citizens from other nationalities.[2]

Terms of Reference

1. **The efficiency of the existing review process as they relate to decisions made under section 501 of the Migration Act**

Any administrative system needs to be judged not only on the basis of the *efficiency* of its operation, but also on the basis of *fairness* (i.e. whether individuals subject to the process are treated fairly and with respect to principles of due process) and *effectiveness* (i.e. whether the system achieves its overall objectives). We concentrate here on discussing matters of fairness, which are already severely compromised within the current system, followed by some general observations about the effectiveness of the system in promoting community safety.

---

[1] 'I still call Australia home': Balancing risk and human rights in the deportation of convicted non-citizens from Australia to New Zealand.

[2] Globalisation and the policing of internal borders (FT140101044) http://artsonline.monash.edu.au/thebordercrossingobservatory/globalisation-and-the-policing-of-internal-borders/

BALANCING EFFICIENCY WITH FAIRNESS

The first term of reference invites discussion on the efficiency of the current system, without regard to the inherent connection across all legal processes between efficiency and fairness. There is substantial evidence from research into the criminal justice system, dating back to early work by legal theorist Herbert Packer (1968), that placing undue emphasis on efficiency (described by Packer as a Crime Control model) results in a system that is unduly weighted against the production of fair outcomes (represented in Packer's formulation by the Due Process Model). Clearly, injustice might also arise from a system that is so preoccupied with observing due process that it fails to deliver timely and appropriate outcomes. We contend that this is not the case in relation to s501 visa cancellation process, in which a series of policy changes dating from around December 2014 have expanded the grounds for visa cancellation and narrowed opportunities to consider mitigating circumstances. We contend that the system is already weighted far too heavily towards the reduction of risk via deportation and away from the important values of rehabilitation, family and social cohesion, and the rights of the child. We therefore concentrate in this section on examples where efficiency in the s501 decision making system aimed at maximizing opportunities for deportation, is being pursued at the expense of fairness and of established due process rights.

Fairness in assessing unacceptable risk

Within most criminal justice systems in Western democratic societies, there is an expectation that classifications of risk and administrative decisions relating to parole, corrections and bail for example, will be informed and made systematically using a formal risk assessment tool. There is a stark absence of a risk assessment tool in relation to s501 visa cancellation decisions which instead rests on assessments and interpretations of the individual case in consultation with Ministerial Direction No. 65.

While risk assessment tools are critiqued for their often negative impact on individual human rights through their static and collective classifying nature, they at least provide transparency regarding what factors are considered as a basis for administrative decision making and promote some degree of consistency. The character test itself is not a formal risk assessment tool. Visa cancellation decisions at both Ministerial and appeal level are

guided by the considerations related to classifying the individual as an 'unacceptable risk' presented within the Ministerial Direction. In the absence of a more formal risk assessment tool, the considerations presented under the Direction are open to interpretation by administrative decision makers as well as by the Minister and subsequently at the AAT review (McCabe 2013; Carrington 2003; Segrave, Forbes-Mewett and Keel 2017).

An AAT adjudicator's subjective interpretation of the Ministerial Direction results in decisions appearing to be made in a very ad hoc way with the majority of adjudicators appealing to presumed community attitudes towards protection from risk as the basis of their decision. It has been argued that Tribunal adjudicators, as representatives and interpreters of community standards and values have 'grappled with the role of community values in decision making for some time' (McCabe 2013:103) which then makes it difficult to approach decision making consistently.

The absence of a formal risk assessment tool associated with visa cancellation decisions impacts on fairness in terms of how risk is assessed and the way in which testable empirical evidence is, or is not, brought to bear on decisions. It also provides grounding to the argument that the wide and arbitrary visa cancellation decision making power of the Minister, mandatory visa cancellation provisions, absolute Ministerial discretion in s501 visa cancellation and an inherently imbalanced decision making guidance enforces practices of exclusion and differentiation against non-citizens that often result in uncertain, unpredictable and indeterminate decisional outcomes (Hilkemeijer 2017).

Lack of consideration for rehabilitation

Assessments about whether an individual presents an 'unacceptable risk' to the community are attempts to predict future actions. If those assessments are made on the basis of past offending alone without regard to evidence of rehabilitation, we argue that this reflects a system weighted too heavily towards visa cancellation and deportation. This is all the more significant in the case of young offenders where a large body of evidence indicates the majority will desist in the normal course of maturation. Possibilities for rehabilitation and desistance can be further enhanced by the provision of individualized support by youth workers.

A case recounted to one of the authors by senior youth workers illustrates how over-emphasis on crime control over due process can undermine successful efforts at rebuilding young lives. Youth workers had provided intensive support to this young person who had engaged in anti-social behavior as a minor and had a record of convictions with the children's court. With their help he had found a career path and had begun to turn his life around. He was seen as a role model by younger members of the community and was developing as a promising community leader. Despite these positive efforts, police served him with documentation from the Department of Home Affairs concerning cancellation of his visa. This case illustrates a failure to consider evidence of rehabilitation in visa cancellation decisions, and the significant reduction in risk of future offending that entails. It also illustrates the use of relatively minor offences to justify visa cancellation, even in the absence of any custodial sentences and without any criminal convictions as an adult. These observations underline the importance of employing a systematic method of assessing risk that considers all relevant factors, and ensuring that an effective appeal process is available to examine the scope and veracity of evidence used to justify visa cancellation in order to correct decisions that fall short of the expectations for natural justice.

Seriousness of crime

Whilst we acknowledge that visa cancellations are mandated against individuals who conduct serious crime resulting in a prison sentence of 12 months or more, we are concerned by growing evidence of visa cancellations against convicted non-citizens for more minor offending.

As 'Key visa cancellation statistics'[3] from the Home Affairs Department indicate, visa cancellations under s501 for serious offences such as murder, manslaughter, aggravated assault, armed robbery and sexual offences appear to make up less than half of cancellations for the previous calendar year. By comparison, the largest categories of visa cancellation by most serious crime type are for common assault (which may be very minor or result in substantive harm that falls short of grievous harm), drug offences (which could include individual possession or other arguably 'victimless' crimes) and other forms of non-violent crime, including driving offences, which may not result in serious harm against individuals.

[3] https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics [Accessed 26 April 2018]

There are also cases of visa cancellation for less serious offences which is reflected in our research analyzing AAT visa cancellation decisional outcomes, including driving whilst disqualified, property damage and theft of a motor vehicle. While all offending is regrettable and potentially harmful to communities, we question whether all the cancellations reported in these official statistics reflect an 'unacceptable risk' to the community considering that the vast majority of people convicted of these offence types will be released from prison and will return to their communities due to their status as citizens.

Emergence of visa cancellations in 'pre-crime' cases

We are concerned that elements of what criminologists refer to as 'pre-crime' are starting to emerge within visa cancellation practices in Australia against those who have not be convicted of a criminal offence. For example there is evidence of increased s501 visa cancellations and deportations of individuals who have not been convicted of a criminal offence on the basis or suspicion of their association with criminal groups (pre-emptive approach to risk), and the cancellation of bridging visas of asylum seekers who violate the Code of Behaviour under 116 (g) in the *Migration Act* and Regulation 2.43 of the *Migration Regulations 1994* (Cth). The pre-crime framework is anticipatory and 'intervenes to punish, disrupt, incapacitate or restrict those deemed to embody future crime threats' (McCulloch and Wilson 2016: 1). It is inherently future orientated, and not necessarily justified by past offending, being based on targeting future threats that are hypothetical, imagined and have not yet occurred.

Considering our arguments about fairness in s501 visa cancellation decision making, this pre-crime practice is alarming for the degree of hardship and 'punishment' it causes to those who may not yet have offended, and have not had the evidence pertaining to their character tested in a criminal court. There has been a handful of recent visa cancellations on the basis of criminal suspicion or suspicion of criminal association where no criminal offence has been committed by the individual (for example, cases of Shane Martin, Aaron Joe Graham and Mehaka Te Puia[4]). These legally controversial cases further underline the need to strengthen, rather than streamline, appeal processes.

[4] See, AAP (2017) 'Dustin Martin's father Shane Martin's deportation case in Federal Court ', *The Age,* 5 December 2015. Available at, https://www.theage.com.au/sport/afl/dustin-martins-father-shane-

Lack of consideration for mitigating factors

For visa cancellation decisions to be considered fair, mitigating factors including length of residence, considerations of children and family life in Australia, rehabilitation and ties to the Australian community need to be given full consideration in AAT decisional reviews, particularly for longer term residents who have long established lives in Australia. Review of visa cancellation decisions at the Administrative Appeals Tribunal provides an opportunity for human rights considerations to be presented as mitigating considerations against the visa cancellation decision. Whilst these are given decisional consideration at the initial visa cancellation stage, mandatory visa cancellation for offences resulting in a prison sentence of 12 months or more will place individuals on a deportation pathway regardless of their human rights and circumstances of life in Australia. This section looks at how these factors are currently considered in the present system and argues that it is essential that people who have visas cancelled continue to have access to full review in order for these mitigating factors to be properly considered.

The Administrative Appeals Tribunal (AAT) has jurisdiction to independently review the Department of Home Affairs' decision to cancel the visa by considering the facts, law and policy relating to the decision in order to arrive at its own decision[5]. The AAT review process allows the individual access to due process surrounding the visa cancellation decision where mitigating considerations such as whether a convicted non-citizen has children in Australia, length of residence and ties to Australia and any rehabilitation they may have achieved following their offending are presented and considered by the adjudicator. S501 deportation from Australia can then be understood as a human rights issue, particularly for longer term

martins-deportation-case-in-federal-court-20171205-gzyqvl.html [Accessed 19 April 2018]; High Court of Australia, AARON JOE THOMAS GRAHAM v MINISTER FOR IMMIGRATION AND BORDER PROTECTION; MEHAKA LEE TE PUIA v MINISTER FOR IMMIGRATION AND BORDER PROTECTION [2017] HCA 33, 6 September 2017; *Graham v Minister for Immigration and Border Protection Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 6 September 2017 M97/2016 & P58/2016; Kampmark, B. (2017) 'Judicial Review: The Graham Case', Rule of Law Institute of Australia. 23 October 2017. Available at, https://www.ruleoflaw.org.au/judicial-review/ [Accessed 19 April 2018).

[5] Administrative Appeals Tribunal website, http://www.aat.gov.au/ [Accessed 26 April 2018]

residents, given the human impact it can have on those who experience this deportation process.

As well as those who have their visa cancelled, families are impacted. Families can be broken, the process can be incredibly destabilizing in situations where deportees have limited to no connection to their country of origin, access to rehabilitation is restricted and punishment of convicted non-citizens for the crime they have committed is experienced beyond the serving of their prison sentence often resulting in periods in immigration detention[6] and, where a visa cancellation decision is affirmed, deportation (Bosworth 2017; Bosworth, Aas and Pickering 2018; Beckett and Murakawa 2012). For New Zealanders, a period of surveillance by New Zealand police on return is also experienced (Stanley 2017; Putake 2017). Convicted non-citizens subjected to s501 therefore experience differential treatment and punishment to that of citizens in addition to their prison sentence on the basis of their migration status.

Case Studies: ████████ *Alex Viane*

████████, a small business owner in Australia, was removed from Australia to New Zealand after his visa was cancelled under s501 in 2015. He arrived in Australia as a toddler with his family and grew up in Sydney's outer western suburbs. He and his family never returned to New Zealand since their arrival. ████ built a life in Australia; his immediate family lives here, he has a young son and an established business. ████ had a criminal history, although it is understood to be for a string of minor offences. Whilst it is not publicly known what offence/s resulted in the cancellation of his visa, it is known that his most recent prison sentence was for 2 months, where, towards the end of his sentence, he was issued with a visa cancellation notice. ████ claims that he was given the choice to either be transferred to Christmas Island Immigration Detention Centre, or voluntarily depart to New Zealand. He chose the latter on the understanding he could appeal his visa cancellation from there, however was difficult for him. He felt like his appeal case was not prioritized or progressing.

---

[6] A recent report by the Commonwealth Ombudsman (2016) revealed that the average length of time spent in immigration detention for those involved in the AAT s501 visa cancellation review process from Jan 2014-Dec 2015 was 150 days (close to 21 weeks). According to the AAT website, appeal decisions are to be made within 12 weeks of the Minister issuing the visa cancellation notice. The average length of time in detention far exceeds the 12 week AAT decision turn around which reflects a degree of inefficiency in the system.

His deportation from Australia meant that he had to leave his family and son behind and look to establish a new life in a country only known to him by his birth, citizenship and passport. He moved to a provincial city, lived with relatives he had not previously met and was faced with limited employment prospects. He eventually moved to Wellington, a city where he knew no one. A year and a half after his deportation, in June 2017, [redacted] committed suicide reportedly because of his desperate situation in New Zealand, with limited support and ties to that country following his return (Putake 2015, 2017). This case highlights the differential treatment and lack of consideration for the consequences for non-citizens subject to the criminal justice system who often experience periods in immigration detention, deportation and in this case, desperation leading to death on return to country of origin.

Receiving a degree of media coverage (Harrison and Martin 2018; Koubaridis 2018; Doherty 2018), Alex Viane, a 38 year old American-Samoan born, New Zealand citizen, is currently due to be deported from Australia. Although he has New Zealand citizenship, Mr Viane has never set foot in New Zealand. He arrived in Australia in 1990 as a teenager with his parents, traveling directly from American Samoa. He has a partner and young daughter in Australia and given that he has never been to New Zealand, he has no family and no ties to that country. He has a history of criminal offending and his visa was cancelled in July last year by the Minister for Immigration and Border Protection. His application for judicial review of the case was dismissed, therefore, he will be deported from Australia.

We have concerns surrounding the deportation of New Zealander (and other nationality) long term residents who have lived in Australia for a period of 10 years or more. The cases of [redacted] and Mr Viane summarised above highlight concerns for longer term New Zealander residents of Australia, particularly those who have lived here since they were children, or who may have been born here without applying for citizenship. For those longer term residents who have their visa cancelled under s501, it could be argued that Australia should take responsibility for criminal offending within its own jurisdiction in support of a commitment to rehabilitation and in recognition that consequences of offending are a consequence of the country in which the individual grew up in, not of the country in which they were born. Deportability under s501 has challenged the concept of permanent residence and has the potential to destabilize lives established in Australia and impact on

the human rights of those who have their visa cancelled, and family members who are directly affected.

The ’10 year rule’ introduced in 1983 under s201 of the *Migration Act 1958,* previously protected convicted non-citizens from deportation if they had been resident of Australia for 10 years or more. This rule was revoked in 1998 with amendments made to character provisions in the *Migration Act 1958*. Further, the previous *Ministerial Direction to the Migration Act 1958* (No. 41 from June 2009- December 2014) introduced two new primary considerations for visa cancellation decision making which concerned length of residence and ties to the Australian community - whether the person was a minor when they began living in Australia, specifying that minors, who have spent their formative years in Australia, have an increased likelihood of establishment of greater ties and linkages to the Australian community, which should be given favourable weight; and, the length of time that the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct. These considerations were relegated to ‘other considerations’ under the current Direction No. 65 and now carry less decisional weight, a policy shift that we argue has shifted the balance too far towards efficiency, potentially at the expense of fairness

Concerns surrounding visa cancellations against young people under s501

The Government’s most recent considerations to extend s501 to the removal of convicted non-citizens aged 16 or 17 years runs counter to the fundamental human rights of the child (under the Convention on the Rights of the Child 1989) and, potentially, the protection of refugees (Convention Relating to the Status of Refugees 1951). These considerations appear to be directed as a deterrent measure for children involved in allegedly gang-related criminal activity, many of whom have been identified in news media to be from South Sudan, New Zealand and the Pacific Islands. These measures, if introduced, would tip the balance further towards ‘efficiency’ in terms of ensuring the deportation of additional categories of people, with serious consequences for fairness and the observance of international human rights undertakings.

Deaths associated with deportation

While deaths of deportees are clearly not an intended consequence of the deportation system, and occur in only a minority of cases, they reinforce in dramatic terms the sometimes serious consequences of failure to consider the human implications of decisions to cancel visas and deport, and the consequent need for careful and comprehensive review.

The Australian Border Deaths Database[7] maintains a record of all known deaths associated with Australian border control since 1 January 2000. The Database includes deaths that occur in preparation for deportation or following return to countries of origin or transit (in the rare cases where this is reported). Since January 2000, the Australian Border Deaths Database has recorded the deaths of three New Zealander citizens associated with s501 visa cancellation decisions including [redacted] and an unknown male. The record of these incidents as presented in the Database are presented below. The deaths of the unknown male and Robert Peihopa are both recorded as deaths in custody, occurring in immigration detention settings. Information about these deaths has all been obtained from media reports or our NGO contacts.

Date	No. deaths	Personal Details	Incident Details	Death in immigration custody
7 -June-17	1	[redacted] New Zealander, male	[redacted] committed suicide in New Zealand, a year and a half after his deportation under s501 of the Migration Act. He was in a desperate situation in New Zealand with limited support and ties to the country following his return. He moved to Australia with his family as a toddler and had never left Sydney until his deportation following his prison sentence for a string of minor offences. He has a young child in Sydney and his immediate family still live there.	

[7] http://artsonline.monash.edu.au/thebordercrossingobservatory/researchoutputs/australian-border-deaths-database/ [Accessed 26 April 2019]

8-Mar-17	1	New Zealander, male	Suspected suicide by hanging in Maribyrnong Immigration Detention Centre	Onshore immigration detention
4-Apr-16	1	[redacted] New Zealander, 42 years old	[redacted] died of a suspected heart attack in Villawood Immigration Detention Centre. Attempts were made to resuscitate him by staff. NSW coroner will prepare a report on this death.	Onshore immigration detention

Source: Australian Border Deaths Database, The Border Crossing Observatory, http://artsonline.monash.edu.au/thebordercrossingobservatory/researchoutputs/australian-border-deaths-database/

BALANCING EFFICIENCY WITH EFFECTIVENESS

As well as meeting the requirements of fairness in individual cases, a system for deporting criminal offenders needs to be judged on its capacity and ability to meet its stated social objective, which in this case is to improve community safety. In this section we offer a few broad observations on this dimension of the s501 visa cancellation process.

Firstly, it is notable that the vast majority of criminal offenders in Australia are citizens. In these cases, deportation is not an available option, and governments rightly rely on established institutions within the criminal justice system to respond appropriately and prevent future offending. It is difficult to see how the offending of non-citizens differs qualitatively from non-citizens in a way that would justify separate treatment. Indeed, no arguments have been offered to establish this necessity, and the justification for and necessity of visa cancellation and deportation tends to be taken as self-evident. Moreover, there is a notable lack of empirical evidence that expelling a small number of often minor offenders makes a major contribution to overall community safety.

Reinforcing the image of ‘criminal migrants’ by increasing the efficiency and scope of the criminal deportation system might be expected to have a negative impact on public opinion which could affect both government and community-led efforts at fostering social cohesion in our diverse society. Moreover, migrant communities themselves, including non-offending

relatives of deported individuals, are subject to hardship and loss which could increase feelings of insecurity within these groups, impacting, in turn, on perceptions of safety and wellbeing across the whole community.

Finally, the widespread deportation of convicted non-citizens, particularly long term residents of Australia, has the potential to cause ramifications for Australia in international political and diplomatic relations. This has been exemplified in tensions that have arisen between Australia and New Zealand over s501 visa cancellations and deportations, particularly since amendments were made in December 2014. Former NZ Prime Minister Keys consistently raised concerns over the deportation of serious and petty criminals and bikie gang members to New Zealand as well as concerns as to the number of New Zealanders being held in immigration detention (Conifer 2015). More recently, Prime Minister Jacinda Arden has also commented on this issue in the media to say that Australia should only be deporting New Zealand-born criminals who have genuine links to New Zealand (Doherty 2018). In the case of offenders who have grown up in Australia, there is a strong case that responsibility for the social conditions that have contributed to offending lies with this country (see, for example, Weber and Powell, 2017; Grewcock 2014).

Given these potentially negative outcomes and lack of evidence of substantial benefit to community safety, we question whether as system driven primarily by an unfettered quest for efficiency in the deportation of offenders is beneficial to Australia.

2. Present levels of duplication associated with the merits review process

DUPLICATION IS PART OF A JUST SYSTEM OF DUE PROCESS

S501 visa cancellation operates relatively unconstrained in comparison to criminal justice processes without many of the checks and balances on executive power that have been established to uphold the rights of defendants and protect from unwarranted state intrusion on civil liberties (Zedner 2016; Bosworth, Franko and Pickering 2018). We therefore argue that continued access to decisional review at the AAT, which might be seen as a duplication of decision making by the delegate of the Minister for Home Affairs resulting in the visa cancellation, is a necessary and mandatory requirement of a just system.

CONTRIBUTION OF MINISTERIAL DISCRETION TO DUPLICATION

The expansiveness of executive power in s501 visa cancellation is another point of concern. Under s501, 501A and 501B, the Minister may exercise his/her executive power to personally cancel a visa. Personal exercise of power over visa cancellation decision making can occur at the original visa cancellation stage which then restricts the individual's access to the appeal process (where the only avenue of decisional challenge would then be through judicial review), or following an AAT review of the visa cancellation decision. Where the Minister exercises his/her executive power to personally cancel a visa following the AAT review decision, this creates an additional level of duplication associated with the merits review process. This is often to the detriment of the individual as well as to the time and resourcing of the Tribunal. In addition, the Minister's personal discretionary power to cancel a visa under s501 is incredibly broad and can impact on the individual's access to the AAT. In this instance, Ministerial intervention has the effect of *removing* the procedural 'duplication' that we have argued is essential in the interests of justice. .

In one extraordinary case where the Minister overturned the AAT decision revoking the visa cancellation of Heydon 'Tiny' Tewao, the applicant's physical size had a strong impact on the Minister's decision which subsequently resulted in the Mr Tewao's removal from Australia. This case reflects how differently the Minister interpreted the ongoing risk the applicant posed from the AAT, apparently based on a legally irrelevant factor: his physical size.

Mr Tewao had his visa cancelled by a delegate of the Minister as a result of his involvement in an aggravated robbery with his cousin. Tewao's case was accepted for review by the AAT and the decision to cancel his visa was set aside based on the Tribunal's assessment that Mr Tewao was of low risk to the Australian community, had good prospects for rehabilitation and that Mr Tewao was, "for all his mountainous bulk, a gentle man" (*Heydon Tewao v Minster for Immigration and Citizenship [AATA 329] 2011*). Whilst the Tribunal set aside the visa cancellation, a great deal was made of his physical size, "Mr Tewao stands at seven feet tall. He is a huge man, 26 years old, with shoulders like buttresses and legs like pylons. His hands, as fists, resemble demolition balls." (*Heydon Tewao v Minister for Immigration and Citizenship [AATA 329] 2011).*

However, in a notable turn of events, the then Minister for Immigration, Chris Bowen, personally overturned the AAT's decision to set aside visa cancellation resulting in the deportation of Mr Tewao to New Zealand. Mr Tewao's physical size was used to justify the

Minister's decision to cancel, with Minister Bowen commenting to the media "I took into account that the above crime involved an unprovoked and brutal attack on another man, that it was committed with another offender and that Mr Tewao is an exceptionally large man whose role was to be the 'enforcer' in the offence." (Owen, 2012).

International human rights law requires that the power of review is available as a remedy in any decision making process. But, the Minister's veto is an unnecessary level of duplication, which has no precedent in the Australian criminal justice system. Access to due process is a human right enshrined in the International Covenant of Civil and Political Rights (ICCPR). As a signatory to this and other relevant international human rights treaties, Australia has an international obligation to uphold and protect those rights. The exercise of executive power in cases where the Minister uses his/her personal discretion to cancel an individual's visa restricts the individual's access to due process which compromises Australia's international human right obligations.

References

Beckett, K. and Murakawa, N. (2012) ' Mapping the shadow carceral state: : Toward an institutionally capacious approach to punishment, *Theoretical Criminology*, 16(2): 221-244.

Bosworth, M. (2017) 'Penal Humanitarianism? Punishment in an era of mass migration' *New Criminal Law Review,* 20(1): 39-65.

Bosworth, M., Franko, K. and Pickering, S. (2018) 'Punishment, globalization and migration control: 'Get them the hell out of here' *Punishment and Society: 20(1): 34-53.*

Carrington, K. (2003) 'Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context' Current Issues Brief No. 3 2003-04. Parliament of Australia.

Commonwealth of Australia, (2016), Proof Committee Hansard, Senate, Legal and

Constitutional Affairs Legislation Committee, Estimates, (Public), Monday, 8 February, 2016.

Commonwealth Ombudsman (2016) ‘Department of Immigration and Border Protection, Administration of s501 of the Migration Act 1958’ December 2016. Report by the Commonwealth Ombudsman, Colin Neave AM, under the Ombudsman Act 1976. Report No. 8, 2016.

Conifer, D. (2015) ‘New Zealand prime minister John Key says detainment of NZ citizens by Australia 'not in Anzac spirit' *ABC News, 30 September 2015.* Available at, http://www.abc.net.au/news/2015-09-30/john-key-australia-detaining-nz-citizens-not-in-anzac-spirit/6816090 [Accessed 19 April 2018].

Doherty, B. (2018) ‘Deporting offending New Zealanders ‘fair and just’, Turnbull says’ *The Guardian,* 2 March 2018. Available at, https://www.theguardian.com/australia-news/2018/mar/02/deporting-offending-new-zealanders-fair-and-just-turnbull-says [Accessed 19 April 2018).

DIBP and ABF Immigration Detention statistics, Available at, https://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention

Grewcock, M. (2014) 'Reinventing "the stain" - bad character and criminal deportation in contemporary Australia', in S. Pickering and J. Ham (eds) *Routledge Handbook on Crime and International Migration,* Routledge: Abingdon: 121-138.

Harrison, C. and Martin, H. (2018) 'Criminal who has never set foot in New Zealand to be deported here from Australia’ *Sunday Star Times*, 14 January 2018.

https://www.stuff.co.nz/national/crime/100551094/criminal-who-has-never-set-foot-in-new-zealand-to-be-deported-here-from-australia [Accessed 26 April 2018].

Heydon Tewao v Minster for Immigration and Citizenship [AATA] 2011.

Hlikemeijier, A. (2017) 'Arbitrary ministerial power under the Migration Act: Permanent residents beware!' *Alternative Law Journal*, 42(3): 221-226.

Karlsen, E. (2016) 'Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016' Bills Digest, Parliament of Australia, Parliamentary Library, Bills Digest No. 97 2015-16. 9 March 2016. Available at, http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/4418865/upload_binary/4418865.pdf;fileType=app lication%2Fpdf#search=%22legislation/billsdgs/4418865%22 [Accessed 26 April 2018].

Koubaridis A. (2018) 'Jacinda Arden and Malcolm Turnbull get down to talk trade- and deportees' *News.com.au,* 2 March 2018. Available at, http://www.news.com.au/finance/work/leaders/jacinda-ardern-and-malcolm-turnbull-get-down-to-talk-trade-and-deportees/news-story/8510fbcc7fbc68580e1b35c84197aea5 [Accessed 26 April 2018].

McCabe, B. (2013) 'Community values and correct or preferable decisions in administrative tribunals' *University of Queensland Law Journal*, 32(1): 102-121.

McCulloch, J. and Wilson, D. J. (2016) *Pre-crime: Pre-emption, precaution and the future*, Abingdon: Routledge.

Owen, J. (2012) ‘Court backs Bowen in genetics ruling on giant’ *The Australian*, 9 January 2012. Available at, https://www.theaustralian.com.au/national-affairs/immigration/court-backs-bowen-in-genetics-ruling-on-giant/news-story/fd52fcf68adbb9b72b9301eba6d9bbaa?sv=c2b70304fa40c31524849300a5b58c2c [Accessed 26 April 2018].

Packer, H. (1968) *The Limits of the Criminal Sanction*, Stanford University Press.

Putake, T. R (2017) ‘Death of a deportee’ *The Daily Blog*, 8 June 2017. Available at, https://thedailyblog.co.nz/2017/06/08/guest-blog-te-reo-putake-death-of-a-deportee/ [Accessed 26 April 2018].

Putake, T. R. (2015) ‘Deportee’ *Te Reo Putake Blog,* 2 December 2015. Available at, tereoputake.wordpress.com/ [Accessed 26 April 2018]

Segrave, M., Forbes-Mewett, H. and Keel, C. (2017) ‘Migration Review Tribunal decisions in student visa cancellation appeals: Sympathy, hardship and exceptional circumstances’ *Current Issues in Criminal Justice*, Vol. 29: 1-17.

Stanley, E. E. (2017) ‘Expanding Crimmigration: The Detention and Deportation of New Zealanders from Australia’ *Australian and New Zealand Journal of Criminology*. doi:10.1177/0004865817730858.

Weber, L and Powell, R (2017) ‘Ripples Across the Pacific: Cycles of Risk and Exclusion Following Criminal Deportation to Samoa’ in S. Khosravi, After Deportation: Ethnographic perspectives, Palgrave Macmillan.

Zedner, L. (2016) 'Penal subversions: When in a punishment not a punishment, who decides and on what grounds?' *Theoretical Criminology*, 21(1): 3-20.

Author biographies

Rebecca Powell

Rebecca Powell is the Research Manager the Managing-Director of the Border Crossing Observatory and the Research Manager of the Population, Migration and Social Inclusion Focus Program at Monash University. She has worked as a senior researcher on a number of irregular migration research projects hosted by the Border Crossing Observatory and has previous experience working as an international research consultant on trafficking in persons and smuggling of migrants for the United Nations Office on Drugs and Crime and the Asia Regional Trafficking in Persons Project.

Rebecca is currently completing a PhD by publications part time titled ''I still call Australia home': The deportation of convicted non-citizens from Australia and the impact of policy and practice from a criminological perspective.'

Associate Professor Leanne Weber

Leanne Weber is an ARC Future Fellow in internal border policing and a co-director of the Border Crossing Observatory. She has studied and worked at the Institute of Criminology in Cambridge and the Human Rights Centre at Essex University; held research contracts at the Centre for Criminological Research at Oxford University; and taught criminology at the University of Western Sydney and The University of New South Wales. She was previously the holder of a Larkins Fellowship at Monash University. She is the author or editor of 8 academic books and multiple journal articles on policing, human rights and border control. Her books include Policing Non-Citizens (Routledge, 2013) and Rethinking Border Control for a Globalizing World (Palgrave, 2015).

About the Border Crossing Observatory

The Border Crossing Observatory is an innovative virtual research centre that conducts high quality, independent and cutting edge research on border crossings and border control.

Based at Monash University, the Observatory draws together an international network of critical criminologists and researchers from related disciplines who work in connection with key NGOs to examine border crossings and border control, putting the experiences of human beings at the centre of their analysis.

The Border Crossing Observatory is built on a strong foundation of empirical research. Our researchers adopt inter-disciplinary social science approaches to research migration and border control. Our research seeks to transform knowledge and develop new ways of thinking, bringing new insights into policy debates associated with the regulation of migration.