

## **Conviction, detention and removal: the multiple punishment of offenders under section 501 Migration Act**

**Paper presented to the Australian and New Zealand Society of Criminology Conference, University of Western Australia, Perth, 24 November 2009.**

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### **Abstract**

Under S501 of the *Migration Act*, being imprisoned for a criminal offence can constitute grounds for visa cancellation, even for people who have spent most of their lives in Australia. 'Non-citizens' who have had their visas cancelled in this way are liable to detention on completion of their prison sentence; form a distinct cohort within the immigration detainee population; and are routinely deported. Developing themes outlined initially at the Critical Criminology conference hosted by Monash University in Melbourne in July 2009, this paper examines the punitive implications of S501 including: its impact on risk assessment and the parole process; the institutionalisation of double punishment; and the multiple mechanisms of disempowerment operating through the detention regime. While this remains work in progress, the paper argues that criminal convictions do not justify detention and removal, and suggests a framework for future research, as part of a wider project to examine the administrative transformation of lawful into unlawful subjects.

### **Introduction**

On 20 October 2009, 43 year-old UK citizen Andrew Moore, who had been a permanent resident in Australia since he was 11 years old, was deported to the UK. Prior to his removal, Moore had been in immigration detention and was known to be suffering from a number of serious health problems. He was accompanied on the flight by five people, including two federal police officers, his immigration department caseworker and a doctor. He was left at Heathrow airport with a small amount of cash; some clothes given to him by friends and his migration agent in Australia; and the address of a hostel in North London. He managed to make it by cab to the hostel but two days later, he was

found dead on the street. Initial information from the local police suggested he died as a result of a heart attack and/or deep vein thrombosis<sup>1</sup>.

While there are many factual and other issues to be resolved in relation to this case, it provides a dismal example of the routine removal from Australia of former residents who pursuant to s501 *Migration Act* have had their visas cancelled as a result of criminal convictions<sup>2</sup>. In this case, the consequences literally were fatal; in virtually all cases, multiple forms of additional punishment beyond those envisaged or sanctioned by the sentencing court are inflicted upon the prisoner. This not only has damaging individual consequences but also has the potential to undermine parole, risk assessment and the nature of the sentencing process as a whole. Moreover, the operation of s501 allows for inconsistent and discretionary political interventions against unpopular and often very vulnerable prisoners.

It is difficult to obtain exact statistics on the numbers of people detained and deported under section 501. The immigration department only publishes generic figures for visa cancellations. However, a Senate hearing was told in May 2007 that 144 section 501 cancellations occurred between 1 July 2005 and 1 June 2007<sup>3</sup>. According to one media report (Gibson 2009), 41 New Zealanders were deported for character reasons in 2007-2008. From my own observations and from speaking to others who regularly visit detention centres, it seems that 20-40 people have been detained at any one time over the past year following s501 visa cancellations.

Section 501 detainees have their individual peculiarities, but the similarities stand out. Regardless of their formal status, mostly they regard Australia as home. Many have spent a significant portion of their lives in Australia and have their social roots here.

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<sup>1</sup> Personal communication with migration agent, Judy Dixon, 2 November 2009.

<sup>2</sup> The details of Moore's convictions, the most serious of which was manslaughter, are set out in *Moore v Minister for Immigration and Citizenship* [2007] FCAFC 134 at pars 3-4 and 8-9.

<sup>3</sup> Question taken on Notice from Senator Andrew Bartlett, Budget estimates hearing, 21-22 May 2007.

They exhibit a range of characteristics associated with general prison population such as mental health problems, histories of alcohol and substance abuse, and disrupted work and education experiences. And they feel frustrated and victimised by being arbitrarily detained for periods often longer than the prison terms used to justify their detention.

### **The legal and policy framework**

Under section 501 of the Migration Act, the immigration minister may cancel the visa of any person who the minister reasonably suspects does not pass the character test and the person does not satisfy the minister that person passes the character test<sup>4</sup>. As the Dr. Mohamed Haneef saga demonstrated, a negative character finding does not require criminal convictions but section 501 does provide for visa cancellation if the person has a 'substantial criminal record'<sup>5</sup>, defined at a minimum in the act as a term of imprisonment of 12 months or more<sup>6</sup>, or 2 or more terms of imprisonment, where the total of those terms is 2 years or more<sup>7</sup>.

Section 501 was intended to vest greater decision making power in the immigration minister and avoid the courts preventing attempts to deport non-citizens convicted of violent crimes (SLCLC 1998: 6). When it was introduced in 1999<sup>8</sup>, section 501 effectively superseded section 201, which enables the deportation of non-citizens, who have been sentenced to imprisonment for at least one year and who have been permanent residents for less than 10 years<sup>9</sup>. Only in exceptional circumstances can a person who has been permanently resident for more than 10 years be removed under that section.

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<sup>4</sup> S 501(2)(a) and (b)

<sup>5</sup> S 501(6)(a)

<sup>6</sup> S 501(7)(c)

<sup>7</sup> S 501(7)(d)

<sup>8</sup> *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998*

<sup>9</sup> S 201(b) and (c)

In 2006, the potential scope of the new provision was confirmed by the High Court in the case of 43 year-old Stefan Nystrom, whose deportation to Sweden was allowed despite Nystrom having lived in Australia for all but 27 days of his life<sup>10</sup>. Nystrom was one of three high profile cases where long term residents with criminal records were literally dumped in other countries, notwithstanding their lack of social ties, capacity to support themselves or proper knowledge of the local language.

In 2003, Ali Tastan, who had lived in Australia since he was 12, was deported to Turkey, where mentally ill, he was destitute and homeless for three years before a Federal Court decision forced the immigration department to arrange his return to Australia (Topsfield 2006).

In 2004, Robert Jovicic, who was born to Serbian parents in France but had lived in Australia since he was 2, was deported to Serbia where destitute, stateless and not entitled to welfare benefits, he camped outside the Australian embassy in Belgrade. He was allowed to return in March 2006 but had to wait until February 2008 before being granted permanent residence (Evans 2008).

Unlike Tastan and Jovicic, Nystrom remains in Sweden. In 2007, he applied to the United Nations Human Rights Committee for a declaration that his treatment breached various provisions of the International Covenant on Civil and Political Rights (HRLRC 2007) but any decision by the Committee is not binding and the new federal government has taken no proactive steps to reverse its predecessor's decision.

Until 15 June 2009, decisions to remove under section 501 were subject to ministerial Direction 21, which set out three primary considerations: the protection of the Australian community, and members of the community; the expectations of the

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<sup>10</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 230 ALR 370

community; and in all cases involving a parental or close relationship between a child or children and the person under consideration, the best interests of the child or children.

Under the new Direction 41, the three primary considerations have been changed to: the protection of the Australian community from serious criminal or other harmful conduct, particularly crimes involving violence; whether the person was a minor when they began living in Australia; the length of time that the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct; and relevant international obligations.

On the face of it, the new directions offer the prospect of a more lenient interpretation of section 501 and give greater scope for representations and the use of mitigating material by potential deportees. But the government has given conflicting signals regarding this. In July 2008, the immigration minister said:

There are a large number [of the current detention population] who are serious risks to the community...We're talking about people who have been determined by the courts of Australia to be serious criminals and they're in immigration detention pending their removal from Australia... They need to be removed from Australia and the moment I can remove them, they will be removed (Sky News 2008).

In December 2008, the Senate Joint Standing Committee on Migration recommended that the government publish guidelines 'as to what is considered to constitute an unacceptable risk to the community' (JSCM 2008:13). This appeared to take on board sustained criticism by the Commonwealth Ombudsman (CIO 2006) and many submissions to the Committee of the arbitrary and prolonged nature of section 501 detentions and as indicated by the following table, the non-violent nature of many of the convictions that were triggering deportation (JSCM 2008:49):

**Convictions of section 501 visa cancellations in detention as at 7 May 2008**

	<b>Number of individuals</b>
Break and enter, break enter and steal, larceny, auto theft, burglary, theft, shoplifting	23
Violent robbery, armed robbery, assault, actual bodily harm, grievous bodily harm, malicious wounding	22
Drug importation, supply, possession, attempted administration	10
Driving offences	9
Firearms offences	7
Possession stolen/prohibited goods, receiving stolen goods	6
Murder, manslaughter, kidnapping	4
Malicious property damage	3
Trespass, perjury	3
Escape from lawful custody	2
Deception	2
Child sex offences	1

Accordingly, the new Direction 41, while reiterating that past and present criminal conduct remain grounds for removal, also requires that ‘both good and bad conduct must be taken into consideration in obtaining a complete picture of the person’s character’<sup>11</sup>.

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<sup>11</sup> Par 7.3.1

Time will tell how much difference this makes to the decision-making process within the immigration department. The immigration minister continues to make periodic statements in favour of deporting criminals<sup>12</sup>. And as Andrew Moore's case illustrates, deportations are still continuing, even when there are extenuating circumstances.

The department also seems determined to argue in legal proceedings for a very broad framework for what constitutes risk. For example, in one recent case before the AAT in Sydney, the immigration department sought unsuccessfully to justify an adverse risk assessment based in part on a serious episode of self-harm by a detainee frustrated by a sudden and unprovoked decision to handcuff him during unrelated court proceedings<sup>13</sup>.

### **Risk assessment**

Regardless of how the new direction is interpreted, there are ongoing issues in relation to risk assessment.

First, risk assessment is a problematic concept in itself. There are no exact scientific predictors of future offending that can take into account the often complex socio-economic, medical and other personal characteristics associated with individual offenders. The fact that someone has offended in the past is, in itself, no guarantee of recidivism. Instead, risk is framed in relative terms by nominated experts and courts, with terms such as 'possible' and 'probable' often carrying as much ideological as scientific meaning.

Second, the use of section 501 undermines the established principles and processes associated with risk assessment within the criminal justice system. With recent exceptions such as sex offender control orders, risk is not a barrier to release upon the

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<sup>12</sup> See for example, his intervention in Migration Amendment (Abolishing Detention Debt) Bill 2009, Second Reading debate, 8 September 2009, p.7

<sup>13</sup> See *WKCG and Minister for Immigration and Citizenship* [2009] AATA 512.

completion of a sentence. Rather parole is used as a method of ensuring post-release compliance, at least for the duration of the original sentence.

However, the prospect of future section 501 detention can have a significant impact on a parole process that is predicated on release into the community. In New South Wales, the Department of Corrective Services has a policy of not allowing C3 classification for prisoners possibly subject to section 501. This means that unescorted day release and other pre-release practices routinely used by the Parole Authority to assess risk are denied to these prisoners.

This particularly affects long term prisoners. Larissa Behrendt, a member of the Serious Offenders Review Council (SORC), which advises the Commissioner regarding classification and other issues associated with prisoners with a non-parole period of at least 12 years, has voiced concerns that potential deportees have 'no opportunity...during the period of incarceration to deal with offending behaviour, access developmental or rehabilitative programs or begin integration back into society' (Behrendt undated).

By contrast, the former chair of SORC, Judge Moss, raised concerns that granting parole to long term prisoners who were subsequently deported, simply subverted the orders of the sentencing judge by effectively removing from the sentence a period of supervised release (Behrendt, undated). Judge Moss's approach is not shared by his former SORC colleagues or his successor, Judge Levine, but as I will discuss shortly, it remains influential.

Either way, section 501 impacts on the parole process in an openly discriminatory manner, with the refusal to grant low security classification removing from delegated immigration officials a concrete measure by which to make their decision and



reinforcing their reliance on the existence of a criminal record as the major determinant of risk.

The third issue is the internal consistencies associated with the practice of section 501 detention. Anecdotally, it seems that a significant number of section 501 detainees are not detained immediately upon their release from prison. In some cases, they have found stable accommodation and jobs and spent several months in the community complying fully with their parole conditions. Some have been arrested at home or their places of work, while others have simply surrendered having received telephone or other requests for them to do so.

The practice of rounding up section 501 detainees reached almost farcical proportions following the decision of the Federal Court in *Sales*<sup>14</sup> on 17 July 2008. As result of this decision, Sales and 14 other immigration detainees were released because it was held that section 501 could not be used to cancel the particular type of visa they held. The government responded to this by amending the Migration Act<sup>15</sup> to validate the initial cancellations with effect from 19 September 2008. In the meantime, the former detainees lived in the community until at least mid October 2008 and in one case for almost a year. And as far as I am aware, none were charged with any criminal offences during that time.

### **Political intervention and the media**

Media coverage of prisoners affected by s501 is generally hostile and provides incentives for the minister and other politicians to use s501 as an indicator of their law and order credentials.

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<sup>14</sup> *Sales v Minister for Immigration and Citizenship* [2008] FCAFC 132

<sup>15</sup> *Migration Legislation Amendment Act (No.1) 2008*, Schedule 4. Amendments were also made to the Act as a result of a similar decision in relation to Andrew Moore. See <http://www.immi.gov.au/legislation/amendments/2008/080919/lc19092008-04.htm>

Prior to his removal, Andrew Moore had been the subject of media attention focusing on him and another former prisoner detained at Maribyrnong detention centre in Melbourne. In particular, the shock jock Derryn Hinch had picked up the case following the Moore's escape from detention during a hospital visit in May 2009, 'for probably a bogus illness'. After the Moore voluntarily surrendered in September, Hinch, who was presumably receiving information from detention centre staff, described Moore as being 'treated like a VIP guest' and was particularly incensed that he had 'a new TV set and DVD'. Hinch also claimed Moore 'reportedly swans around in a blue bathrobe and treats the place like 'his own Ritz-Carlton''<sup>16</sup>.

According to Moore's migration agent, the truth was somewhat less glamorous. Moore was in a dressing gown because he was chronically ill and unable to move around for more than a few hours. When he turned himself in, 'his face was like a skull' and it took 'some days' for proper medical treatment to be provided. His TV and DVD were replaced because most of his possessions had been taken from his room after he had absconded<sup>17</sup>.

While no direct link can be shown between Hinch's outburst and the minister's refusal to allow Moore to stay, it seems unlikely any favourable decision would have gone unnoticed by the media.

In September 2009, 31 year-old Patricia Toia, who had lived in Australia since she was 14 months old, was deported to New Zealand. Toia, who had been dubbed 'a one woman crime wave', periodically appeared in the media in both Australia and New Zealand, where her impending arrival generated a critical response from the New Zealand authorities (McClymont and Tibbits 2007). She was removed from Australia by private jet after the commercial airlines refused to take her. She was accompanied by three

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<sup>16</sup> 'Maribyrnong Madness', <http://www.hinch.net/hinch-says-2009/september/22/22-09-09.html>, accessed 2 November 2009.

<sup>17</sup> Personal communication with Judy Dixon, 2 November 2009.

police and two immigration officers and found temporary accommodation in an Auckland hotel before reportedly absconding (Lewis 2009). Toia had no meaningful social ties in New Zealand. In Australia, the Federal Court described ‘her family unit as highly dysfunctional’ and portraying ‘a picture of drug and alcohol abuse, physical and sexual abuse and incest’<sup>18</sup>. Here was a vulnerable woman who had virtually lived on the streets since early adolescence, had spent most of her adult life in prison and clearly needed intensive support. Deporting her did nothing to address the immediate causes of her offending and arguably increased the potential risk to her and others. But for the Australian government, the dumping exercise ends at the airport; no attempt is made to follow up what happens to the deportee.

This lack of post-deportation accountability underpins the different twist to the use of s501 highlighted by the ongoing case of Choon Tee Lim. Lim was one of two men convicted of the murder of Sydney heart surgeon Victor Chang in 1991. He was sentenced to 24 years imprisonment with a non-parole period of 18 years. Following a recommendation by the Serious Offenders Review Council, who had regularly monitored and interviewed Lim, the New South Wales State Parole Authority determined in September 2009 that Lim was eligible for parole on 11 November 2009. At the Parole Authority hearing in September, no substantive objections were raised against releasing Lim, who appears to have been regarded as a model prisoner. Nevertheless, his case had previously been used by the former chair of SORC, Judge Moss, as an example of someone whose removal following his release would effectively expunge six years of his sentence because he would not be subject to parole supervision upon his return to Malaysia (Behrendt, undated).

Judge Moss’s argument was revived by the *Sydney Daily Telegraph* in October 2009, when the paper launched an online petition urging the State Parole Authority to reconsider its position, largely on the basis that Chang had been an eminent surgeon and

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<sup>18</sup> *Toia v Minister for Immigration and Citizenship* [2009] FCAFC, at par.6.

that his family had not been informed. The petition was duly lodged in state parliament by the leader of the opposition, by which point the Corrective Services Minister had apologised to the Chang family and directed the Corrective Services Commissioner to lodge an objection to parole at a special hearing of the Parole Authority on 6 November (ABC News 2009; Jones 2009). On 20 November, the Authority announced that Lim would not be granted parole because of “the need to maintain public confidence in the administration of justice” (Caruana 2009).

### **Sentencing and multiple punishments**

Leaving aside the confected political theatre of recent weeks, the Lim case raises important questions of principle regarding the relationship between deportation and sentencing. The main issue is that the prospect of person’s deportation is irrelevant to the sentencing exercise, particularly in relation to non-parole periods (Hutchins 2006). The purposes of sentencing set out, for example, in the NSW *Crimes (Sentencing Procedure) Act* are not contingent upon the offender’s migration status. Section 19AK of the Commonwealth *Crimes Act* states that a court is not precluded from imposing a non-parole period, merely because the offender might be liable to deportation. Moreover, the High Court in the case of *Shrestha*<sup>19</sup> made it clear that denying foreign offenders the right to parole was discriminatory and denied them the right to the potential reform and rehabilitation that underpins the concept of parole. In Lim’s case, it would appear that there is little point apart from the public spectacle of revenge for keeping him in custody. If that is the rationale, it would still apply when his full sentence expires in six years time.

Lim can be distinguished from the other cases I have discussed in that he was not a permanent resident and does not appear to be making any claim to be staying in Australia. However, for those fighting to stay in Australia following the cancellation of

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<sup>19</sup> *R v Shrestha* (1991) 173 CLR 48

their visas, the fundamental question of principle arising from the use of section 501 is the effective imposition of multiple additional punishments.

The immigration department has repeatedly argued that visa cancellation does not amount to double jeopardy. In 2006, the department told a senate committee:

Visa cancellation and consequent removal of a non-citizen is not an additional punishment for the commission of a criminal offence by a non-citizen – it is an administrative decision taken by Australia pursuant to its sovereign right to decide the circumstances in which a non-citizen is permitted to enter and remain within its jurisdiction, with the power to do clearly enacted by Parliament (SLCRC (2006: 291)

Such sophistry, which mirrors the pronouncements of the High Court in cases such as *Al-Kateb*<sup>20</sup>, simply denies the impact of immigration detention on detainees. Immigration detention is open-ended. Some s501 detainees have been detained for up to four years and many for periods longer than the prison sentences that triggered visa cancellation.

The indeterminate nature of the immigration detention regime also means its primary focus is containment. Immigration detention centres operate as a liminal punitive space. Unlike prisons, formally there is no internal structure designed to progress detainees back in the community. As one detainee who has since been deported also told me: ‘The whole system is structured to put the blame on you – if you choose to fight the minister’s decision and stay here for years, it’s all your fault’<sup>21</sup>.

While formally there are different levels of security within immigration detention centres, placement and other security decisions can be haphazard. In Stage 1 at

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<sup>20</sup> *Al-Kateb v Godwin* (2004) 208 ALR 124

<sup>21</sup> Private communication received 20 September 2009.

Villawood detention centre, which is being re-built following repeated recommendations by the Human Rights Commission that the centre be demolished, there has been a number of serious assaults, including at least two stabbings, over the past couple of years. In August 2008, a detainee was badly lacerated by razor wire after being pulled off the roof while he had a rope around his neck. Despite the supposedly higher security, there have been ongoing tensions between groups of detainees from different ethnic backgrounds and a series of roof top protests and hunger strikes over collective and individual grievances arising from both the circumstances and conditions of detention.

The institutional violence inflicted through detention, segregation, restrained escort and ultimately forced removal, none of which has the sanction of a criminal court and much of which sits outside any formal prison disciplinary regime, reflects both the powerlessness of detainees and the routine imposition of multiple punishments. From a criminological perspective, these ought to be the most significant areas of concern, rather than the dubious exercises of sovereignty imputed to section 501.

## **Conclusion**

In my view, section 501 and the unaccountable, administrative, subterranean violent practices associated with it should be abolished. Since its inception, section 501 has justified penal measures against targets whose deviance is constructed as much from their identity as their criminality. Accepting the legitimacy of section 501 elevates the formalities of citizenship above all other factors used to justify punishment by the state; it undermines the principles of rehabilitation and reintegration; and enforces permanent separation from social and family networks beyond any measure contemplated by the sentencing court. At a minimum, some systematic scrutiny of it is required.

The following themes are some of those that could be addressed: the lack of basic data; the limited monitoring, especially in relation to deportation; the impact on prison regimes and parole; and the absence of any accountable, rights based, legal process. The main conceptual issue is whether such multiple additional punishments can be justified, especially when they operate outside the formal sentencing process. This can't be addressed fully without examining the complex relationship(s) between risk, citizenship and sovereignty; or the ways in which administrative detention and deportation increasingly shape state practice in the transformation of lawful subjects into deviant deportees.

It seems a particularly appropriate time to be looking at such questions, given the increasing focus by criminologists on border policing and the federal government's stated aim of reforming the immigration detention system.

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