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Multiple punishments: the detention and removal of convicted non-citizens

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Under 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 significant proportion of the current immigration detainee population and are routinely deported. This paper examines the punitive implications of this policy including: its impact on the parole process; the institutionalisation of double punishment; and the multiple mechanisms of disempowerment operating through the detention regime. While this is still work in progress, the paper argues that criminal convictions do not justify detention and removal, and suggests a framework for future research.

Multiple punishments: the detention and removal of convicted non-citizens

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Abstract

Under 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 significant proportion of the current immigration detainee population and are routinely deported. This paper examines the punitive implications of this policy including: its impact on the parole process; the institutionalisation of double punishment; and the multiple mechanisms of disempowerment operating through the detention regime. While this is still work in progress, the paper argues that criminal convictions do not justify detention and removal, and suggests a framework for future research.

Introduction

In August 2008, a 45 year old male who had lived in Australia since he was a teenager, climbed onto the roof of the high security compound at one of Australia's immigration detention centres. After he got onto the roof, the man tied a rope around his neck. One of the detention centre staff was then ordered onto the roof to get him down. The staff member took hold of the rope and in the ensuing confusion, the man fell and was left dangling by his neck on the razor wire fence. He lost consciousness; sustained severe cuts to his stomach and hands; was hospitalised for a week; and remains visibly and extensively scarred.

This was one of at least three suicide attempts made by the man since being taken into immigration detention. Heavily medicated, he has been admitted to a local psychiatric hospital on at least three occasions and as a suicide risk, is under 24 hour observation by detention centre staff. In April 2009, an independent psychiatric examination concluded

he was mentally ill and in need of continuous care. Notwithstanding this diagnosis, the immigration department notified him on 10 June that he was to be deported in 48 hours and that the sole support to be provided on removal was hotel accommodation for 5 days. Representations to the minister's office succeeded in having the removal stayed, but the man remains in detention and his future is uncertain.

The man is one of a group of immigration detainees, whose visas have been cancelled under S501 Migration Act as a result of criminal convictions. Such detainees struggle to attract the same level of sympathy[1] or interest as refugees and some have offending histories that indicate substantial recidivism and risk. But this applies to many people with the mainstream prison population, who are released on parole or at the expiry of their sentence.

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[2]. 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. 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

[1] See for example, 'Throwing out the Trash', *Daily Telegraph*, 18 June 2008.

[2] Question taken on Notice from Senator Andrew Bartlett, Budget estimates hearing, 21-22 May 2007.

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[3]. 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'[4], defined at a minimum in the act as a term of imprisonment of 12 months or more[5], or 2 or more terms of imprisonment, where the total of those terms is 2 years or more[6].

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[7], 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[8]. Only in exceptional circumstances can a person who has been permanently resident for more than 10 years be removed under that section.

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

[3] S 501(2)(a) and (b)

[4] S 501(6)(a)

[5] S 501(7)(c)

[6] S 501(7)(d)

[7] *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* 1998

[8] S 201(b) and (c)

despite Nystrom having lived in Australia for all but 27 days of his life[9]. 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 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

[9] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 230 ALR 370

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):

	Number of individuals
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'[10].

Time will tell how much difference this makes to the decision-making process within the immigration department. At best, the signals are mixed. In early March, the minister wrote to several detainees at Villawood advising that he was not going to intervene against their deportation; there also appear to be substantial variations in approach between the various state offices; and indications that the department is determined to argue in legal proceedings for a very broad framework for what constitutes risk[11].

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-

[10] Par 7.3.1

[11] See for example,the submissions made unsuccessfully on behalf of the Minister for Immigration and Citizenship in W*KCG and Minister for Immigration an Citizenship* [2009] AATA 512.

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 expressed 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 sex offender control orders, risk is not a barrier to release upon the 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 (Hutchins 2006). 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. My understanding is that Judge Moss's view is not shared by his former SORC colleagues or his successor, Judge Levine, although I have been unable to officially confirm this. 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 tell of groups of immigration officers and police coming to their homes in displays of force unrelated to any objective measure of contemporary risk. Others speak of receiving phone calls or messages telling them to surrender and have complied with these requests.

The practice of rounding up section 501 detainees reached almost farcical proportions following the decision of the Federal Court in *Sales*[12] 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[13] 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 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.

Multiple punishments

While these practices highlight some of the problems with the notions of risk employed by the immigration department, the fundamental question of principle arising from the use of section 501 is the effective imposition of multiple additional punishments.

[12] *Sales v Minister for Immigration and Citizenship* [2008] FCAFC 132

[13] *Migration Legislation Amendment Act (No.1) 2008*, Schedule 4.

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 additiona 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*[14], 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 express the sentiments summed up by one former detainee, now living in the community, who told me:

> The main difference is the mentality – in prison you know you're one day closer – in [detention] you're a day further away because you know you could get deported. It's depressing. You don't want to wake up. In the observation room in [the detention centre], you could hear guys crying in there. You don't hear that in jail.

The indeterminate nature of the immigration detention regime means its primary focus is containment. 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'.

[14] *Al-Kateb v Godwin* (2004) 208 ALR 124

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

As the opening example indicates, self harm is one of the forms of self destructive protest adopted by detainees. In late 2007, a detainee, who had previously been to court and hospital many times without incident, slashed his arms, hands and stomach with a razor blade after being told he was going to be handcuffed during a routine appearance in the Family Court. Some weeks later, this detainee was placed in segregation accused of supporting a roof top protest by 3 other detainees. He denied the allegations and went on hunger strike and consumed no food or water for 6 days and no food for 14 days. He was kept segregated for 143 days before being released on a lower security classification.

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 routinised 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.

Research themes

In my view, section 501 and the unaccountable, administrative, subterranean violent practices associated with it should be abolished. 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 question is whether such multiple additional punishments can be justified, especially when they operate outside the formal sentencing process. But this can't be answered fully without examining the complex relationship(s) between risk, citizenship and sovereignty. It seems a particularly appropriate time to be looking at such questions given the federal government's stated aim of reforming the immigration detention system.

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