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Prison to Deportation Pipeline

How mandatory visa cancellation creates a parallel form of imprisonment for non-citizens

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Executive Summary

In 2014, the *Migration Act 1958* (Cth) was amended to introduce mandatory 'character'-based visa cancellation powers.[1] According to those amendments, any visa held by a non-citizen could be mandatorily cancelled if the visa-holder was serving a full-time sentence of imprisonment[2] and if they failed the 'character test' – most commonly[3] on the grounds they had been sentenced to serve a prison term of 12 or more months.[4]

Since the introduction of mandatory cancellation powers a decade ago, rates of visa cancellation on 'character' grounds have increased more than tenfold.[5] Because Australian law requires the detention of people who do not hold a valid visa,[6] the increase in character-based visa cancellations has led directly to a growth in the number of people held in immigration detention for this reason. People subject to character-based cancellation are often held in detention for prolonged periods, sometimes indefinitely, while they attempt to have their visa reinstated.[7]

This project started as an attempt to understand the experience of the mandatory visa cancellation process by people on visas in the prison system. Our research involved the analysis of relevant government publications, reports and statistics. We also conducted several in-depth interviews with people who work directly with incarcerated people, who were threatened with visa cancellation as a result of their incarceration.

This report identifies several ways in which non-citizens have a structurally different, more restrictive experience in prison, compared with Australian citizens. The most obvious difference is that non-citizens spend their time in prison anticipating receipt of a visa cancellation notice, knowing that their time in custody will likely be extended by transfer to immigration detention at the end of their sentence, or end with their deportation.

But visa cancellation impacts the experience of people in prison in several more direct ways:

1. Interviewees spoke of the **difficulty in accessing parole** for people facing visa cancellation. Some spoke of parole as an impossibility; others described it as a 'game of wait-and-see' with the Adult Parole Board often expressing reluctance to release people into immigration detention.

2. Interviewees spoke about the **inaccessibility of prison-based programs** and supports for people facing visa cancellation – including therapeutic programs and pre-release supports.

3. Interviewees working with young people in Parkville College spoke about the impact of visa cancellation on **prison placement**, with cancellation leading young people to be automatically reclassified as 'high risk,' transferred to secure units and prevented from continuing their schooling.

1 See the *Migration Amendment (Character and General Cancellation) Act 2014* (Cth) ('*Migration Amendment (Character and General Cancellation) Act*') which inserted new section 501(3A) and related provisions into the *Migration Act 1958* (Cth) ('*Migration Act*')

2 *Migration Act* (n 1) s 501(3A)(b).

3 Mandatory cancellation powers are most commonly exercised in relation to non-citizens who have been sentenced to serve 12 or more months in prison, and who accordingly fail the 'character test' at *Migration Act* (n 1) s 501(7)(c). The Department of Home Affairs' statistics reveal that, in 2023-2024, only 27 of the total 244 (or 11%) s 501-based decisions related to child sex offences; 'Character and General Cancellation Statistics', *Department of Home Affairs* (Web Page, December 2023) <https://www.homeaffairs.gov.au/research-and-stats/files/character-and-general-cancellation-stats-31-dec-2023.pdf>.

4 *Migration Act* (n 1) s 501(3A)(a)(i). It is worth noting that, in accordance with s 501(3A)(a)(i), the mandatory cancellation powers also extend to persons who fail the 'character test' under ss 501(7)(a) and (b), on the basis that they have been either sentenced to death or imprisonment for life. Though capital punishment was abolished in Australia nearly four decades ago and, according to the most recent published data, as at June 2023, 1008 people were serving a life sentence in Australia: see Australian Bureau of Statistics, '*Prisoners in Australia*' (25 January 2024) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>; Mandatory cancellation powers also extend, under Migration Act (n 1) s 501(3A)(a)(ii), to persons who have been convicted of 'sexually-based offences against children,' and who therefore fail the character test under s 501(6)(e).

5 See Section 3.3. below and table at (n 59).

6 *Migration Act* (n 1) s 189(1).

7 In accordance with the procedure set out at *Migration Act* (n 1) s 501CA, former visa-holders may seek revocation of the decision made under s 501(3A) to mandatorily cancel their visa. For ease, we refer to that process here as seeking reinstatement of a previously held visa.

This report builds on an extensive body of research examining the impact and operation of visa cancellation provisions in Australia. Such research has typically examined this through the lens of 'crimmigration', a term coined by US criminologist Juliet Stumpf,[8] to describe the blurring of criminal and migration law and processes, marked by the intensified policing of non-citizens and the criminalisation of migration.[9] With much of the research focusing on the impact of detention regimes and 'crimmigration' upon visa holders - notably on asylum seekers - there has been comparatively little research on how criminal and detention systems interact to limit access to rehabilitation and other programs for permanent and other non-citizens.[10]

Recent research has addressed the impact of visa status on sentencing outcomes, suggesting 'the creation of a different criminal law for people without formal citizenship status.'[11] Research to date has not addressed the creation of a different system of *incarceration* for non-citizens – involving differential placement, access to prison-based programs and parole. Nor has there been significant research attending to the impact – as we describe below - of this distinct form of incarceration on the long-term visa status of non-citizens, impeding their ability to seek reinstatement of their visas and resume their lives in the Australian community.

It is critical, at this time, to focus attention on the intersection between imprisonment, visa cancellation and immigration detention. This report contributes to that study, by documenting the ways in which visa-holders are 'set up to fail' from the moment they are sentenced to serve time in prison. It finds that visa-holders experience a distinct, parallel form of custody – whereby they are locked out of certain courses and programs, and are often placed in more restrictive facilities and struggle to access parole. These factors also mean that visa-holders cannot provide the type of evidence – such as engagement in rehabilitative and educative programs - that decision-makers often demand when considering whether to reinstate a visa. These factors conspire to create what we have termed a 'prison to deportation pipeline.'

These processes build upon racialised policing trends, according to which racialised people – particularly Indigenous, Pasifika, African or of Middle-Eastern background – are more likely to be targeted by police and consequently come into contact with the criminal legal system.[12]

In light of its findings, this report makes two key recommendations, calling for:

1. Repeal of mandatory visa cancellation provisions, in view of the extraordinary systemic barriers faced by non-citizens in exercising their procedural rights and seeking reinstatement of their visa.

2. Review of operating standards relating to prison placement, programs, education and parole, to eliminate the discriminatory treatment of non-citizens based on visa status.

8 Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56(2) *American University Law Review* 367.

9 Peter Billings, 'Regulating Crimmigrants Through the 'Character Test': Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia' (2019) 71(1) *Crime Law and Social Change* 1; Jennifer Chacón, 'Managing Migration Through Crime' (2009) *109 Columbia Law Review Sidebar* 135; Alison Gerard and Sharon Pickering, 'Crimmigration: Criminal Justice, Refugee Protection and the Securitisation of Migration' in Bruce Arrigo and Heather Bersot (eds) *The Routledge Handbook of International Crime and Justice Studies* (Routledge, 1st ed, 2015) 587; Rebecca Powell, 'A Return to the 10 Year Rule? The Deportation of Convicted New Zealander Long-Term Residents from Australia under Section 501 of the *Migration Act*' (2023) 36(3) *Current Issues in Criminal Justice*; Stumpf J (2006) The crimmigration crisis: immigrants, crime and sovereign power. American University Law Review (56):367–419; Stumpf J (2014) Crimmigration: encountering the leviathan. In Pickering S, Ham J (eds) The Routledge handbook on crime and international migration, Routledge, Abingdon, p 237–250; Weber, Leanne, and Rebecca Powell. "Crime, pre-crime and sub-crime: Deportation of 'risky non-citizens' as 'enemy crimmigration'." *Criminal justice, risk and the revolt against uncertainty*. Cham: Springer International Publishing, 2020. 245-272; Weber L (2013) Policing non-citizens. Rout ledge, Abingdon; Vogl, Anthea, and Elyse Methven. (2020) "Life in the shadow carceral state: Surveillance and control of refugees in Australia." *International Journal for Crime, Justice and Social Democracy* 9.4: 61-75.Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56(2) American University Law Review 367; Juliet Stumpf, 'Crimmigration: Encountering the Leviathan' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 1st ed, 2014) 237; Leanne Weber and Rebecca Powell, '*Crime, Pre-Crime and Sub-Crime: Deportation of 'Risky Non-Citizens' as 'Enemy Crimmigration*'' in John Pratt and Jordan Anderson (eds) *Criminal Justice, Risk and the Revolt Against Uncertainty* (Palgrave Macmillan, 1st ed, 2020) 245; Leanne Weber, *Policing Non-Citizens* (Routledge, 1st ed, 2013); Anthea Vogl and Elyse Methven, 'Life in the Shadow Carceral State: Surveillance and Control of Refugees in Australia' (2020) 9(4) *International Journal for Crime, Justice and Social Democracy* 61 ('Life in the Shadow Carceral State: Surveillance and Control of Refugees in Australia').

10 With the exception of Powell, 'A Return to the 10 Year Rule? The Deportation of Convicted New Zealander Long-Term Residents from Australia under Section 501 of the *Migration Act*' (n 9); and also Patrick van Berlo, 'Crimmigration and Human Rights in Contexts of Confinement' in Peter Billings (ed) *Crimmigration in Australia* (Springer, 1st ed, 2019) 362; It is expected that significant findings will also result from the Australian Research Council Discovery project 'Criminal Deportation': Analysing Interactions Between Migration Control and Criminal Justice Systems in Australia', Team members: Leanne Weber, Marinella Marmo, Alison Gerard, Mary Bosworth, Rebecca Powell, Meg Randolph.

11 Ellen Moore, 'Sentencing Crimmigrants: How Migration Law Creates a Different Criminal Law for Non-Citizens' (2020) 43(4) *University of New South Wales Law Journa*l 1271, 1272.

12 For an overview of racialised policing trends in Australia, see Yin Paradies, 'Racial Profiling', *Police Accountability Project* (Web Page) <https://policeaccountability.org.au/issues-and-cases/racial-profiling/> ('Racial Profiling').

Introduction

Between 2014 and 2024, rates of visa cancellation on 'character' grounds increased more than tenfold.[13] Because visa cancellation renders former visa holders into 'unlawful non-citizens,'[14] and given that the detention of unlawful non-citizens is mandatory in Australia,[15] the increase in visa cancellations has translated directly into an increase in the number of people held in immigration detention for this reason.

But this is only part of the story. This research provides important insights into the treatment of visa holders in the prison system, with a particular focus on Victoria. It documents the effect that visa status has on access to parole, rehabilitation programs and other services – including young people's access to school education programs.

We examine recent legislative changes to the *Migration Act* allowing for mandatory visa cancellation, and provide direct accounts of the systemic barriers faced by non-citizens in prison, which together form what interviewees described as a 'pipeline' between prison, immigration detention and removal from Australia.

The project findings contribute to a growing body of research that documents the increased blurring between criminal law controls and administrative law, particularly in the realm of migration: a phenomenon described by researchers as 'crimmigration.'[16] This reveals the creation of a 'two-track' criminal legal system, leading to the differential treatment of non-citizens in prison on account of their visa status. This treatment, in turn, impedes the ability of non-citizens to seek reinstatement of their visas – leading some to 'accept' removal from Australia, without taking up the formal opportunity to seek visa reinstatement. For most, this removal is experienced as a 'choice' that is forced upon them by the circumstances of their detention and imprisonment.

These processes build upon racialised policing practices[17] and the already-existing 'pipeline' between school and prison, which disproportionately affects First Nations young people and other racial minorities.[18] Hopkins and Popovic offer 'the first quantitative study in Australia to investigate whether police in Victoria disproportionately subject racialised communities to unfair or unnecessary treatment or scrutiny', finding that 'for Aboriginal, African, Pasifika and Middle Eastern/Muslim-appearing people the odds [of unwarranted police contact] are about 3.6…times those of white people.'[19] The racialised over-policing of Indigenous people has been the focus of intense scrutiny by the Yoorrook Justice Commission, which reported last year that 'Victoria Police is more likely to arrest Aboriginal alleged offenders across every high-level offence category.'[20] Given that Indigenous people are not necessarily exempt from the operation of 'character' powers under the *Migration Act*,[21] racialised over-policing can also pipeline Indigenous people into the cancellation and deportation processes we describe here.

This report recommends:

1. **Repeal of mandatory visa cancellation provisions**, in view of the extraordinary systemic barriers faced by non-citizens in exercising their procedural rights and seeking reinstatement of their visa.

2. **Review of operating standards relating to prison placement, programs, education and parole**, to eliminate the discriminatory treatment of non-citizens based on visa status.

13 See Section 3.3. below and table at (n 59).

14 *Migration Act* (n 1) s 15.

15 *Migration Act* (n 1) s 189(1).

16 This term was initially coined by Juliet Stumpf, in her ground-breaking analysis of the convergence of administrative and criminal law in the US, in Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (n 9); See also Mary Bosworth's examination of how these processes are leading to the 'transformation of justice' in Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' (2019) 28(1) *Social & Legal Studies* 81.

17 For an overview, see Paradies, 'Racial Profiling' (n 9); For a recent account of racialized policing in the Australian context, see Tamar Hopkins and Gordana Popovic, 'Do Australian Police Engage in Racial Profiling? A Method for Identifying Racial Profiling in the Absence of Police Data' (2024) *Current Issues in Criminal Justice 1 ('Do Australian Police Engage in Racial Profiling?')*.

18 'The School Exclusion Project', *National Indigenous Youth Education Coalition* (Web Page, March 2024) <https://www.niyec.com/the-school-exclusion-project>.

19 Hopkins and Popovic, 'Do Australian Police Engage in Racial Profiling?' (n 17) 16.

20 Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems* (Report, August 2023) 253.

21 In *Love v Commonwealth* (2020) 270 CLR 152, the majority of the High Court held that Aboriginal persons (as understood in accordance with the 'tripartite' test espoused in *Mabo v Queensland* (No 2) (1992) 175 CLR 1 (*'Mabo (No 2)'*) were outside the reach of the 'aliens' power under s 51(xix) of the Australian Constitution, and therefore the provisions of the *Migration Act.* Though it remains for Indigenous people who would otherwise be subject to the *Migration Act* to make out their Aboriginal status in accordance with *Mabo (No 2)* in order to be 'exempted' from its operation. In the context of 'character' decisions under the *Migration Act*, there is no requirement for the Department of Home Affairs to undertake an anterior process of determining whether a visa-holder is Indigenous, before deciding to cancel their visa. On this issue, see Louise Boon-Kuo, 'Crimmigration and the Deportation of Aboriginal Non-Citizens' in Billings (ed) Crimmigration in Australia: Law, Politics and Society (Springer, 1st ed, 2019) 39.

1. Project Aims

Since the introduction of mandatory cancellation powers to the *Migration Act* in 2014, there has been a dramatic and consistent increase in the number of people subject to visa cancellation and removal[22] from Australia. The result has been the permanent separation of families, the disruption of communities and the return of former visa holders – including long-term permanent residents – to destitution in countries with which they have no connection.[23] It is also clear that, while serving a term of imprisonment, many of those subject to mandatory visa cancellation have not had access either to legal advice that would allow them to respond in time to seek reinstatement of their visa, or to prison-based programs that might assist in their re-entry into community.

People in prison who are facing visa cancellation also confront significant structural barriers in attempting to resist cancellation. Disproportionate reliance on prison staff and infrastructure to facilitate communication on their case, together with linguistic obstacles and lack of legal assistance are amongst the most obvious of those barriers. Until recently, there were limited publicly-funded legal services providing advice and assistance specifically in relation to visa cancellation proceedings.[24]

This project commenced as an attempt to understand why such a significant number of people did not seek revocation of mandatory cancellation decisions.[25] The initial working hypothesis was that this was due to systemic barriers affecting people subject to visa cancellation, such as the inaccessibility of legal advice or systemic failures in the prison system, that prevented the transmission or receipt of legal documents within the rigid timelines provided under the *Migration Act*. The initial aim of this project was therefore to research the extent of legal information available to people in prison regarding visa cancellation, and to identify the most effective method to provide legal information to assist people to self-represent in cancellation proceedings. In other words, the project initially assumed that better processes enabling the timely and effective provision of legal advice would help individuals to contest visa cancellation decisions.

But the project quickly transformed into a much broader inquiry into the entrenched, systemic barriers within the prison and detention networks which act against people subject to visa cancellation – making the process either unnavigable or self-defeating. It was clear that the provision of timely legal advice would be insufficient, of itself, to address these systemic obstacles. Some of the barriers initially predicted were confirmed by the people interviewed. But much more significant and entrenched issues were identified – including the differential treatment of people subject to visa cancellation in relation to prison programs, eligibility for parole and post-exit arrangements. People interviewed spoke prominently about the extraordinary *'mental load'* on people facing visa cancellation while they were in prison, who were left with the impending knowledge that they would face cancellation, usually by their earliest release date, meaning their time in custody would merge with an indefinite period in immigration detention.

22 We use the term 'removed' here because this is how the process is described under the *Migration Act* (n 1) s 198. The more commonly-known term is 'deportation,' and that is the language used by most of the interviewees in this project when describing removal from Australia. We have retained that language used by interviewees, though we note that 'deportation' describes a distinct process under the *Migration Act* (n 1) s 200 that is no longer utilised to achieve removal from Australia.

23 'What Are the Human Rights Issues Raised by Refusal or Cancellation of Visas Under Section 501?' *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/4-what-are-human-rights-issues-raised-refusal-or-cancellation-visas-under-section-501>.

24 Certain legal aid societies and community legal centres have recently received funding to provide limited legal assistance to people facing visa cancellation; see Attorney-General's Department, 'Investing in Access to Justice and Improving Community Safety' (Media Release, 14 May 2024) <https://ministers.ag.gov.au/media-centre/investing-access-justice-and-improving-community-safety-14-05-2024>.

25 For statistics relating to the number revocation requests received per year, see Section 3.3. below.

2. Methodology

This research was supported by a Community Engagement Grant from the Melbourne Social Equity Institute, as part of their Community Engagement program. The project was granted Human Ethics approval by the University of Melbourne Human Research Ethics Committee (Ethics ID Number: 21320).

The project findings are based both on qualitative, interview-based research, and the retrieval and analysis of relevant government publications, reports and statistics. The latter has included, for example, an examination of sentencing decisions, manuals and reports of the Adult Parole Board of Victoria; relevant Victorian statutes and legislation; information published on the website of Corrections Victoria; Commonwealth Ministerial Guidelines, and Department of Home Affairs statistical reports. Freedom of Information requests were submitted to the Department of Home Affairs. However, as we observe later in this report (see section 4.3.) there is a dearth of detailed information regarding Parole Board decisions.

The qualitative research undertaken comprised six hour-long interviews, conducted with social workers, teachers and counsellors working directly with people in prison who are subject to visa cancellation. Within the constraints of undertaking this project, it was not feasible to seek ethics approval to speak directly with people subject to visa cancellation. Despite this, the interviews with professionals working with those directly impacted by this process offer valuable insights into the experiences of those detained, imprisoned and/or threatened with deportation as a result of their visa status.

The interviewees were selected through a 'snowballing' method, starting with four people who had sought training on visa cancellation through the Visa Cancellation Working Group – a national group of lawyers and advocates providing free assistance to people subject to visa cancellation. The initial interviewees were identified for inclusion in the research based on their direct contact with people in prison seeking assistance with visa cancellation processes. The interviewees identified two of their immediate colleagues involved with the same client group, who were also then interviewed.

The interviewees worked across several different sites and agencies, including:

Parkville College – Malmsbury[26]	Parkville College - O Street[27]	VACRO ReLink Program[28]
Parkville College is a specialist Victorian state government school, providing education to students who are, or have been, detained in custody. The school operates across four campuses. The Malmsbury campus is located 100 kilometres out of Melbourne and is open to young men aged 15-21 years in high security units, and low and medium security residential units, run by DJCS (Department of Justice and Community Safety).	Previously known as the Flexible Learning Centre, O Street is a transitional campus located in the heart of Fitzroy, designed for young people who have been involved with the youth justice system, or Secure Care Services, in a co-educational setting.	ReLink is a program operated by the Victorian Association for the Care and Resettlement of Offenders (VACRO) and is available to people in prison up to 12 months prior to their release. The program operates across 11 prisons and aims to provide people in prison with support on their release, including medical assessments, Office of Housing applications and referrals for post-release support agencies before release.

26 'Home Page', *Parkville College* (Web Page) <https://www.parkvillecollege.vic.edu.au/>.

27 "About', *Parkville College* (Web Page) <https://www.parkvillecollege.vic.edu.au/about>.

28 'Transitional Programs', *Corrections, Prison & Parole* (Web Page) <https://www.corrections.vic.gov.au/release/transitional-programs>.

3. Background to the Visa Cancellation Regime

3.1. Histories of Exclusion and Expulsion

In this report we stress that the developments described below are deeply connected to Australia's settler colonial past and present. These have been marked by the over-policing and incarceration of particular communities, notably of First Nations people, and by Australia's foundation as a penal colony.[29] The treatment of people deemed 'outsiders' reflects this prior history of this country.[30] Any survey of systems of incarceration and detention in Australia must therefore commence from an understanding of the colonial history of the continent.[31]

Australia's colonial origins as a penal settlement of British convicts initiated a history of military law, autocratic governance practices, violence against Indigenous peoples and the dispossession of their land by British settlers. The harmful effects of this history have been the subject of substantial record, testimony and analysis.[32] Racialised control and exclusion has historically been achieved through institutional and legal practices of classification, quarantining, population management and martial law which have set a model for future law-making.[33]

Nethery describes the creation of reserves and protectorates to contain Aboriginal communities as one of the earliest practices of administrative detention in the colony, involving removal from Country, enforced separation of families, and control over mobility.[34] From the earliest period of colonisation, frameworks of mass incarceration were developed alongside complex forms of administrative containment of Indigenous peoples. Thus, according to Nethery,[35]

> [i]n Australia, administrative detention was fundamental to the establishment of the settler colonial nation. Thereafter, this form of incarceration became a template, imbued with the racial and cultural whiteness of settler colonial societies, to which future policymakers have reached time after time to manage perceived threats to national identity, integrity, or security.

A policy shift from the early 1990s onward, towards greater exclusionary and punitive responses to migration, found fertile ground in a long history of governmental assertions of sovereignty and control. References from the early 1980s and onwards to migrants arriving without visas as 'queue jumpers' reveal this nexus between the assertion of sovereign authority and orderly entry; it underpins institutional control as a key orientation in Australia's migration policy. The following statement by Senator Jim McKiernan, Chair of the Joint Standing Committee on Migration under the Labor Government in 1993, reflects this:[36]

> Australia as a nation has long asserted its right under international law to decide who shall enter and remain in Australia. We assert that right by way of a visa system established under the authority of the Migration Act 1958 (Cth) . . . It is well known that I support the policy of detaining non-documented arrivals . . . I believe it is the government and its authorised delegates and delegate bodies that should determine who should be admitted to Australia.
>
> To concede that right to foreign nationals, from whatever country or region of the world, irrespective of political allegiances or whatever religious faith they follow, would be a direct attack on Australia's sovereignty.

29 See for example, Chris Cunneen and Amanda Porter, 'Indigenous Peoples and Criminal Justice in Australia' in Antje Deckert and Rick Sarre (eds), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, 1st ed, 2017) 667; Amanda Porter and Eddie Cubillo, 'Not Criminals or Passive Victims: Media Need to Reframe their Representation of Aboriginal Deaths in Custody', *The Conversation* (online, 20 April 2021) <http://theconversation.com/not-criminals-or-passive-victims-media-need-to-reframe-their-representation-of-aboriginal-deaths-in-custody-158561>.

30 See Maria Giannacopoulos' analysis of these connections in Maria Giannacopoulos, 'Mabo, Tampa and the Non-Justiciability of Sovereignty' in Suvendrini Perera (ed), *Our Patch: Enacting Sovereignty Post 2001* (Network Books, 1st ed, 2007) 45; For a collection of essays examining these connections, see also Holly Randell-Moon, *Incarceration, Migration and Indigenous Sovereignty: Thoughts on Existence and Resistance in Racist Times* (Charles Sturt University, 2nd ed, 2019).

31 Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 1st ed, 2001); Tony Birch, 'The Last Refuge of the UnAustralian'' in Timothy Neale, Crystal McKinnon and Eve Vincent (eds) *History, Power, Text: Cultural Studies and Indigenous Studies* (UTS ePRESS, 2014) 17; Crystal McKinnon, 'Enduring Indigeneity and Solidarity in Response to Australia's Carceral Colonialism' (2020) 43(4) *Biography* 691; Aileen Moreton-Robinson, 'Virtuous Racial States: The Possessive Logic of Patriarchal White Sovereignty and the United Nations Declaration on the Rights of Indigenous Peoples' (2011) *Griffith Law Review* 20(3) 641.

32 For example, Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* (Melbourne University Press, 1st ed, 2008); Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide Research* 387; Julie Evans, 'Where Lawlessness is Law - The Settler-Colonial Frontier as a Legal Space of Violence' (2009) 30(1) *Australian Feminist Law Journal* 3.

33 Alison Bashford and Caroline Strange, *Isolation: Places and Practices of Exclusion* (Routledge, 1st ed, 2003). We refer specifically here to the terms of the *Aborigines Protection Act 1886* (Vic).

34 Amy Nethery, 'Incarceration, Classification and Control: Administrative Detention in Settler Colonial Australia' (2021) 89 *Political Geography* 1, 4.

35 Ibid.

36 Jim McKiernan, 'The Political Imperative: Defend, Deter, Deny' in Mary Crock (ed), *Protection or Punishment - The Detention of Asylum Seekers in Australia*, (Federation Press, 1st ed, 2003) 4.

This is not to say that this orientation towards strong, exclusionary border control practices is absent in the policies of other nation-states. However, an analysis of Australia's migration policies suggests that this orientation is particularly and historically pronounced in Australia for the reasons described in much of the research.[37] Along these lines, as Dehm et al (2022) observe, mandatory administrative detention of non-citizens – introduced in 1992 as a supposed stop-gap measure, and persisting until today – must be understood as an extension of colonial policies of containment and control practiced first against Indigenous peoples:[38]

> Mandatory immigration detention draws on this history of strong institutional control over migration, reproducing the exceptional, military provisions invoked by settler colonies seeking to exert control over – and to mete out punishment to – Indigenous peoples … Immigration detention, as administrative detention, is thus connected with this country's use of missions, quarantine stations, enemy internment camps and prisons as central mechanisms for the management of populations.

At the same time that discretionary capacity was removed and detention was made mandatory, limits were placed on the availability of judicial review of government decisions.[39] These moves were supported by both major political parties and laid the foundations for the most 'comprehensive reform of immigration legislation in 30 years.'[40] Labor Minister for Immigration, Gerry Hand, remarked at this time:[41]

> I believe it is crucial that all persons who come to Australia without prior authorisation not be released into the community. Their release would undermine the Government's strategy for determining their refugee status or entry claims. Indeed, I believe it is vital to Australia that this be prevented as far as possible. The Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country and expecting to be allowed into the community.

While a message of deterrence is inferred here,[42] the government's insistence that detention does not constitute punishment saw it subsequently amend the *Migration Act* in 1992 by removing any terminology enabling it to be construed as punitive. Then-Minister Gerry Hand remarked:[43]

> References to powers of arrest will be removed from sections 92 and 93 and from a number of related sections to ensure that no confusion arises between the powers under the Act to take persons into what might be termed 'migration custody' and the power to arrest persons for criminal offences.

Yet as this research shows, there is a pattern of underlying and reiterative punitiveness that has characterised Australia's border protection laws and policies over several decades. The prison to deportation pipeline is the most recent example of this trend, drawing on the normalisation of prolonged or indefinite detention.[44]

3.2. Introduction of 'Character' Powers

Current laws and practices in relation to visa cancellation and deportation have evolved over time, reflecting increasing government control over what has been described by successive Federal governments as 'irregular' migration and refugee movement.

In 1998, the Howard Coalition government introduced a framework of 'character' powers into the *Migration Act*.[45] These new powers allowed for a visa application to be refused, or a visa cancelled, on the basis that the applicant or holder failed what was termed the 'character test.' In introducing the 1998 amendments to parliament, Assistant Treasurer Kemp explained their purpose as follows:[46]

37 James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press, 2nd ed, 2007) 13.

38 Sara Dehm et al, 'Policy Paper – Healthcare and the Health-Related Harms of Australia's Refugee Externalisation Policies' (Policy Paper, Comparative Network on the Externalisation of Refugee Policies, July 2022) 5.

39 Mary Crock, 'Judicial Review and Part 8 of the Migration Act: Necessary Reform or Overkill?' (1996) 18(3) *Sydney Law Review* 267, 268.

40 Barry York, 'Australia and Refugees, 1901 – 2002 An Annotated Chronology Based on Official Sources' (Chronology, Parliamentary Library, Parliament of Australia, 16 June 2003) <IRSGeneralDistributionPaper Mar03 (multiculturalaustralia.gov.au)>.

41 Commonwealth, *Parliamentary Debates*, House of Representatives, 5 May 1992, 2371 (Gerard Hand, Minister for Immigration, Local Government and Ethnic Affairs) ('*Second Reading Speech, Migration Amendment Bill 1992*').

42 Sharon Pickering and Leanne Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39(4) *Law & Social Inquiry* 1006.

43 *Second Reading Speech, Migration Amendment Bill* 1992 (n 41) 2371.

44 Sharon Pickering and Caroline Lambert, 'Deterrence: Australia's Refugee Policy' (2002) 14(1) *Current Issues in Criminal Justice* 65, 77.

45 *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth).

46 Commonwealth, Parliamentary Debates, Senate, 11 November 1998, 59 (Rod Kemp, Assistant Treasurer).

> In a world of rapidly increasing people movements, our immigration arrangements must be designed to streamline the entry and stay of all genuine visitors, students, business people and permanent residents. However, a small proportion of non-citizens seeking to enter Australia do have substantial criminal backgrounds or criminal associations. Others commit crimes while they are in Australia.
>
> Steps to improve the Department of Immigration and Multicultural Affairs' ability to detect visa applicants with substantial criminal backgrounds or associations are being taken including consultation with law enforcement bodies overseas. For these steps to be effective, however, they must be complemented by legislative provisions to ensure that non-citizens with criminal backgrounds or criminal associations can be refused a visa. The provisions must also enable the Government to remove those non-citizens who are detained following convictions for crimes committed in Australia.

According to the 1998 amendments, the consequence of having a visa refused or cancelled on 'character' grounds was the refusal of all other visa applications made, or the cancellation of all visas held, by a non-citizen.[47] Thus, the result of visa cancellation or refusal on character grounds is to render a person an 'unlawful non-citizen.'[48] Because Australia enforces a policy of mandatory immigration detention for all 'unlawful non-citizens' who do not hold a valid visa,[49] visa cancellation or refusal on character grounds leaves a person liable to detention. In short, the consequences of character-based visa cancellation or refusal are immediate and dire.

In 2014, the 'character' cancellation framework was expanded and fortified by the Abbott Coalition Government.[50] Most importantly, the 2014 amendments introduced a mandatory visa cancellation regime by way of section 501(3A) of the *Migration Act*, which required the Minister to cancel the visa of any person serving a full-time sentence of imprisonment who had failed the character test because of:

- a 'substantial criminal record,'[51] encompassing a sentence of imprisonment for life[52] or 12 months or more[53]; or
- a conviction for sexual offending against a child.[54]

The 2014 amendments also introduced a power to revoke the mandatory cancellation of a visa, where 'representations' were made within the specified period and where the Minister (personally, or by their delegate) was satisfied either that the person passed the 'character test' or there was 'another reason' that the original cancellation should be revoked.[55]

When introducing the 2014 amendments in the House of Representatives, then-Minister for Home Affairs Scott Morrison claimed that there was 'community sentiment' in favour of strengthening the character powers:

> Consistent with community views and expectations, the Australian government has a low tolerance for criminal, noncompliant or fraudulent behaviour by non-citizens. Entry and stay in Australia by non-citizens is a privilege, not a right, and the Australian community expects that the Australian government can and should refuse entry to non-citizens, or cancel their visas, if they do not abide by Australian laws. Those who choose to break the law, fail to uphold the standards of behaviour expected by the Australian community or try to intentionally mislead or defraud the Australian government should expect to have that privilege removed.

47 *Migration Act* (n 1) s 501F.

48 *Migration Act* (n 1) s 15.

49 *Migration Act* (n 1) s 189(1).

50 *Migration Amendment (Character and General Visa Cancellation) Act* (n 1).

51 *Migration Act* (n 1) s 501(3A)(a)(i).

52 *Migration Act* (n 1) ss 501(3A)(a)(i), (7)(b). Note that section 501(3A)(a)(i) also extends to capture a 'substantial criminal record' as defined under section 501(7)(a), being a sentence to death, though capital punishment has been abolished across Australia's states and territories.

53 *Migration Act* (n 1) ss 501(3A)(a)(i), (7)(c).

54 *Migration Act* (n 1) ss 501(3A)(a)(ii), (6)(e).

55 *Migration Act* (n 1) s 501CA.

In a statement signalling the systemic erosion of procedural protections for non-citizens in these amendments to the Act, the Minister then explained the deliberate reversal of onus that the mandatory cancellation powers entailed:

> Under this process, a non-citizen will have their visa mandatorily cancelled without prior notice of an intention to cancel a visa, with a notification of the cancellation decision provided after the fact. Upon notification, the non-citizen will be provided with the opportunity to seek revocation of the cancellation decision. Where a decision is taken by a delegate to not revoke the decision, the former visa holder will have access to merits review. This will be a streamlined process which will deliver the key benefit of providing a greater opportunity to ensure non-citizens who pose a risk to the community will remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved.

Despite substantial opposition to the Bill,[56] the amendments were passed into law, and no subsequent attempts have been made to walk them back.

The character cancellation regime effectively establishes a parallel criminal legal process under which non-citizens are doubly punished for offending that has already been dealt with through the courts. The existence of a parallel process leading to additional punishment of non-citizens was observed by the Parliamentary Joint Committee on Human Rights in a recent scrutiny report:[57]

> 1.11 …It is not clear why a court's assessment of an appropriate sentence for an individual having committed one or multiple offences would not be sufficient to manage such risk, such that visa cancellation or refusal is also required. If the risk posed by Australian citizens who have been sentenced to an aggregate term of imprisonment can be adequately managed in the community, such that they do not require further detention and removal from Australia following the completion of their sentence, it is unclear why similar measures could not adequately mitigate the potential risk posed by non-citizens, noting that it has not been demonstrated that non-citizens pose a greater risk to the community than citizens.

There are no limits on the operation of the cancellation regime in relation to non-citizens. For instance, there is no prohibition on the cancellation of a visa held by a minor, by a long-term resident or by a person owed *non-refoulement* obligations. The absence of such limits means that all visas are vulnerable to cancellation – and in that sense, permanent residence does not constitute a protected legal status.

56 The Australian Human Rights Commission, as well as a number of civil society groups, made submissions to the Senate Legal and Constitutional Affairs Committee opposing passage of the *Migration Amendment (Character and General Visa Cancellation) Bill 2014.* Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Final Report, November 2014).

57 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report (2 of 2023)* (Parliamentary Paper, 8 March 2023) 16.

3.3. Cancellation Statistics and Patterns

The 2014 amendments saw an immediate increase in the annual number of visa cancellation decisions.

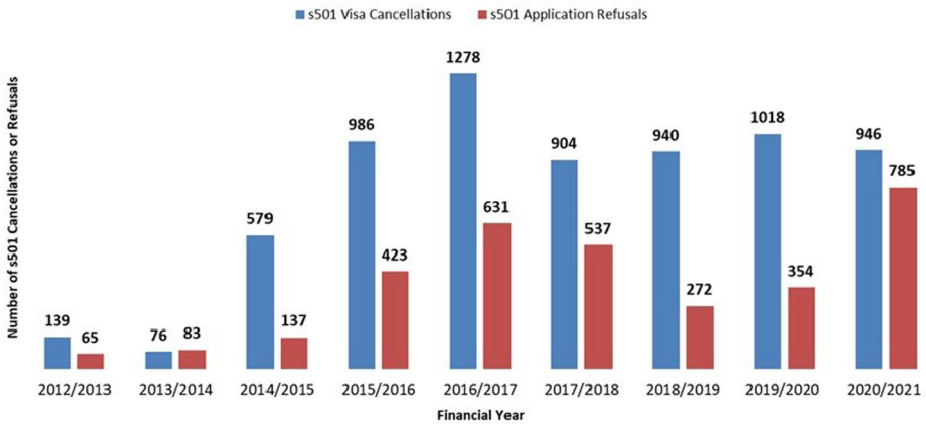
The graph below depicts this immediate and sharp increase in visa cancellation decisions between the 2014 and 2015 program years (with the amending legislation coming into effect in December 2014).[58]

The increase in the number of people subject to mandatory visa cancellation has, in turn, led to an increase over time in the number of people in immigration detention because of a 'character' related decision. The following table shows the number of people in immigration detention because of a 'character' based visa cancellation from 2017 onwards, when recording of character cancellation data commenced:[59]

2017[60]	2018[61]	2019[62]	2020[63]	2021[64]	2022[65]	2023[66]
448	490	390	629	737	939	689

The rise in the number of people in immigration detention due to a 'character'-based cancellation decision is due, in part, to the delay by the Department of Home Affairs in deciding revocation requests. Compared with the number of mandatory visa cancellation decisions made each year, very few revocation requests are decided – and those subject to cancellation must remain in immigration detention in the interim. The following table sets out the number of mandatory cancellation decisions and related revocation decisions made in each year since 2018:[67]

Year	Number of s 501(3A) Cancellation Decisions	Number of s 501CA Revocation Decisions
2018-2019	918	73
2019-2020	962	19
2020-2021	914	6
2021-2022	616	<5
2022-2023	280	6



58 'Visa Cancellation Statistics', *Department of Home Affairs* (Web Page) <https://web.archive.org/web/20220324232828/https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation.

59 While detention statistics are published quarterly, these figures are taken from the first report (issued 31 January) each year.

60 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 January 2017) 7 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-jan-2017.pdf>.

61 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 January 2018) 7 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-january-2018.pdf>.

62 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 January 2019) 7 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-jan-2019.pdf>.

63 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 January 2020) 7 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-january-2020.pdf>.

64 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 January 2021) 8 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-january-2021.pdf>.

65 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, 31 January 2022) 8 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-january-2022.pdf>.

66 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, March 2023) 8 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-march-2023.pdf>.

67 Department of Home Affairs, *Freedom of Information Request – FA 23/02/01018* (2023) 1 <https://www.homeaffairs.gov.au/foi/files/2023/fa-230201018-document-released.PDF>.

A growing backlog in undecided revocation requests has, in turn, led to significant delays in the resolution of those requests. The following table demonstrates the average time taken to decide a revocation request between 2015 – when the mandatory cancellation powers took effect – and 2022:[68]

Average elapsed time from mandatory visa cancellation under section 501(3) of the *Migration Act* 1958 to revocation decision under section 501CA of the *Migration Act* 1958 from 1 January 2015 to 6 October 2022, by revocation outcome year	
Revocation outcome year	Average number of days to revocation decision
2015	149
2016	226
2017	229
2018	359
2019	447
2020	384
2021	460
2022	641

When introducing the mandatory cancellation provisions, the Minister foreshadowed the creation of a 'streamlined' process whereby visa-holders would be notified of cancellation early on in their sentence, leaving open the possibility that their visa might be reinstated by their earliest release date.[69]

But it has become standard practice, at least in Victoria, for mandatory cancellation decisions to be notified to the visa-holder immediately before their earliest release date, with the effect that the period seeking revocation is spent in immigration detention.

The length of time taken to decide revocation requests has now reached an average of 641 days.[70] Considering that mandatory cancellation is triggered by a 12-month prison sentence, visa-holders can therefore end up spending double the time of their original sentence in immigration detention, while awaiting a decision on the revocation of their visa cancellation.

But not all people subject to mandatory visa cancellation submit revocation requests. Revocation must be sought within 28 days of notification of the mandatory cancellation decision; otherwise, the request is deemed invalid. The below tables expresses the number of mandatory cancellation decisions, and requests for the revocation of these decisions, made between 2015 and 2021:[71]

According to these statistics, between 2015 and 2021, 1364 people did not submit revocation requests or seek reinstatement of their visa. This means that, at the conclusion of their sentence, these people were available to be removed from Australia.

Without having the opportunity to present their circumstances and reasons for remaining in Australia, a significant number of people were removed and permanently barred from re-entering the country.

Q3 - For s501(3A) How many times was the power exercised?

Number of Cancellations	2015	2016	2017	2018	2019	2020	2021 As at 31 January 21	Total
8501(3) Mandatory cancellation	855	1006	1151	832	872	1135	70	5,921

Q4 - For s501CA How many requests for revocation were made within time?

Number of Cancellations	2015	2016	2017	2018	2019	2020	2021 As at 31 January 21	Total
s501CA Mandatory cancellation revocation requests	681	790	891	678	694	777	46	4,557

68 Department of Home Affairs, *Freedom of Information Request – FA 22/10/00154* (2022) 3 <https://www.homeaffairs.gov.au/foi/files/2022/fa-221000154-document-released.PDF>.

69 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 10325 (Scott Morrison MP, Minister for Immigration and Border Protection).

70 According to the most current, available statistics; Department of Home Affairs, *Freedom of Information Request - FA 22/10/00154* <https://www.homeaffairs.gov.au/foi/files/2022/fa-221000154-document-released.PDF>.

71 Department of Home Affairs, *Freedom of Information Request – FA 21/02/00558* (2021) 2 <https://www.homeaffairs.gov.au/foi/files/2021/fa-210200558-document-released.PDF>.

3.4. Indefinite Immigration Detention: NZYQ v Minister for Immigration

Public debate regarding immigration detention has been re-enlivened by the 2023 decision of the High Court in *NZYQ v Minister for Minister for Immigration, Citizenship and Multicultural Affairs*,[72] which overruled a longstanding constitutional precedent authorising indefinite immigration detention. Around the time that case was commenced, people were spending the longest periods in immigration detention in recorded history – on average, 806 days.[73] One hundred and thirty-six people had been in immigration detention for more than five years.[74] In March 2023, the Government revealed that it had detained one person for 5,766 days – that is, nearly 16 years.[75]

In *NZYQ*, the High Court unanimously held that it was unconstitutional for the Australian government to continue to detain people for the purposes of removal, when there was no real prospect of their removal becoming practicable in the reasonably foreseeable future.[76] Until then, under Australian law, people could be detained indefinitely for the purpose of removal from Australia, even if there was no country to deport them to.[77] In other words, the law allowed people to be held in immigration detention for the rest of their lives. The High Court repeatedly affirmed the constitutional validity of indefinite detention in the nearly twenty years since its initial decision on the subject.[78]

Following the decision in NZYQ, around 150 people have been released from immigration detention into the community.[79] Many of the people released from immigration detention were previously subject to visa cancellation on 'character' grounds: most had previously served time in prison.[80]

In all cases, however, their sentences had concluded long ago – in some cases, more than ten years prior to their release from immigration detention. According to material filed in a recent proceeding before the High Court, 34 of the 153 people released from immigration detention following NZYQ were sentenced 10 or more years ago.[81] Thirty-six of those 153 people had been sentenced to a term of 12 months' imprisonment or less.[82] In other words, they had already been prosecuted and sentenced through the criminal legal system, and been punished further through an indefinite period in immigration detention. The sole reason that people in the group were being held in immigration detention was because they no longer held a visa – not because they were serving a sentence.[83]

72 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 415 ALR 254 ('NZYQ').

73 Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (Report, January 2023) 12 <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-31-january-2023.pdf>.

74 Ibid.

75 Senate Standing Committee on Legal and Constitutional Affairs, Budget Estimates, Parliament of Australia, May 2023 '*BE23-088 - Detention - Long Term and Over 10 Years*' cited by the Refugee Council of Australia in 'Statistics on People in Detention in Australia', *Refugee Council of Australia* (Web Page, 11 September 2024) <https://www.refugeecouncil.org.au/detention-australia-statistics/>.

76 *NZYQ* (n 72) [44].

77 *Al-Kateb v Godwin* (2004) 219 CLR 562.

78 See *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Plaintiff M96A/2016 v Commonwealth of Australia* (2017) 261 CLR 582; *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

79 'Where are People in Detention in Australia?', *Refugee Council of Australia* (Web Page, 11 September 2024) <https://www.refugeecouncil.org.au/detention-australia-statistics/2/>.

80 Paul Karp, 'Indefinite Detention: Coalition had Already Released Five of 93 Impacted by High Court Decision, Document Reveals', *The Guardian* (online, 21 November 2023) <https://www.theguardian.com/australia-news/2023/nov/21/indefinite-detention-coalition-had-already-released-5-of-93-impacted-by-high-court-decision-document-reveals>.

81 Special case materials in YBFZ (Proceeding S7/2023) cited in Paul Karp, 'Murderer and Attempted Murderer Among 25 Detainees Released by Ministerial Discretion, Documents Reveal' *The Guardian* (online, 3 June 2024) <https://www.theguardian.com/australia-news/article/2024/jun/03/murderer-and-attempted-murderer-among-25-detainees-released-by-ministerial-discretion-documents-reveal>.

82 Ibid.

83 Sanmati Verma, 'Released Detainees Have Done Their Time. Let Them Be', The Age (online, 16 November 2023) <https://www.theage.com.au/politics/federal/released-detainees-have-done-their-time-let-them-be-20231116-p5ekgt.html>; Sanmati Verma, 'A Lifetime of Immigration Detention can Never be Australia's Punishment for Simply Not Holding a Visa', *The Guardian* (online, 10 May 2024) <https://www.theguardian.com/commentisfree/article/2024/may/10/australia-indefinite-immigration-detention-high-court-ruling>.

The ensuing debates in the public domain have made it clear that many in the public and in political office regard immigration detention as an extension of prison. This has been fuelled by negative media and political narratives regarding non-citizens, generating a 'moral panic' which paints all of those detained as a threat to the community.[84] Much energy and attention has been focused on whether the government has 'done enough' to safeguard the community against the perceived risk posed by former detainees.[85] In order to preemptively contain that risk, the government hastily introduced a new regime of Bridging 'R' visas, subject to at least 20 mandatory conditions[86] – requiring holders to seek permission before engaging in particular types of work or travelling interstate.[87] There was also a discretion, liberally exercised by immigration officials, to require Bridging R visa holders to submit to electronic monitoring with an ankle bracelet and nightly curfews. A quarter of a billion dollars was earmarked by government for monitoring former detainees.[88]

Underlying these developments is the powerful but misplaced assumption that immigration detention serves a protective function and is designed to contain 'risk' to the community. Perhaps a deeper animating premise is the notion that all migrants and refugees – 'aliens' – pose an inherent risk to the Australian populace.

It is critical, at this time, to focus attention on the intersection between imprisonment, visa cancellation and immigration detention. This report contributes to that study, by documenting the ways in which visa-holders are 'set up to fail' from the moment they are sentenced to serve time in prison. It finds that visa-holders experience a distinct, parallel form of custody – whereby they are locked out of certain courses and programs, and are often placed in more restrictive facilities and struggle to access parole. These factors also mean that visa-holders cannot provide the type of evidence – such as engagement in rehabilitative and educative programs - that decision-makers often demand when considering whether to reinstate a visa. These factors conspire to create what we have termed a 'prison to deportation pipeline.'

84 See for example, Claire Loughnan and Philomena Murray, '*Combatting Corrosive Narratives about Refugees*' (Comparative Network on Refugee Externalisation Policy Report, July 2022) <CONREP-Policy-Report-3_Narrative_Loughnan-and-Murray_final.pdf (unimelb.edu.au)>.

85 Andrew Giles, Minister for Immigration, Citizenship and Multicultural Affairs, 'Government Action in Response to NZYQ High Court Decision', (Media Release, 14 November 2023) <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/government-action-response-nzyq-high-court-decision-14112023.aspx>.

86 Migration Amendment (Bridging Visa Conditions Bill) 2023 (Cth).

87 'Summary: Migration Amendment (Bridging Visa Conditions Bill) 2023', *Human Rights Law Centre* (Web Page, 17 November 2023) <https://www.hrlc.org.au/reports-news-commentary/2023/11/17/summary-migration-amendment-bridging-visa-conditions-bill-2023>.

88 'New Revised Ministerial Direction, NZYQ High Court Case', *Radio Interview ABC AM, Sabra Lane*, (ABC Radio AM, 30 May 2024) <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/radio-interview-abc-am-sabra-lane-30052024.aspx>.

4. Findings and Discussion

4.1 Access to Prison Programs for Non-Citizens

Aside from their punitive and 'deterrent' objectives, criminal sentences in Australia are intended, at least in theory, to serve a rehabilitative function. In Victoria, the *Sentencing Act 1991* (Vic) sets out the exclusive purposes for which a sentence may be imposed, which includes 'establish[ing] conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated.'[89] Prison-based programs serve a rehabilitative function and may either be offence-specific or general in nature – addressing literacy, vocational skills, drug and alcohol use and social and family relationships.[90]

Research has identified various barriers to access and efficacy of prison-based programs – including inconsistency across States and Territories in provision of programs and lack of cultural appropriateness of programs for Aboriginal and Torres Strait Islander people.[91] Further research is needed into the specific barriers faced by non-citizens in accessing prison-based programs.

Several of the interviewees (who will be referred to by their initials only) spoke of the barriers faced by people in prison without formal citizenship status when accessing prison programs. GC, who works across various prisons in the VACRO Transitions Program, noted that some of his clients struggled to access programs because of their visa status – even when they actively advocated for access:

> For instance, in prison, if you've got that SVO - serious violent offenders - status, you're usually required to complete forensic intervention service programs. Often that's around understanding emotion and how you react to violence, and thinking through the impact on victims. Those programs go sometimes for 12 months, and people go twice a week. But people have said it's been really hard to get into those programs because they know that they're not going for parole and they're going to be deported.
>
> …
>
> And so…one particular guy, he really had to fight – he said he had to fight to get into the program and he was surprised when he actually was let in eventually and managed to complete his program. But people talk about [visa status] being a hindrance.

It is unclear whether the '*hindrance*' is the result of an official position adopted by correctional authorities, or of local practice in particular prisons. Visa status, or the prospect of visa cancellation, is not mentioned in current manuals or instructions published by Corrections Victoria in relation to prison-based programs.[92] The most recent Sentence Management Manual indicates that visa holders – particularly those liable or subject to mandatory visa cancellation – will generally not be eligible for minimum security classification and will be ineligible for rehabilitation and transition permits, which would otherwise allow for leave from prison to participate in community-based programs.[93] As stated in the manual:

> Any prisoner on a permanent visa who has been found guilty of a sexually based offence against a minor, or is serving, or has in the past served a term of imprisonment of 12 months or more will become an unlawful non-citizen and subject to mandatory visa cancellation under section 501 of the *Migration Act 1958*. These prisoners will be automatically deported or taken into immigration custody upon release from prison while any appeal process is finalised. Given this, visa holders will not be granted a C1 or C2 security rating. These prisoners remain eligible for a C (restricted minimum) security rating if assessed as being a minimal escape risk, **however are not eligible to participate in rehabilitation and transition permits.**

Research by the Victorian Ombudsman has identified numerous barriers within the system to the delivery of prison-based programs, due to inconsistent practices across prisons, and lack of resourcing and overcrowding leading to increased demand to such programs.[94] Given that completion of these programs is often a pre-requisite for parole, lack of access can ultimately determine the time that a person spends in custody.[95] This profoundly affects non-citizens, as we describe below.

89 *Sentencing Act 1991* (Vic) s 5(c).

90 Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper No 84, 19 July 2017) [5.4].

91 Ibid.

92 'Deputy Commissioner's Instructions – Programs and Industry', *Corrections, Prisons & Parole* (Web Page) <https://www.corrections.vic.gov.au/deputy-commissioners-instructions-programs-and-industry>.

93 'Sentence Management Manual – AC3 – Determining Security Ratings', *Corrections Prisons & Parole* (Online, 24 July 2018) 11 <https://www.corrections.vic.gov.au/sentence-management-manual-part-2>. Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (Investigation Report, 17 September 2015) 18.

94 Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (Investigation Report, 17 September 2015) 18.

95 Julie Debeljak, 'The Rights of Prisoners under the Victorian Charter: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and their Conditions in Detention' (2015) 38(4) *University of New South Wales Law Journal* 1332, 1336.

4.2 Parole

4.2.1 The Function and Significance of Parole

In the experience of all interviewees, parole for people at risk of visa cancellation was inaccessible either as a matter of Parole Board policy or as a practical reality.

Parole is intended to provide a structured, supported transition between prison and the community.[96] The *Review of the Parole System in Victoria,* conducted by the Department of Justice in 2013, established that parole is critical to fulfilling the rehabilitative function of sentencing, by facilitating the 'reintegration' of people in prison back into the community and thereby reducing the risk of further contact with police and the criminal law.[97] The Review thus cited the following principle, established by case law in relation to the utility of parole:[98]

> Parole is important for hope, self-esteem, the incentive to reform and for rehabilitation, but it is fundamentally not about conferring a benefit on any offender. Rather it is about the needs of the community, recognizing that the community benefits from the rehabilitation of offenders.

People subject to visa cancellation who are prevented from accessing parole are thus denied the 'hope' that it is intended to represent. Importantly, the rehabilitative and reintegrative function that parole is intended to serve for the community is undermined.

In *R v Shreshta*,[99] the High Court emphatically rejected the submission advanced by the Commonwealth that 'foreign' offenders subject to deportation from Australia should be disqualified from receiving parole. The refusal of parole in these circumstances, Brennan and McHugh JJ held, was nothing other than discrimination based on nationality and race: [100]

> In so far as the submission involves an assertion that the community is not concerned with the rehabilitation of a prisoner who has no ties with this country and who will be deported when released from gaol, it takes a blinkered view of community concerns and interests and unjustifiably confines them within strict territorial limits. This country has a direct and significant interest in the well-being and rehabilitation of all who are detained within its gaols, whether or not their origins, ties or future prospects lie in this or in some other country. It also has a responsibility, both moral and under international treaty, to treat all who are subjected to criminal proceedings in its courts or imprisonment in its gaols humanely and without discrimination based on national or ethnic origins…
>
> To deny foreign offenders of the kind in question the opportunity for the amelioration of their situation and the incentive for reform and rehabilitation which the parole system offers is not to differentiate by reference to degrees of criminality or prospects of rehabilitation. **It is to discriminate against prisoners of that class because of their origins, their place of residence and their family ties.** (emphasis ours)

In Victoria, the grant of parole is decided by the Adult Parole Board.[101] Eligibility for parole is not automatic; people in prison approaching their parole eligibility date must make an application to the Parole Board for consideration.[102] The Parole Board is required to treat 'community safety' as paramount in consideration in making parole decisions[103] and consider the 'record of the court in relation to the offending, including the judgment and reasons for sentence.'[104]

The Parole Board's consideration is otherwise guided by the various factors set out in the Parole Board **Manual**.[105] The advice provided by the Manual in relation to people subject to visa cancellation (or "deportation") has substantially evolved over time.

96 'Purpose and Benefits', *Adult Parole Board Victoria* (Web Page) <https://www.adultparoleboard.vic.gov.au/what-parole/purpose-and-benefits#:~:text=Parole%20provides%20prisoners%20with%20a,sentence%20without%20supervision%20or%20support>.

97 Ian Callinan, *Review of the Parole System in Victoria* (Report, July 2013) 31.

98 Ibid 32.

99 *R v Shrestha* (1991) 173 CLR 48.

100 Ibid [7]-[8].

101 *Corrections Act 1986* (Vic) s 61 ('*Corrections Act*').

102 'Board Decisions', *Adult Parole Board Victoria* (Web Page) ('Board Decisions') <https://www.adultparoleboard.vic.gov.au/parole-process/board-decisions>.

103 *Corrections Act* (n 101) s 73A.

104 Ibid s 74(1AA).

105 Adult Parole Board Victoria, *Parole Manual, 2020 Edition* (Manual, June 2020) ('Parole Manual, 2020 Edition') <https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%20-%20final%20version%20for%20APB%20website.pdf>.

4.2.2. Evolution of parole and visa cancellation powers

When mandatory cancellation powers came into effect in 2015, the Fifth Edition of the Manual stipulated that applications by people subject to visa cancellation were to be treated like any other.

When the Manual was reissued in 2018, after several years of operation of the mandatory cancellation regime, the advice had substantially evolved. While directing the Board to deal with parole applications 'on the merits,' the 2018 edition of the Manual effectively created a presumption against parole.

The most recent version of the Manual provides *no guidance at all* in relation to people at risk of visa cancellation.

In *Zhao v The Queen*,[109] the appellant, Mr Zhao, attempted to put in evidence the evolution of the Parole Board's approach between 2015 and 2018 when appealing against his sentence. He argued that, while the Parole Board's position before 2017 had been to grant parole to people in prison facing visa cancellation, that position had changed after 2018, such that it would now be impossible for him to access parole. He provided evidence of this in email correspondence from the Parole Board to his lawyer: [110]

> Recently, due to a range of issues, the Board has reviewed its decision-making process on deportation for prisoners with a parole period. The difficulty in monitoring prisoners placed in immigration centres or overseas are some of the reasons why the Board has reviewed its decision-making for deportation.

Parole Manual (2015 Edition) [106]	Parole Manual (2018 Edition) [107]
7.5 Removal from Australia The Board will consider each such case on its merits. If it is otherwise appropriate to release the prisoner on parole, having regard to the considerations set out in Chapter 5 of this manual (for example, the prisoner has satisfactorily completed all necessary programs in prison), the Board may make an order for release on parole even though the removal from Australia means that the prisoner would not be in a position to complete the requirements of parole.	**7.5 Parole and prisoners who are subject to deportation** In considering parole for a prisoner who is subject to deportation, the Board needs also to have regard to the following factors. • Whether the prisoner is seeking to overturn the cancellation of their visa or to challenge their removal from Australia. **The Board will ordinarily avoid paroling such a prisoner until they have exhausted any such challenges**. This is because if the Board were to parole such a prisoner, they would go into Federal immigration detention pending the resolution of their matter. While in Federal immigration detention an unlawful non-citizen is in practice unable to comply with the ordinary requirements of parole and may be moved to a facility outside Victoria and hence outside the Board's jurisdiction.
Parole Manual (2020 Edition) [108]	
8.5 Parole and prisoners who are subject to deportation The Board is reviewing this section of the Parole Manual.	

106 Adult Parole Board Victoria, *Parole Manual*, (Manual 5th ed, April 2015) 31 ('*Parole Manual, 5th ed*') <https://vgls.sdp.sirsidynix.net.au/client/search/asset/1281928>.

107 Adult Parole Board Victoria, *Parole Manual* (Manual, September 2018) 31 <https://www.adultparoleboard.vic.gov.au/system/files/inline-files/Adult%20Parole%20%20Board%20-%20Parole%20Manual%20-%202018%20-%20FINAL.pdf>. Parole Manual, 2020 Edition (n 105) 35.

108 Parole Manual, 2020 Edition (n 105) 35.

109 *Zhao v The Queen* [2018] VSCA 267.

110 Ibid [62].

> The Board considers each case carefully, looking closely at the nature of offending, the risk of future offending, and public expectations about prisoners completing their sentence with some form of supervision whether in custody or the community.
>
> While every matter is considered on its merits, **the Board is now less inclined to grant parole to a prisoner who is to be deported on release from prison**. There have, nevertheless, been occasions when, in the circumstances presented to it, the Board has granted parole knowing the prisoner will be deported on release from prison.

The Court did not deal with the aspect of Mr Zhao's appeal that related to his visa status, nor come to a finding regarding the unavailability of parole as a factor to be considered in sentencing.

It is difficult to establish the impact of the Parole Board's evolving guidance on its decisions in relation to people at risk of, or subject to, visa cancellation, since the Parole Board's decisions in Victoria are not reported.[111] This absence of publicly available data means it is not possible to identify parole trends, especially in relation to non-citizens.

A request was made under Freedom of Information legislation to access the number of decisions of the Adult Parole Board in Victoria made between 2015 and 2023 concerning people subject to (or at risk of) visa cancellation. In order to facilitate its completion, the request was re-framed by reference to the number of decisions made by the Parole Board referencing sections in the Parole Manual concerning visa cancellation.[112] The Department of Justice could not complete the request, on the basis that the 'information requested is not routinely collected or reported on, nor can it be readily extracted from [the Department's] computer systems.'[113]

In other States and Territories, visa status and the prospect of transfer to immigration detention does not generally feature in guidance provided to parole authorities. The parole manuals and procedures in New South Wales[114] and the Northern Territory[115] make no reference to a person's visa status. In Queensland, while mention is made of visa status and the prospect of transfer to immigration detention in the Ministerial Guidelines to the Parole Board Queensland, that guidance is limited to 'ensur[ing] that the Department of Home Affairs is contacted to confirm its intentions regarding the relevant prisoner's release.'[116]

Administrative guidance, in the form of a parole manual or similar, does not exist in the Australian Capital Territory, Tasmania, Western Australia and South Australia – though it is worth noting the Legal Services Commission of South Australia provides the following general advice to people in the jurisdiction:[117]

> The Department will usually notify the prison when the decision is made to cancel your visa.
>
> It is unlikely that you will be granted parole because you will not be able to abide by any parole conditions once you are taken into immigration detention.

Given the serious, adverse consequences of denial of parole, further research is urgently required to analyse the position of parole authorities across the country in relation to people facing visa cancellation. The findings of this research – as well as reported cases, and advice provided to incarcerated people in other States – strongly suggest that non-citizens face serious barriers in accessing parole.

111 Board Decisions (n 102).

112 Parole Manual, 5th ed (n 106) 31; Parole Manual, 2020 Edition (n 105).

113 Response to request under *Freedom of Information Act 1982* from Department of Justice and Community Safety, 26 April 2023.

114 'Parole Consideration', *NSW State Parole Authority* (Web Page, 19 July 2022) <https://paroleauthority.nsw.gov.au/parole-in-nsw/parole-process/parole-consideration.html>.

115 Parole Board of the Northern Territory, *Policy and Procedures Manual* (Manual, undated) <https://paroleboard.nt.gov.au/__data/assets/pdf_file/0011/666758/Policy-and-Procedures-Manual.pdf>.

116 Parole Board Queensland, *Parole Board Queensland: Parole Manual* (Manual, 5 August 2019) <https://www.pbq.qld.gov.au/wp-content/uploads/2020/06/Parole-Board-Queensland-Decision-Making-Manual.pdf>; Mark Ryan, Ministerial Guidelines to the Parole Board of Queensland (Guidelines, 20 December 2021) <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/06b6f246-59ee-4ff4-9e30-493cfcb02d67/pbq-ministerial-guidelines.pdf?ETag=3c96ecac41ffa78d0108f1b03e995981>.

117 Legal Services Commission of South Australia, *Mandatory Visa Cancellation Kit* (Kit, June 2024), 11 <https://lsc.sa.gov.au/resources/Mandatoryvisacancellationkit%20.docx>.

4.2.3. Barriers to Accessing Parole

All interviewees spoke of the difficulties that people facing visa cancellation confronted when seeking parole. Some described parole as an impossible prospect, referring to what they understood as a policy of the Adult Parole Board in Victoria never to grant parole to people in prison where the result would be transfer to immigration detention rather than release into the community. Others described a slightly more fluid position on the part of the Adult Parole Board, but pointed to the systemic barriers in accessing parole because of the ineligibility of people facing visa cancellation for pre-parole programs. In either case, all interviewees described the significant additional obstacles faced by non-citizens when accessing parole.

AN, a teacher at Parkville College, remarked on the different trajectories of two young people she had been working with through the school – one an Australian citizen and the other a visa-holder:

> Obviously individual circumstances and details will be different, but actually, they're in for the same reason, and one young person's a citizen and the other isn't, and the citizen will be out on parole in a few weeks. I won't even probably be able to see him because of COVID reasons at all for his entire stay at Malmsbury, which is only a couple of months. Whereas our other beloved student is languishing, just waiting to see…

GC, a social worker with the ReLink program, spoke of the *'dread'* that pervaded time in prison for people facing visa cancellation and the hardship associated with uncertainty over their future:

> ...there's a definite sense of dread for the people that think [visa cancellation] might be coming. It's the kind of thing that you don't go asking about. You'll wait to see if it comes to you, but it means that they're just tense around that all the time. It has a big impact on several things. For instance, it means that they can't think about parole, you know, because .... while in that process [they], can't get paroled or that's the point [at which] they might be deported or sent to immigration detention.
>
> …
>
> So it's hard to plan for that sentence. ... There's discipline in knowing that they're going to have to wait 'til their end date, and may not be released at their end date. So it's that hardship of additional prison time.

For GC and his co-workers, the uncertainty of parole meant that it was impossible to develop a post-release program with people at risk of visa cancellation:

> So with [our] program, we can… make a plan with anyone. … [I]f people are going out to live in Victoria, we can follow up and assist them and organise workers…in the community. For people facing a mandatory cancellation of their visa we have to withdraw them [from the program] at the end of that support period.
>
> …Because I think as far as Corrections Victoria is concerned, because it's not known how long people will go into detention for, they don't fund support packages for those people once they're released from immigration detention.

4.2.4. Impact of Parole on Visa Status

While visa status can impede access to parole, the absence of a parole determination, or a post-release plan, can also weigh against non-citizens in the cancellation revocation process. Non-citizens are doubly penalised in the process: firstly, by being denied access to the structured release provided by parole, and secondly, by being viewed unfavourably in the visa cancellation process because of the absence of a parole determination or evidence of time in the community.

In deciding whether to set aside a mandatory visa cancellation under s 501(3A), a delegate of the Minister for Home Affairs must be guided by the factors set out in a relevant Ministerial Direction, which can vary from time to time. Several Ministerial Directions have been in effect during the research period: all have required 'primary consideration' to be afforded to 'protection of the Australian community,' assessed by reference to:[118]

> evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

To assess the impact that access to parole had on decision-makers, we analysed a series of decisions made by the Administrative Appeals Tribunal between 1 January 2022 and 1 January 2023.[119]

118 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), *Direction No 90: Visa Refusal and Cancellation under section 501 and Revocation of a Mandatory Cancellation of a Visa under section 501CA* (8 March 2021) [8.1.2](2)(b)(ii); Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), *Direction No 99: Visa Refusal and Cancellation under section 501 and Revocation of a Mandatory Cancellation of a Visa under section 501CA* (23 January 2023) [8.1.2](2)(b)(ii).

119 It is worth noting that most of the decisions involved applicants based in Victoria, and accordingly reflect the current practice in this State. Further research is needed to document variation in parole-related procedures and outcomes for non-citizens in other States.

Of the 30 matters analysed, 21 applicants (70%) were eligible for parole, or similar[120], through the criminal sentences that resulted in their visa cancellation. Of these 21 applicants, 11 (52%) had served their full sentence by the time of the AAT decision and remained in immigration detention.

There were seven cases (33% of 21) in which it was clearly evident from the facts that the applicant had been granted parole and yet sent to immigration detention where the full-term of their sentence then expired. It could be inferred from this that these applicants were considered suitable for parole on the basis of their behaviour in prison and their risk profile, but that they then lost this opportunity due to visa cancellation – with consequences both for their liberty, as well as their ability to access supervision and programs that they may have had through parole. Twenty-nine of the 30 applicants were in immigration detention at the time of the Tribunal decision.

While the refusal or grant of parole was not a *determinative* factor in the 21 cases where parole was available to the applicant, the applicant's *rehabilitation* was critically assessed in all cases. In all cases, applicants were prevented from submitting evidence of their engagement in post-release programs, which might have been relevant to the assessment of their rehabilitation in the community.

Several of the surveyed cases illustrate the Tribunal's approach to the issue of parole and the absence of relevant evidence of rehabilitation. For example, in *Re Dennis and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*,[121] the applicant was a 21-year-old citizen of Fiji, who had arrived in Australia at the age of nine. He was sentenced to a 12-month Community Corrections Order for offences that occurred when he was around 19 years of age.[122] When he breached that order, he was sentenced to an aggregate term of 14 months' imprisonment in the community, by way of an Intensive Corrections Order (**ICO**).[123] Because of a reported breach of the ICO, by 'unsatisfactory' engagement with the Community Corrections Office, the State parole authority revoked the ICO on 19 January 2021, requiring the applicant to serve the remaining sentence in custody.[124] Nearly two months later, on 11 April 2021, the relevant authority granted parole to the applicant even though he had by then been transferred to immigration detention.[125]

Had his visa not been cancelled, the applicant would have served only a little over two months in prison (5 February - 11 April 2021) before then being paroled back to the community. But visa cancellation interceded in the case, with this young person then extending his time in custody by at least a further year by the time of the Tribunal's decision.[126] Because the applicant was in prison for such a short period, and subsequently *paroled to immigration detention* without a post-release plan, his ability to demonstrate his rehabilitation was necessarily circumscribed. Yet in deciding his case, the Tribunal placed significant weight on the absence of any evidence of rehabilitation, including while the applicant was in immigration detention – despite the fact that rehabilitation programs are not offered in that setting. In relation to the 'primary consideration' of risk to the community, the Tribunal reasoned as follows:[127]

> The denial of a problem, the initial resistance to the IDAPT programme and the failure to engage meaningfully with any alcohol-related programmes while in custody or detention gives the Tribunal no sense of confidence that the Applicant, on release, would not revert to the misuse of alcohol in a way which would eventually result in harm to others.

120 See *Re Skedden and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 2440, the applicant was to be eligible for release on a Good Behaviour Bond. Given the similar nature of this, as a tool of the criminal justice system that allows for conditional and supervised release from prison, we counted it as eligible for parole for this purpose.

121 *Re Dennis and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 356 ('Re Dennis').

122 Ibid [13](a).

123 Ibid [13(b)].

124 Ibid [18].

125 Ibid [19].

126 The Tribunal's decision was made on 1 March 2022. There is no indication of what became of the applicant following the Tribunal's decision: whether he was returned to Fiji promptly, or whether he pursued appeals further extending his time in detention.

127 *Re Dennis* (n 121) [62].

The Tribunal concluded that the applicant was a 'real risk' to the community,[128] which weighed 'quite significantly' against him.[129] Thus, while acknowledging that sentencing courts thought the applicant was best managed in the community, and noting that he had not had the benefit of legal representation to put his case, the Tribunal decided against reinstating the applicant's visa.[130]

In *Re Panagiotidis and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*,[131] the applicant - who had lived in Australia from the age of 2 - was sentenced to a term of imprisonment of three years and four months, on the basis of drug related offending. He was 62 years of age at the time of the Tribunal's decision.[132] The sentencing judge ordered 'a lower than usual non-parole period' of one year and nine months, to allow for a 'fairly lengthy period on parole with a structured and monitored program upon release, with the non-parole period set at one year and nine months.'[133] However despite making several requests for this while in prison, the applicant was denied drug-related treatment and told it would not be available until his parole commenced.[134] The applicant still had not received treatment by the time of the Tribunal's decision.[135]

This was clearly a matter in which visa cancellation resulted in an applicant being denied the opportunity to engage in Court-ordered paroled rehabilitation. Because of the denial of that opportunity, the Tribunal concluded, in relation to the primary consideration of risk to the community, that the applicant posed at least a 'moderate risk' of reoffending,[136] and that matter weighed 'strongly against revocation.'[137]

While not specifically concerned with parole, it is worth noting that decision-makers tend to place adverse weight on the fact that a person subject to visa cancellation 'has not been tested in the community' following the conclusion of a prison sentence. Of course, the operation of the mandatory cancellation powers and mandatory detention provisions mean that people subject to visa cancellation cannot be released into the community at the end of their prison sentence.[138] Indeed, the purpose of the mandatory cancellation powers was specifically to preclude the release of non-citizens into the community at the end of their sentence.[139]

There is such a high incidence of decision-makers giving adverse weight to a non-citizen being 'untested in the community' that the issue has given rise to a distinct line of appellate court authority. In *Splendido*[140], a Full Court of the Federal Court concluded that the decision-maker – in that case being the Assistant Minister for Home Affairs – had reasoned irrationally by concluding that Mr Splendido posed a risk to the community, including on the basis that his rehabilitation had not been 'tested' in the community.[141]

But decision-makers' reliance on 'untested' rehabilitation has been upheld in other, subsequent cases. In *Tran*,[142] the appellant gave evidence that he had overcome a long-term drug addiction while in prison and then in immigration detention, evidenced by regular drug screens.[143] However in upholding the Assistant Minister's decision against Mr Tran, the Full Court reasoned that:[144]

> The Assistant Minister's conclusion that the appellant's rehabilitation had not been tested in the community was correct…The drug testing regime to which the appellant had previously been subject was undertaken in a correctional environment while the appellant was released on parole, during which time he was reported to have "responded well to supervision".

128 Ibid [64].

129 Ibid [65].

130 Ibid [108].

131 *Re Panagiotidis and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 672.

132 Ibid [3].

133 Ibid [21](j).

134 Ibid [41].

135 Ibid [126].

136 Ibid [58].

137 Ibid [59].

138 Mandatory visa cancellation under the *Migration Act* (n 1) s 501(3A) results in the consequential cancellation of all visas held, and the refusal of all visa applications made, by the former visa-holder: *Migration Act* (n 1) s 501F. The result of cancellation is therefore to render the former visa-holder an 'unlawful non-citizen': *Migration Act* (n 1) s 15. All unlawful non-citizens in Australia must be detained: *Migration Act* (n 1) s 189(1).

139 The Explanatory Memorandum, *Migration Amendment (Character and General Visa Cancellations Bill) 2014* (Cth) plainly stated that the intention of mandatory cancellation was to ensure that 'a decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued.'

140 *Assistant Minister for Immigration & Border Protection v Splendido* (2019) 271 FCR 595.

141 Ibid [95] (Mortimer J), [113] (Moshinsky J).

142 *Tran v Minister for Immigration and Border Protection* [2019] FCAFC 126.

143 Ibid [127].

144 Ibid [179].

Likewise, in *Taualii*,[145] the Full Court upheld the Minister's refusal to favourably consider evidence of Mr Taualii's rehabilitation in prison, finding that:[146]

> The observation [that Mr Taualii had not been tested in the community] was correct in light of the appellant's submissions — the asserted rehabilitation that had come about through his time in gaol and the asserted disassociation from outlaw motorcycle gangs.

These decisions indicate the self-fulfilling structure of the mandatory cancellation process. Mandatory cancellation prevents the release of former visa-holders into the community – whether by way of parole, or otherwise at the conclusion of their sentence. And the fact that former visa-holders – due to obstacles beyond their control - have not evidenced their rehabilitation in the community at the conclusion of their sentence weighs significantly against them in the revocation process.

4.3. Placement in youth detention – the experiences of young people

Interviewees based at Parkville College spoke extensively of the different 'risk' classification ascribed to young people facing visa cancellation, which in turn impacted their placement within the prison unit. Once a young person's visa was cancelled, they would be assigned a 'high risk' rating and transferred to the secure section of the prison facility in Malmsbury, where their movements would be severely restricted. In turn, these restrictions impeded students' access to continuing education.

AN, a teacher at Parkville College, explained the course of events after visa cancellation as follows, beginning with describing the contrast between leave that can be accessed by citizens, and that available to people subjected to visa cancellation:

> But our young people, once they have their visas cancelled, there's no opportunity for leaves. So, often there's work leave, study leave, home leave.
>
> The other thing that there's no opportunity for is to be in an open unit. So, at Malmsbury, we have secure and open units. Secure units are quite heavily… policed is maybe an okay word to use? ...
>
> You can't move unless someone's moving with you, you don't have your own swipe, you literally can't leave your room, you can't leave the unit, you can't do anything unless there is a couple of staff with you.

AN went on to observe:

> [But after visa cancellation] what will happen is, they'll be sent to a secure unit. Mind you, they've been moving around on the secure site, on the junior site, but then they're on no movements. So, they literally can't leave the unit to go the gym, they can't leave the unit to go a classroom. They can only move for health appointments and for visits. Because they are on no movements at all. *It's got nothing to do with behaviour … it's just the visa thing.* (emphasis added).

> And what happens for us in the custodial setting is immediately if you are in an open unit, - which means you can kind of move around a bit freely - you are immediately moved to a secure unit with limited movements. So that itself is quite destabilising. Just the fact that you've been served that and moved to an environment with a totally different group of young people who will know exactly what you've been moved there for, is a very tough situation to be in. So theirs is a very emotional response. They'll immediately worry about what to do next, or how to respond, where, not knowing that [they] need an immigration lawyer and not just every lawyer can actually respond to that. And then not knowing who [they] can ask for this to happen. Do you go to your teacher? Do you go to your transition planner? Do you go and call your lawyer? All these things are up in the air in the moment. (SO, teacher at Parkville College).

SO also emphasised the displacement, humiliation and isolation involved in suddenly being shifted to the secure unit. Young people placed in the unit, for no other reason than their visa status, were *'singled out'*:

> So for example, normally what happens with the secure units, a lot of their classes, if you are on a visa situation, actually you don't move out until you've been given approval by the department. And that's the Department of Justice in the precinct. So what happens, is all of a sudden other people can move off the unit for class, except for you, you have to stay there. Yeah. You have to stay on the unit. It's very limited.

145 *Taualii v Minister for Home Affairs* [2020] FCAFC 102.
146 Ibid [59].

All people in prison in Victoria have a right to access education and training under the *Corrections Act 1986* (Vic).[147] However, in relation to young persons under the age of 18 - for whom the State provides subsidised access to education in the community - access to education in prison is arguably an extension of the right to equality before the law and to age-appropriate treatment, enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[148]

Further research is needed to investigate the impact of 'risk assessment' frameworks on prison placement and, in turn, access to education by people subject to visa cancellation in prison.

4.4. The 'Mental Load' of Cancellation: 'it is not a process you can fight and win'[149]

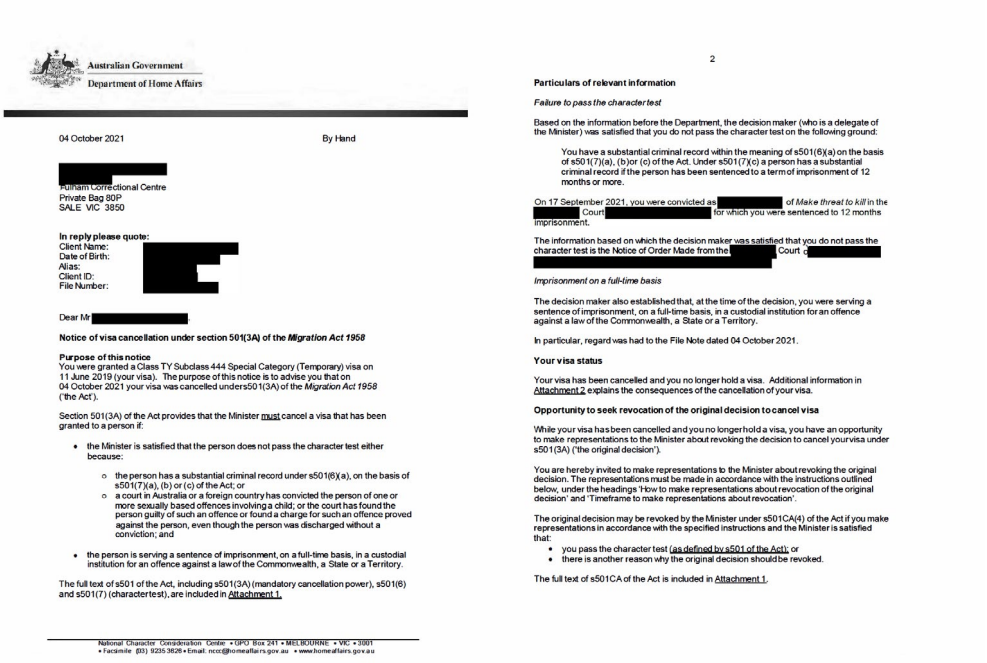
All interviewees spoke of the increased 'mental load' placed on visa-holders in prison. That burden arose from the impending expectation of a cancellation notice, the knowledge that options for legal assistance were either few or non-existent and the prospect that time in prison was likely to be accompanied by an undefined further period in immigration detention.

The mental load was compounded by the knowledge that prison authorities often did not communicate visa cancellation notices effectively to people in prison. GC, who works with the VACRO Transitions Program, recalled that a young man he worked with had been deprived of the opportunity to seek reinstatement of his visa, simply because he was not notified of the cancellation decision in time:

> In general, correspondence seems to arrive very slowly ... people hadn't received their paperwork in time for the 28-day limit, or they only had a few days from when they receive their paperwork, and so they were [stuck].

Visa-holders subject to mandatory visa cancellation are provided with only 28 days to seek revocation of that decision.[150] That time period is strict and non-extendable, and it is presumed that they receive notice of this in a timely manner, which is not always the case, as noted above. A revocation request must also be made formally, in English[151] and include specified information.[152]

Image: First two pages of a 'Notice of Visa Cancellation under s 5013A of Migration Act 1958 (Cth)'. Such Notices can run to tens of pages and include AFP police clearances; sentencing comments and other material requiring the visa-holder's comment



Australian Government
Department of Home Affairs

04 October 2021 By Hand

[redacted]
Fulham Correctional Centre
Private Bag 80P
SALE VIC 3850

In reply please quote:
Client Name:
Date of Birth:
Alias:
Client ID:
File Number:

Dear Mr [redacted]

Notice of visa cancellation under section 501(3A) of the *Migration Act 1958*

Purpose of this notice
You were granted a Class TY Subclass 444 Special Category (Temporary) visa on 11 June 2019 (your visa). The purpose of this notice is to advise you that on 04 October 2021 your visa was cancelled unders501(3A) of the *Migration Act 1958* ('the Act').

Section 501(3A) of the Act provides that the Minister must cancel a visa that has been granted to a person if:

- the Minister is satisfied that the person does not pass the character test either because:
  - the person has a substantial criminal record under s501(6)(a), on the basis of s501(7)(a), (b) or (c) of the Act; or
  - a court in Australia or a foreign country has convicted the person of one or more sexually based offences involving a child; or the court has found the person guilty of such an offence or found a charge for such an offence proved against the person, even though the person was discharged without a conviction; and
- the person is serving a sentence of imprisonment, on a full-time basis, in a custodial institution for an offence against a law of the Commonwealth, a State or a Territory.

The full text of s501 of the Act, including s501(3A) (mandatory cancellation power), s501(6) and s501(7) (character test), are included in Attachment 1.

National Character Consideration Centre • GPO Box 241 • MELBOURNE • VIC • 3001
• Facsimile (03) 9235 3826 • Email: nccc@homeaffairs.gov.au • www.homeaffairs.gov.au

2

Particulars of relevant information

Failure to pass the character test

Based on the information before the Department, the decision maker (who is a delegate of the Minister) was satisfied that you do not pass the character test on the following ground:

> You have a substantial criminal record within the meaning of s501(6)(a) on the basis of s501(7)(a), (b)or (c) of the Act. Under s501(7)(c) a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

On 17 September 2021, you were convicted as [redacted] of *Make threat to kill* in the [redacted] Court [redacted] for which you were sentenced to 12 months imprisonment.

The information based on which the decision maker was satisfied that you do not pass the character test is the Notice of Order Made from the [redacted] Court [redacted]

Imprisonment on a full-time basis

The decision maker also established that, at the time of the decision, you were serving a sentence of imprisonment, on a full-time basis, in a custodial institution for an offence against a law of the Commonwealth, a State or a Territory.

In particular, regard was had to the File Note dated 04 October 2021.

Your visa status

Your visa has been cancelled and you no longer hold a visa. Additional information in Attachment 2 explains the consequences of the cancellation of your visa.

Opportunity to seek revocation of the original decision to cancel visa

While your visa has been cancelled and you no longer hold a visa, you have an opportunity to make representations to the Minister about revoking the decision to cancel your visa under s501(3A) ('the original decision').

You are hereby invited to make representations to the Minister about revoking the original decision. The representations must be made in accordance with the instructions outlined below, under the headings 'How to make representations about revocation of the original decision' and 'Timeframe to make representations about revocation'.

The original decision may be revoked by the Minister under s501CA(4) of the Act if you make representations in accordance with the specified instructions and the Minister is satisfied that:

- you pass the character test (as defined by s501 of the Act); or
- there is another reason why the original decision should be revoked.

The full text of s501CA of the Act is included in Attachment 1.

147 *Corrections Act* (n 101) s 47(1)(o).

148 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 23.

149 See quote in discussion below, by one of the interviewees, JM from O-Street.

150 *Migration Act* (n 1) s 501CA(3)(b); *Migration Regulations 1994* (Cth) reg 2.52(2)(b) ('*Migration Regulations*').

151*Migration Act* (n 1) s 501CA(3)(b); *Migration Regulations* (n 150) reg 2.52(3)(a).

152 *Migration Act* (n 1) s 501CA(3)(b); *Migration Regulations* (n 150) reg 2.52(4).

Case Study – EFX17

In 2018, an Afghan refugee, known by the pseudonym 'EFX17,' commenced a court challenge to the mandatory cancellation of his visa.[153]

EFX17 was serving a prison sentence at the time the mandatory cancellation paperwork was handed to him by prison staff. The paperwork comprised of the 6-page cancellation notice and another 86 pages of enclosures, all in English – including information about legal services and how to seek revocation of the decision.[154]

EFX17's lawyers had provided the Department of Home Affairs with information that indicated he did not speak English, could not read or write in any language and suffered from schizophrenia 'occurring on the background of substance abuse and traumatic events in his homeland (including having his throat cut by Taliban soldiers).'[155]

None of these factors were considered when deciding how to notify EFX17 of the cancellation of his visa. The foreseeable result was that EFX17 was 'very confused' by the cancellation paperwork,[156] and did not seek reinstatement of his visa within the strict timeframe allowed.

The Full Court of the Federal Court found that EFX17 had not been lawfully notified of the cancellation decision.[157] Justice Rares found the notification invalid on the ground that it was incomprehensible to EFX17, observing that:[158]

> A prisoner is a person deprived of civil rights and liberties. He or she has no right to seek out or obtain assistance, including competent interpreters, as or when he or she needs them, let alone to deal with the meaning of, or response to, the four-page revocation notification and the 86-page package.

The High Court rejected that analysis, noting:[159]

> The majority of the Full Court erred in reasoning that the capacity of a person to understand the written notice, particulars, or invitation described in s 501CA(3) was relevant to whether the written notice and particulars had been given or whether the invitation to make representations had been made.

As well as procedural concerns regarding the receipt of notice of a cancellation decision, most interviewees spoke of the lack of free legal assistance to seek revocation of a visa cancellation decision. AN, at Parkville College, described the process of finding legal representation as haphazard:

> I get on my phone and I call the people that I know, or my colleague calls someone that is a person in his community. Literally that's what it is … And there's more and more cases. And genuinely, there is nowhere to call, I will say that. And there is almost nothing that we can do in terms of finding our young people legal representation beyond calling our friends who are immigration lawyers willing to take it on.

CM, who worked with young people at O-Street, recalled attempting to locate support and advice services for a young person from a refugee background who had come to Australia from New Zealand, only to find that he did not fit the eligibility for any of the available free legal services:

> But then we were kind of left going, what do we do now? And so I was just on the phone calling Justice Connect, I called a bunch of different private lawyers, I called some colleagues from Foundation House to get advice… [I remember] just realising that pro bono legal support for these cases is so rare, and I would say non-existent.

AM, who worked with young people at Parkville College, noted that the few legal services available to young people were *'not necessarily culturally responsive,'* and that they did not acknowledge *'that our young people come from families who have really … complex migration experiences.'* She spoke in this regard of young people from refugee backgrounds, for whom the initial migration process to Australia had been a source of significant difficulty and trauma. A lack of acknowledgment of this background often led to difficulties with lawyers. AM explained that the young people she was in contact with were:

> just stressed – they're overwhelmed, they get obsessive, and then we struggle sometimes with their lawyers because we just want them to support, like, help manage and regulate our young people but that's not their job. It's a lot.

153 His proceeding was first commenced in what was then the Federal Circuit Court of Australia: *EFX17 v Minister for Immigration* (2018) 341 FLR 286.

154 See summary given at *EFX17 v Minister for Immigration and Border Protection* (2019) 273 FCR 508 [3].

155 Ibid [6].

156 Ibid [10].

157 Ibid [162]-[163] (Greenwood J), [182] (Rares J).

158 Ibid [182].

159 *Minister for Immigration and Border Protection v EFX17* (2021) 271 CLR 112 [31]. The High Court upheld the Full Federal Court's decision at [40] only because the notification incorrectly stated that EFX17 was 'taken to have received [the letter] at the end of the day it was transmitted [by email]' when it was in fact hand-delivered to him. The High Court is yet to deliver judgment in M44/2024, an appeal from the decision of the Full Federal Court in *BIF23 v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 301 FCR 229, which concerns whether it is "practicable" within the meaning of s 501CA(3) to give the relevant notice and invitation to a person who lacks decision-making capacity where no guardian has been appointed.

While a range of plain-language written materials were available to assist people in making a revocation request, interviewees noted that these were all in English and were not written in a way that reflected the situation of non-citizens in the prison system. AN, who worked with young people at Parkville College, spoke of having developed a specific 'toolkit' based on available legal materials, which was suited to the specific circumstances of the people she worked with. That toolkit was intended to help social workers assist young people to complete a revocation request, rather than to simply hand over to the students, which AN explained they could not do:

> because we don't want to just give young people 20 pages of overwhelming information to sit with in their rooms. And so, the resources that we've made are student facing. So, we just pretty much use all the same information but we just change the language to make it very them specific, and for lower literacy levels and stuff.
>
> Even the most organised, efficient, untraumatized young person I think would struggle with the process. And I think what we're seeing is [that] they're all young people who have significant histories of incarceration and have significant trauma from that incarceration, and prior to that incarceration, from their racialisation and their criminalisation in the community.
>
> It's not like it's kind of just a, a young person's living their life and then boom it happens, it's like a young person's been oppressed and then pushed into the margins of our society and then they're kind of given this visa cancellation.
>
> So I think it certainly comes at a time when the young person has no capacity to do, to even deal with their criminal matter. Like I think often for young people they struggle to do what they need to do to, to get on top of their criminal matter, and find it quite challenging to understand the process around the criminal stuff… Let alone the migration stuff which is so much more complex.

In light of this historical trauma and criminalisation – often racialised - the absence of legal assistance in relation to visa cancellation matters for young people amounts to a serious access to justice issue. Visa cancellation takes place at the conclusion of a lengthy criminal legal process and after a period of imprisonment. Seeking reinstatement requires engagement with a complex bureaucratic process governed by strict timelines. The mental load on people in these circumstances faced with visa cancellation means that 'self-help' legal materials are unlikely to be appropriate or effective.

4.5. An 'Informed Choice' to Accept Removal

A number of interviewees spoke of the combined pressures on people faced with visa cancellation encouraging them to make an '*informed choice*' to go home.[160] These interviewees referred to an impression of needless 'double punishment' by those at risk of visa cancellation, having already served a lengthy prison sentence and been deprived of opportunities available to others – such as prison-based programs, leave from prison or parole. Given visa cancellation revocation requests were often determined after the end of a sentence, when the person had already been transferred to immigration detention, the incentive to 'give up' was strong. Practices like this, which generate such a strong sense of hopelessness that people without citizenship end up complying with the exclusion forced upon them, has been researched extensively. However, the findings in this report point to the particular way in which this unfolds in Victoria, and in Australia more broadly.

Several interviewees spoke of cancellation notices being served on people at the end of their sentence, or as their parole date approached – meaning that, as 'unlawful non-citizens,' they could not be released into the community, and would instead be transferred to immigration detention while awaiting consideration of their request for revocation. AN, from her experience at Parkville College, observed that:

> … it's just a pattern. As the possibility for a possible parole date starts to approach, suddenly you get slammed with [the cancellation notice]. Or once you turn 18 you get slammed with it.

160 Much of the research addressing the impact of contemporary border protection policies has reflected on these 'choices' as being forced upon non-citizen: harsh border and migration policies and laws, increasingly function in order to make conditions so difficult for some non-citizens, that their only 'choice' is to give up and leave/be deported. See for example, Nicolay Johansen, 'Governing the Funnel of Expulsion: Agamben, the Dynamics of Force and Minimalist Biopolitics' in Katja Franko and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford University Press, 1st ed, 2014) 257; Claire Loughnan, 'Active Neglect and the Externalization of Responsibility for Refugee Protection', in Azadeh Dastyari, Amy Nethery and Asher Hirsh (eds) *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability Externalisation* (Routledge, 1st ed, 2022) 105; Leanne Weber and Sharon Pickering 'Constructing Voluntarism: Technologies of 'Intent Management' in Australian Border Controls', in Helen Schwenken and Sabine Ruß-Sattar (eds), *New Border and Citizenship Politics* (Basingstoke, Palgrave Macmillan, 1st ed, 2014) 17; Vogl and Methven, 'Life in the Shadow Carceral State: Surveillance and Control of Asylum Seekers in Australia' (n 9); Marta Welander, 'The Politics of Exhaustion and the Externalisation of British Border Control. An Articulation of a Strategy Designed to Deter, Control, and Exclude' (2020) 59(3) *International Migration* 29.

GC, from the Department of Justice, noted that because cancellation notices were routinely served at the end of a sentence, it was impossible for his team to establish plans for a person's transition from prison to the community. He observed that if the Department of Home Affairs:

> would give people an opportunity to have their appeals completed while they're in prison, they could access the support on release adequately. That would take out immigration detention as a factor.

He also spoke of the frustration of being unable to develop release plans for people subject to visa cancellation. He said that it was 'common knowledge' amongst visa-holders that they would be served with a cancellation notice towards the end of their sentence, meaning that they would be transferred to immigration detention while their revocation request was considered:

> It's generally accepted in prison that…no one's appeal will be heard while they're in prison, and that they will all go into immigration detention at the end of their sentence for an indefinite period. You know, when people have done even a few years…people that have done 10 years as well, or 12 years, the prospect of having to do additional time is [daunting]. I've witnessed that incentivising people to not appeal and prefer to go through a process of deportation rather than do more time.

GC recalled the specific case of a man who had opted to return to New Zealand rather than spend an indeterminate time in immigration detention, attempting to have his visa reinstated:

> The most recent case was someone who'd done over 10 years and got to the point in the ninth year of the sentence that they just couldn't do any more time. They just needed to start afresh to get out, and so they withdrew the appeal and just signed the papers to say that they can be deported on release.

SO, at Parkville college, spoke of several other young people who decided to give up on the revocation process at the conclusion of their sentence:

> So there was four students that didn't respond, and three of them ended up going back to New Zealand. One went to immigration detention.

JM, at O-Street, also spoke about young people accepting deportation rather than facing an uncertain future in immigration detention. This was because, based on their experience up until receiving the notice of visa cancellation 'they believed it is not a process that you can fight and win.'

Conclusion

Over the past year, since the High Court's watershed decision in *NZYQ*, there has been an increasing focus on 'character'-based cancellation powers and prolonged or indefinite immigration detention. Political and public debate has focused intensely on the 'risk' posed by former visa holders subject to character-based visa cancellation and subsequently released from immigration detention into the community.

In this context, there is an urgent need for further attention on the legal processes that lead to visa cancellation and that structure the experience of non-citizens in prison. This report attempts to contribute to that study, finding that non-citizens are 'set up to fail' from the moment they are sentenced to serve prison time.

This research indicates that non-citizens experience a parallel form of imprisonment, facing structural barriers in relation to placement within prison, access to pre-release programs and the post-release support of parole. Visa cancellation makes the experience of prison more onerous – both because of the constant *'dread'* of awaiting cancellation, but also the realisation that a sentence is likely to be followed by a much longer, undefined, period in immigration detention.

These factors conspire to create a self-defeating process, whereby people subject to visa cancellation are effectively under pressure to give up and accept removal from family and community in Australia rather than contend with a process that they 'cannot win.' It also means that the tens of people recently released into the community from indefinite immigration detention have most likely been denied pre-release programs and post-release support available to Australian citizens. The impact of this on the people released and their communities should properly be understood as the result of systemic, rather than individual, failures.

This report indicates several critical areas for further research, particularly in relation to parole procedures; placement and rehabilitation protocols in prison.

We make two key recommendations, calling for:

1. The **repeal of mandatory visa cancellation provisions,** noting the findings here regarding the extraordinary practical barriers faced by non-citizens in exercising their procedural rights and seeking reinstatement of their visas.

2. **Review of operating standards relating to prison placement, programs, education and parole,** to eliminate discriminatory treatment of non-citizens based on their visa status.

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